SUPERFUND PROGRAM
(Part 3)

HEARINGS

BEFORE THE

SUBCOMMITTEE ON
TRANSPORTATION AND HAZARDOUS MATERIALS

OF THE

COMMITTEE ON
ENERGY AND COMMERCE
HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRD CONGRESS

SECOND SESSION

ON

H.R. 3800

A BILL TO AMEND THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980, AND FOR OTHER PURPOSES

FEBRUARY 3, 1994—LEGISLATIVE PROPOSALS
FEBRUARY 10, 1994—LIABILITY ISSUES
FEBRUARY 24, 1994—REMEDY SELECTION PROCESS
MARCH 17, 1994—ENVIRONMENTAL INSURANCE RESOLUTION FUND

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THE SUPERFUND PROGRAM

Legislative Proposals

THURSDAY, FEBRUARY 3, 1994

HOUSE OF REPRESENTATIVES,
COMMITTEE ON ENERGY AND COMMERCE,
SUBCOMMITTEE ON TRANSPORTATION
AND HAZARDOUS MATERIALS,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:10 a.m., in room 2359A, Rayburn House Office Building, Hon. Al Swift (chairman) presiding.

Mr. SWIFT. The subcommittee will come to order.

I would like to do just a very brief bit of business. We had two hearings scheduled next week. We have made some adjustments there.

The hearing on remedy selection will be postponed until after the recess. The hearing on liability will be moved from the 8th to the 10th, and that was originally noticed as on liability and insurance. The insurance portion will also be delayed.

These are because the legislation just got up here today, and we feel the hearings will be more useful if all interested parties have a chance to study them before we get testimony. So we will be following that schedule.

I am very pleased to welcome Senator Lautenberg and the EPA Administrator, Carol Browner, to this hearing on the administration's bill to reform the Superfund program.

This legislation is a product of consultations with both bodies of Congress and extensive discussions with Superfund stakeholders from industry, the environmental community, State and local governments and community groups. The advisory committee process initiated by EPA last summer as part of the National Advisory Council on Environmental Policy and Technology—known as NACEPT—also played a very major role in the development of this legislation.

I commend the administration and EPA for encouraging a broad public dialogue on Superfund and for undertaking such extensive outreach efforts. These actions helped immeasurably in identifying the major problems associated with the Superfund program, analyzing proposed solutions to those problems and ultimately shaping the bill that we will be introducing later today.

While these consultations and discussions were extremely valuable, they were also very time-consuming. It had been my hope originally that we would have been well along the legislative proc-

ess by this time. At any rate, I am pleased that we are now finally getting the legislative process under way.

For several years, Superfund has been referred to as the program that everyone loves to hate. Some of its more thoughtful and constructive critics have legitimate concerns which need to be addressed and which will be addressed. Other critics will not be satisfied unless the program is totally dismantled or the strict, joint and several liability scheme is scrapped in its entirety. Still others are content to adopt a wait-and-see attitude or to attack summarily the compromises reached by both NACEPT and the National Commission on Superfund.

To these latter critics I would say time is on your side. With the calendar we are facing, I sincerely believe that any significant interest group can single-handedly kill this legislation simply by encouraging delay. But, at the same time, I do not believe that it is in anyone's interest for that to happen. All stakeholders are agreed that Superfund is in urgent need of reform, and I am convinced that if everyone comes to the table quickly and if they negotiate in good faith, consensus can be reached on the legislative changes that are required.

The administration's bill, in my view, is a good beginning in the effort to achieve that objective because it sets forth a reasonable middle ground on most of the issues. The bill is designed to speed the pace of cleanup at sites, reduce transaction costs, provide fairness in the allocation of shares of cleanup liability costs and greatly expand public participation in the Superfund program.

There can be little disagreement with these laudable goals, and I am anxious to work with the relevant parties to flush out the details. We begin that process with our hearing today and next week when we will focus on the liability aspects of this proposal.

I do not expect that reauthorizing Superfund will be an easy task. Those of us who were here when Superfund was created in 1980, and later when it was modified in 1986, recognize the controversial nature of the program, the emotions that surround it and the difficulties in changing it. This is compounded by the multiple congressional committees that have jurisdiction over one or more aspects of the program and the already overloaded schedule for the full committee, which includes both telecommunications and health care.

Because of these concerns and in an effort to expedite consideration of this legislation, the subcommittee held extensive oversight hearings on the Superfund program last year to get us ready. In fact, we hope our preparatory work in the first session of this Congress will enable us to move faster than the normal legislative process this year. To do so, we must have the cooperation of all interested parties, and we would urge them to develop their views on the administration's bill quickly and to enter into meaningful discussions with the subcommittee as expeditiously as possible.

Let me just add something that I mentioned at the news conference and that is I think that what must change here, if we are going to be successful, is the timing, the pace, if you will, the rhythm of the legislative process. I think in all three committees—the Senate committee and both of the House committees—the subcommittees are going to have to do a more complete job than we

often do. If we bounce a half-chewed piece of legislation up to our full committee chairs, they are going to have a very difficult time finding the time to spend 3 weeks, 7 weeks, working out things we haven't been able to do. That means, to all interested parties—that is the insurance industry.

Mr. TAUZIN. Maybe the Bar Association.

Mr. SWIFT. If that is the case, let them in, by all means. We need to talk to them.

It means that all interested parties, you know, should worry about their bottom line and when you make the compromises. That is perfectly legitimate. But watch the timing. The need to do that may come earlier in the legislative process in all three committees than it has in the past.

All of those who are here today, as participants in the press conference or as witnesses at our hearing, have worked long and hard to improve the Superfund program. If we receive a similar level of cooperation from other interested parties, I think there is a chance we can bring some meaningful reform to the Superfund program this year.

I am going to ask unanimous consent that all members be permitted to submit opening statements for the record. Without objection, so ordered.

[Testimony resumes on p. 179.]

[The text of H.R. 3800 follows:]

I

103D CONGRESS
2D SESSION

H. R. 3800

To amend the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 3, 1994

Mr. SWIFT, by request (for himself, Mr. DINGELL, Mr. MINETA, Mr. ROSTENKOWSKI, and Mr. APPLEGATE) introduced the following bill; which was divided and referred as follows: titles I through VIII jointly to the Committees on Energy and Commerce and Public Works and Transportation; and title IX to the Committee Ways and Means

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A BILL

To amend the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Superfund Reform Act of 1994".

(b) TABLE OF CONTENTS.—

★

TITLE I—COMMUNITY PARTICIPATION AND HUMAN HEALTH

SEC. 101. PURPOSES AND OBJECTIVES.

The purposes and objectives of the community participation activities required by this title are to—

(a) inform citizens and elected officials at all levels of government of the existence and status of facilities listed on the National Priority List and contaminated sites identified on State Registries (as established by section 207 of this Act);

(b) provide citizens with information regarding the Superfund identification and cleanup process and maintain lists of technical, health and other relevant experts licensed or located in the state who are available to assist the community;

(c) ensure wide dissemination of and access to information in a manner that is easily understood by the community, considering any unique cultural needs of the community, including presentation of information orally and distribution of information in languages other than English; and

(d) ensure that the President is aware of and considers the views of affected communities.

SEC. 102. EARLY, DIRECT AND MEANINGFUL COMMUNITY PARTICIPATION.

(a) Section 117(e)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, referred to in this Act as "the Act" (42 U.S.C. 9617) is amended by amending the first sentence to read as follows:

"(1) AUTHORITY.—Subject to such amounts as are provided in appropriations Acts and in accordance with rules promulgated by the President, the President may make grants or services available to any group of individuals which may be affected by

a release or threatened release of a hazardous substance or pollutant, or contaminant at or from a facility where there is significant response action under this Act including, a site assessment, remedial investigation/feasibility study, or other removal or remedial action.".

(b) Section 117(e) of the Act is amended by striking paragraph (2) and inserting the following:

"(2) AMOUNT.—The amount of any grants or services may not exceed $50,000 for a single recipient of grants or services. The President may waive the $50,000 limitation in any case where such waiver is necessary to carry out the purposes of this subsection. Each recipient of grants or services shall be required, as a condition of the grants or services, to contribute at least 20 percent of the total costs of the technical assistance for which such grants and services are made. The President may waive the 20 percent contribution requirement if the grants or services recipient demonstrates financial need, and such waiver is necessary to facilitate public participation in the selection of remedial action at the facility. Not more than one award or grants or services may be made with respect to a single facility, but the grants or services may be renewed to facili-

tate public participation at all stages of remedial action.".

(c) Section 117 of the Act (42 U.S.C. 9617) is amended by adding after subsection (e) the following new subsection:

"(f) EARLY, DIRECT AND MEANINGFUL COMMUNITY INVOLVEMENT.—The President shall provide for early, direct and meaningful community involvement in each significant phase of response activities taken under this Act. The President shall provide the community with access to information necessary to develop meaningful comments on critical decisions regarding facility characterization, risks posed by the facility, and selection of removal and remedial actions. The President shall consider the views, preferences and recommendations of the affected community regarding all aspects of the response activities, including the acceptability to the community of achieving background levels.

"(g) INFORMATION TO BE DISSEMINATED.—In addition to other information the President considers appropriate, the President shall ensure that the community is provided information on the following:

"(1) The availability of a Technical Assistance Grant (TAG) under subsection (e), directions on

completing the TAG application, and the details of the application process.

"(2) The possibility (where relevant) that members of a community may qualify to receive an alternative water supply or relocation assistance.

"(3) The Superfund process, and rights of private citizens and public interest or community groups.

"(4) The potential for or existence of a Community Working Group (CWG) established under subsection (i) (as added by the Superfund Reform Act of 1994).

"(5) An objective description of the facility's location and characteristics, the contaminants present, the known exposure pathways, and the steps being taken to assess the risk presented by the facility.

"(h) PROCESS FOR INVOLVEMENT.—As early as practicable after site discovery, the President shall provide regular, direct, and meaningful community involvement in all phases of the response activities at the facility, including the following:

"(1) SITE ASSESSMENT.—Whenever practicable, during the site assessment, the President shall solicit and evaluate the concerns and interests of the community likely affected by the facility. The evaluation

may consist of face-to-face community surveys, a minimum of one public meeting, written responses to significant concerns, and other appropriate participatory activities.

"(2) REMEDIAL INVESTIGATION/FEASIBILITY STUDY.—During the remedial investigation and feasibility study, the President shall solicit the views and preferences of the community on the remediation and disposition of the hazardous substances, pollutants or contaminants at the site. The community's views and preferences shall be described in the remedial investigation and feasibility study and considered in the development of remedial alternatives for the facility.".

SEC. 103. COMMUNITY WORKING GROUPS.

Section 117 of the Act (42 U.S.C. 9617) is amended by adding after subsection (h) (as added by this Act) the following new subsection:

"(i) COMMUNITY WORKING GROUPS.—

"(1) CREATION AND RESPONSIBILITIES.—The President shall provide the opportunity to establish a representative public forum, known as a Community Working Group (CWG), to achieve direct, regular and meaningful consultation with community members throughout all stages of a response action.

The President shall consult with the CWG at each significant phase of the remedial process.

"(2) INFORMATION CLEARINGHOUSE.—The CWG shall serve as a facility information clearinghouse for the community. In addition to maintaining records of facility status and lists of active citizen groups and available experts, the CWG shall also be a repository for health assessment information and other related health data.

"(3) LAND USE RECOMMENDATIONS.—To establish land use expectations more reliably, and obtain greater community support for remedial decisions affecting future land use, the President shall consult with the CWG on a regular basis throughout the remedy selection process regarding reasonably anticipated future use of land at the facility. The CWG may offer recommendations to the President at any time during the response activities at the facility on the reasonably anticipated future use of land at the facility, taking into account development possibilities and future waste management needs. The President shall not be bound by any recommendation of the CWG. However, when the CWG achieves substantial agreement on the reasonably anticipated future use of the land at the facility, the

President shall give substantial weight to that recommendation. In cases where there is substantive disagreement within the CWG over a recommendation regarding the reasonably anticipated future use of land at the facility, the President shall seek to reconcile the differences. In the event of continued substantive disagreement, substantial weight shall be given to the views of the residents of the affected community. Should the President make a determination that is inconsistent with a CWG recommendation on the reasonably anticipated future use of land at the facility, the President shall issue a written reason for the inconsistency.

"(4) MEMBERS.—CWG membership shall not exceed twenty persons. CWG members shall serve without pay. Nominations for CWG membership shall be solicited and accepted by the President. Selection of CWG members shall be made by the President. In selecting citizen participants for the CWG, the President shall provide notice and an opportunity to participate in CWG's to persons who potentially are affected by facility contamination in the community. Special efforts shall be made to ensure that the composition of CWG's reflects a balanced representation of all those interested in facility re-

mediation. In general, it shall be appropriate for the President to offer members of the following groups representation on a CWG:

"(A) Residents and/or landowners who live on or have property immediately adjacent to or near the facility, or who may be directly affected by releases from the facility, with a minimum of one representative of the recipient a grant for technical assistance, if any, awarded under subsection (e).

"(B) Persons who, although not physically as close to the facility as those in the group identified in subparagraph (A), may be potentially affected by releases from the facility.

"(C) Members of the local medical community who have resided in the community for at least five years.

"(D) Representatives of Indian tribes.

"(E) Representatives of citizen, environmental or public interest groups with members residing in the community.

"(F) Local government officials.

"(G) Workers at the facility who will be involved in actual cleanup operations.

"(H) Persons at the facility during response actions.

"(I) Facility owners and the significant PRP's who, whenever practicable, represent a balance of interests.

"(J) Members of the local business community.

"(5) OTHER COMMUNITY VIEWS.—The existence of a CWG shall not affect or diminish any other obligation of the President to consider the views of any person in selecting response actions under this Act.".

SEC. 104. CITIZEN INFORMATION AND ACCESS OFFICES.

Section 117 of the Act (42 U.S.C. 9617) is amended by adding after subsection (i) (as added by this Act) the following new subsection:

"(j) CITIZEN INFORMATION AND ACCESS OFFICES.—

"(1) CREATION AND RESPONSIBILITIES.—The Administrator shall ensure that an independent Citizen Information and Access Office (CIAO) is established in each State and on each tribal land affected by a National Priorities List facility.

"(2) PRIMARY FUNCTIONS.—The primary functions of each CIAO shall be to—

"(A) inform citizens and elected officials at all levels of government of the existence and status of National Priorities List facilities in the State;

"(B) provide citizens with information about each phase of the Superfund process, including the site identification, assessment and cleanup phases;

"(C) ensure wide distribution of information that is easily understood by citizens;

"(D) serve as a statewide, or tribal landwide clearinghouse of information; and

"(E) assist in the Administrator's efforts to notify, nominate, and select potential Community Working Group members.".

SEC. 105. RESPONSE TO COMMENTS.

Section 117(a) (42 U.S.C. 9617(a)) of the Act is amended by striking "both of" from the phrase immediately preceding paragraph (1) and by inserting after paragraph (2) the following new paragraph:

"(3) Consider the recommendations of any Community Working Group, community members and Technical Assistance Grant recipients established for the facility pursuant to this section. Provide, in writing a response to each significant com-

ment received during the public comment period. The written response shall include an explanation of how the lead agency has used or rejected significant comments of the Community Working Group in its final decision.".

SEC. 106. MULTIPLE SOURCES OF RISK DEMONSTRATION PROJECTS.

Section 117 of the Act (42 U.S.C. 9617) is amended by adding after subsection (j) (as added by this Act) the following new subsection:

"(k) MULTIPLE SOURCES OF RISK DEMONSTRATION PROJECTS.—

"(1) IN GENERAL.—The Administrator shall select at least 10 demonstration projects to be implemented over a five-year period, relating to the identification, assessment, management of, and response to, multiple sources of risk in and around designated facilities. These demonstration projects will examine various approaches to protect communities exposed to such multiple sources of risk. The Administrator shall promulgate regulations that set forth the criteria by which demonstration projects will be selected.

"(2) ADDITIONAL HEALTH BENEFITS.—In the course of conducting these demonstration projects, if

a distinct pattern of adverse health effects is identified in the surrounding community, the Administrator shall consider the provision of additional health benefits to the affected community, in an effort to improve community health and welfare. Additional benefits may include services such as consultations on health information and health screening, the kind and availability of which will be set forth in regulations promulgated by the Administrator. These benefits shall not duplicate any activities already undertaken at those facilities by the Agency for Toxic Substances and Disease Registry under section 104(i) of this Act.

"(3) MULTIPLE SOURCES OF RISK.—For the purposes of this section, the term 'multiple sources of risk' means—

"(A) health risks from the existence of and exposure to hazardous substances in the vicinity of a facility for which a response action under this Act is considered, which may present risks to persons who are also at risk due to conditions at such a facility; or

"(B) health risks from releases or threatened releases of a hazardous substance, pollutant or contaminant from facilities, permitted or

otherwise, in the vicinity of a facility for which a response action under this Act is being considered, which may present risks to persons who are also at risk due to the specific facility for which a response action is being considered.

"(4) CONSISTENCY WITH DESIGNATION OF EMPOWERMENT ZONES.—The Administrator shall, to the maximum extent practicable, select locations for conducting demonstration projects under this subsection that coincide with areas which have been identified as empowerment zones under the Omnibus Budget Reconciliation Act of 1994 (Public Law 103–66).

"(5) RIGHT TO PETITION.—Any person may petition the Administrator to conduct a demonstration project under this subsection at a specified location. Without regard to paragraph (4), the Administrator may grant such a petition if—

"(A) the petition sets out a reasonable basis in fact that the population residing in the vicinity of the specified location may be exposed to multiple sources of risk as described in paragraph (3); and

"(B) the petition otherwise meets the requirements of regulations promulgated by the

Administrator which set forth the criteria by which demonstration projects will be selected.

"(6) REVIEWS OF PETITIONS.—The Admninistrator's determination and reviews of petitions under this subsection are committed to the Administrator's unreviewable discretion.

"(7) INTERAGENCY COORDINATION.—The Administrator shall coordinate with other departments or agencies as necessary in carrying out the responsibilities of this subsection.".

SEC. 107. ASSESSING RISKS FROM MULTIPLE SOURCES.

Section 105(a) of the Act (42 U.S.C. 9605(a)) is amended by adding after paragraph (10) the following new paragraph:

"(11) standards and procedures for assessing the risks, and the cumulative impact of such risks, posed by the release or threatened release of hazardous substances, or pollutants, or contaminants from multiple sources of risk (as described in section 117(l)(3) of this Act) in and around a facility, for utilization in response actions authorized by this Act. The demonstration projects authorized under subsection 117(l) of this Act shall be used to help meet the requirements of this subsection.".

SEC. 108. MULTIPLE SOURCES OF RISK IN PRIORITY SETTING.

Section 105(a)(8)(A) of the Act (42 U.S.C. 9605(a)(8)(A)) is amended by adding in the last sentence before "and other appropriate factors" the following: "the presence of multiple sources of risk (described in section 117(l)(3) of this Act) to affected communities,".

SEC. 109. DISEASE REGISTRY AND MEDICAL CARE PROVIDERS.

Section 104(i)(1) of the Act (42 U.S.C. 9604(i)(1)) is amended—

(a) by amending subparagraph (A) to read as follows:

"(A) in cooperation with the States, for scientific purposes and public health purposes, establish and maintain a national registry of persons exposed to toxic substances;"; and

(b) by amending subparagraph (E) by striking "admissions to hospitals and other facilities and services operated or provided by the Public Health Service" and by inserting "referral to accredited medical care providers".

SEC. 110. SUBSTANCE PROFILES.

Section 104(i)(3) of the Act (42 U.S.C. 9604(i)(3)) is amended by amending the paragraph beginning "Any toxicological profile or revision thereof" to read as follows:

"Any toxicological profile or revision thereof shall reflect the Administrator of ATSDR's assessment of all relevant toxicological testing which has been peer reviewed. The profiles prepared under this paragraph shall be for those substances highest on the list of priorities under paragraph (2) for which profiles have not previously been prepared or for substances not on the listing but which have been found at non-National Priorities List facilities and which have been determined by ATSDR to be of critical health concern. Profiles required under this paragraph shall be revised and republished as necessary, based on scientific need. Such profiles shall be provided to the States and made available to other interested parties.".

SEC. 111. DETERMINING HEALTH EFFECTS.

Section 104(i)(5) of the Act (42 U.S.C. 9604(i)(5)) is amended—

(a) in subparagraph (A) by—

(1) striking "designed to determine the health effects (and techniques for development of methods to determine such health effects) of such substance" and inserting—"conducted directly or by means such as cooperative agreements and grants with appropriate public and nonprofit institutions. The research shall be designed to determine the health effects (and

techniques for development of methods to determine such health effects) of the substance"; and

(2) redesignating clause (iv) as "(v)", striking "and" after clause (iii), and by inserting a new clause (iv) to read as follows:

"(iv) laboratory and other studies which can lead to the development of innovative techniques for predicting organ-specific, site-specific, and system-specific acute and chronic toxicity; and"; and

(b) striking subparagraph (D).

SEC. 112. PUBLIC HEALTH AND RELATED HEALTH ACTIVITIES AT NPL FACILITIES.

Section 104(i)(6) of the Act (42 U.S.C. 9604(i)(6)) is amended by—

(a) amending subparagraph (A) to read as follows:

"(A) The Administrator of ATSDR shall perform a public health assessment or related health activity for each facility on the National Priorities List established under section 105 of this Act. The public health assessment or related health activity shall be completed for each facility proposed for inclusion on the National Priorities List not later than one year after the date of proposal for inclusion,

including those facilities owned by any department, agency, or instrumentality of the United States."; and

(b) in subparagraph (H), striking "health assessment" and "such assessment" each place that they appear and inserting "public health assessment or related health activity".

SEC. 113. HEALTH STUDIES.

Section 104(i)(7)(A) of the Act (42 U.S.C. 9604(i)(7)(A)) is amended to read as follows:

"(A) Whenever in the judgment of the Administrator of ATSDR it is appropriate on the basis of the results of a public health assessment or on the basis of other appropriate information, the Administrator of ATSDR shall conduct a human health study of exposure or other health effects for selected groups or individuals in order to determine the desirability of conducting full scale epidemiologic or other health studies of the entire exposed population.".

SEC. 114. DISTRIBUTION OF MATERIALS TO HEALTH PROFESSIONALS AND MEDICAL CENTERS.

Section 104(i)(14) of the Act (42 U.S.C. 9604(i)(14)) is amended to read as follows:

"(14) In implementing this subsection and other health-related provisions of this Act in cooperation with the States, the Administrator of ATSDR shall—

"(A) assemble, develop as necessary, and distribute to the States, medical colleges, physicians, nursing institutions, nurses, and other health professionals and medical centers, appropriate educational materials (including short courses) on the medical surveillance, screening, and methods of prevention, diagnosis and treatment of injury or disease related to exposure to hazardous substances (giving priority to those listed in paragraph (2)), through means the Administrator of ATSDR considers appropriate; and

"(B) assemble, develop as necessary, and distribute to the general public and to at-risk populations appropriate educational materials and other information on human health effects of hazardous substances.".

SEC. 115. GRANT AWARDS/CONTRACTS/COMMUNITY ASSISTANCE ACTIVITIES.

Section 104(i)(15) of the Act (42 U.S.C. 6904)(i)(15)) is amended by—

(a) inserting "(A)" before "The activities";

(b) striking "cooperative agreements with States (or political subdivisions thereof)" and inserting "grants, cooperative agreements, or contracts with States (or political subdivisions thereof), other appropriate public authorities, public or private in-

stitutions, colleges, and universities, and professional associations,";

(c) in the second sentence, inserting "public" before "health assessments"; and

(d) adding a new subparagraph as follows:

"(B) When a public health assessment or related health activity is conducted at a facility on, or a release being evaluated for inclusion on the National Priorities List, the Administrator of ATSDR may provide the assistance specified in this paragraph to public or private nonprofit entities, individuals, and community-based groups who may be affected by the release or threatened release of hazardous substances in the environment.".

SEC. 116. PUBLIC HEALTH RECOMMENDATIONS IN REMEDIAL ACTIONS.

Section 121(c) of the Act (42 U.S.C. 9621(c)) is amended by inserting after the phrase "remedial action" the second time it appears the following: ", including public health recommendations and decisions resulting from activities under section 104(i),".

SEC. 117. ATSDR NOTIFICATION.

Section 122 of the Act (42 U.S.C. 9622) is amended by inserting after subsection (m) the following new subsection:

"(n) NOTIFICATION OF ATSDR.—When the Agency for Toxic Substances and Disease Registry (ATSDR) has conducted health related response activities pursuant to section 104(i) in response to a release or threatened release of any hazardous substance that is the subject of negotiations under this section, the President shall notify ATSDR of the negotiations and shall encourage the participation of ATSDR in the negotiations.".

TITLE II—STATE ROLES

SEC. 201. STATE AUTHORITY.

(a) Title I of the Act (42 U.S.C. 9600 et seq.) is amended by adding after section 126 the following new section:

"§ 127. State authority

"(a) STATE PROGRAM AUTHORIZATION.—

"(1) IN GENERAL.—At any time after the promulgation of the criteria required by paragraph (3) of this subsection, a State may apply to the Administrator to carry out, under its own legal authorities, response actions and enforcement activities at all facilities listed or proposed for listing on the National Priorities List, or certain categories of facilities listed or proposed for listing on the National Priorities List, within the State. This section shall not apply to any facility owned or operated by a department,

agency, or instrumentality of the United States listed on the National Priorities List if, on the date of enactment of the Superfund Reform Act of 1994, an interagency agreement for such facility has been entered into pursuant to section 120(a)(2).

"(2) REQUIREMENTS FOR AUTHORIZATION.—If the Administrator determines that the State possesses the legal authority, technical capability, and resources necessary to conduct response actions and enforcement activities in a manner that is substantially consistent with this Act and the National Contingency Plan at the facilities listed or proposed for listing on the National Priorities List for which it seeks authorization, the Administrator, pursuant to a contract or agreement entered into between the Administrator and the State, may authorize the State to assume the responsibilities established under this Act at all such facilities or categories of facilities. Except as otherwise provided in this Act, such responsibilities include, but are not limited to, responding to a release or threatened release of a hazardous substance or pollutant or contaminant; selecting response actions; expending the Fund in amounts authorized by the Administrator to finance response activities; and taking enforcement actions,

including cost recovery actions to recover Fund expenditures made by the State. In an application for authorization, a State shall acknowledge its responsibility to address all response actions at the facilities for which it seeks authorization.

"(3) PROMULGATION OF REGULATIONS.—The Administrator shall issue regulations to determine a State's eligibility for authorization and establish a process and criteria for withdrawal of such an authorization. At a minimum, a State must demonstrate—

"(A) that it has a process for allocating liability among potentially responsible parties that is substantially consistent with section 122a of this Act (as added by the Superfund Reform Act of 1994);

"(B) that it provides for public participation in a manner that is substantially consistent with section 117 of this Act and the National Contingency Plan;

"(C) that it provides for selection and conduct of response actions in a manner that is substantially consistent with section 121 of this Act; and

"(D) that it provides for notification of and coordination with trustees in a manner that is substantially consistent with section 104(b)(2) and section 122(j)(1) of this Act.

"(b) REFERRAL OF RESPONSIBILITIES.—

"(1) IN GENERAL.—At any time after the promulgation of the criteria required by paragraph (3) of this subsection, a State may apply to the Administrator to carry out, under its own legal authorities, response actions at a specific facility or facilities listed or proposed for listing on the National Priorities List, within the State.

"(2) REQUIREMENTS FOR REFERRAL.—If the Administrator determines that the State possesses the legal authority, technical capability, and resources necessary to conduct response actions and enforcement activities in a manner substantially consistent with this Act and the National Contingency Plan at the facilities listed or proposed for listing on the National Priorities List facilities for which it seeks referral, the Administrator, pursuant to a contract or agreement entered into between the Administrator and the State, may refer the responsibilities established under this Act to the State for the facilities for which the State seeks referral. Except as

otherwise provided in this Act, such responsibilities include, but are not limited to, responding to a release or threatened release of a hazardous substance or pollutant or contaminant; selecting response actions; expending the Fund in amounts authorized by the Administrator to finance response activities; and taking enforcement actions, including cost recovery actions to recover Fund expenditures made by the State.

"(3) PROMULGATION OF REGULATIONS.—The Administrator shall promulgate regulations to determine a State's eligibility for referral and establish a process and criteria for withdrawal of such referral. At a minimum, a State must demonstrate that it meets the requirements described in subsection (a)(3).

"(c) AUTHORIZED USE OF FUND.—At facilities listed on the National Priorities List for which a State is authorized under subsection (a), and at facilities listed on the National Priorities List which are referred to a State under subsection (b), the State shall be eligible for response action financing from the Fund. The Administrator shall ensure that all allocations of the Fund to the States for the purpose of undertaking site-specific response actions are based primarily on the relative risks to human

health and the environment posed by the facilities eligible for funding. The amount of Fund financing for a State-selected response action at a facility listed on the National Priorities List shall—

"(1) take into account the number and financial viability of parties identified as potentially liable for response costs at such facility, and

"(2) be limited to the amount necessary to achieve a level of response that is not more stringent than that required under this Act.

A State also may obtain Fund financing to develop and enhance its capacity to undertake response actions and enforcement activities. The Administrator shall establish specific criteria for allocating expenditures from the Fund among States for the purposes of undertaking response actions and enforcement activities at referred and State-authorized facilities, and building State capacities to undertake such response actions and enforcement activities. The Administrator shall develop a program and provide an appropriate level of Fund financing to assist Indian tribes in developing and enhancing their capabilities to conduct response actions and enforcement activities.

"(d) STATE COST SHARE.—As provided in section 104(c)(3)(B) of this Act (as added by the Superfund Reform Act of 1994), a State shall pay or assure payment

of 15 percent of the costs of all response actions and program support or other costs for which the State receives funds from the Fund under this section. An Indian tribe authorized to conduct response actions and enforcement activities or to which facilities have been referred under this section is not subject to the cost-share requirement of this subsection.

"(e) TERMS AND CONDITIONS; COST RECOVERY.—A contract or agreement for a State authorization or referral under this section is subject to such terms and conditions as the Administrator prescribes. The terms and conditions shall include requirements for periodic auditing and reporting of State expenditures from the Fund. The contract or agreement may cover a specific facility, a category of facilities, or all facilities listed or proposed to be listed on the National Priorities List in the State. The contract or agreement shall require the State to seek cost recovery, as contemplated by this Act, of all expenditures from the Fund. Five percent of the moneys recovered by the State may be retained by the State for use in its hazardous substance response program, and the remainder shall be returned to the Fund. Before making further allocations from the Fund to any State, the Administrator shall take into consideration the effectiveness of the State's enforcement program and cost recovery efforts.

"(f) ENFORCEMENT OF AGREEMENTS.—If the Administrator enters into a contract or agreement with a State pursuant to this section, and the State fails to comply with any terms and conditions of the contract or agreement, the Administrator, after providing sixty days notice, may withdraw the State authorization or referral, or seek in the appropriate Federal district court to enforce the contract or agreement to recover any funds advanced or any costs incurred because of the breach of the contract or agreement by the State.

"(g) MORE STRINGENT STATE STANDARDS.—Under either an authorization or referral, a State may select a response action that achieves a level of cleanup that is more stringent than required under section 121(d) of this Act if the State agrees to pay for the incremental increase in response cost attributable to achieving the more stringent cleanup level. Neither the Fund nor any party liable for response costs shall incur costs in excess of those necessary to achieve a level of cleanup required under section 121(d) of this Act.

"(h) OPPORTUNITY FOR PUBLIC COMMENT.—The Administrator shall make available, for public review and comment, applications for authorization under subsection (a) and applications for referral under subsection (b). The Administrator shall not approve or withdraw authorization

or referral from a State unless the Administrator notifies the State, and makes public, in writing, the reasons for such approval or withdrawal.

"(i) PERIODIC REVIEW OF AUTHORIZED STATE PROGRAMS AND REFERRALS.—The Administrator shall conduct a periodic review of authorized State programs and referrals to determine, among other things, whether—

"(1) the response actions were selected and conducted in a manner that was substantially consistent with this Act, the National Contingency Plan, and the contract or agreement between the Administrator and the State;

"(2) the State response costs financed by Fund expenditures were incurred in the manner agreed to by the State, in accordance with the contract or agreement between the Administrator and the State; and

"(3) the State's cost recovery efforts and other enforcement efforts were conducted in accordance with the contract or agreement between the Administrator and the State.

The Administrator, in consultation with the States, shall develop specific criteria for periodic reviews of authorized State programs and referrals. The Administrator shall es-

tablish a mechanism to make the periodic State reviews available to the public.

"(j) MODIFICATION OF RESPONSE.—At a facility for which a State selects a response action under an authorization or a referral, the State shall afford the opportunity for public participation in a manner that is substantially consistent with the requirements of section 117(f)–(i) of this Act, and shall give notice of and a copy of the proposed plan for response action to the Administrator. The State also shall give prompt written notice and a copy of the final decision in selecting the response action to the Administrator. Within 90 days from the date of receipt of such notice and final response action decision from the State, the Administrator may issue a notice of a request to modify the State-selected remedy. The Administrator's notice shall be in writing and shall set forth the basis for the Administrator's position, and the final date for responding to the Administrator's request, which shall be no less than 90 days from the date of the notice. If the State's response does not resolve the Administrator's concerns to the Administrator's satisfaction, the Administrator may withhold the distribution of Fund monies for the selected response action or may withdraw all or part of the State's authorization or referral.

"(k) EFFECT OF SECTION.—The President shall retain the authority to take response actions at facilities listed or proposed for listing on the National Priorities List that are not being addressed by a State under an authorization or referral pursuant to this section. At facilities listed or proposed for listing on the National Priorities List that are being addressed by a State under either an authorization or a referral, the President may take response actions that the President determines necessary to protect human health or the environment, if the State fails, after a request by the Administrator to take such response actions in a timely manner. A State does not have the authority, except pursuant to this section, to take or order a response action, or any other action relating to releases or threatened releases, at any facility listed or proposed for listing on the National Priorities List. This section does not affect the authority of the United States under this Act to seek cost recovery for costs incurred by the United States.".

(b) TRANSITION AND CONFORMING AMENDMENTS.—

(1) Sections 104(c)(5), 104(c)(7), 104(d)(1), and 104(d)(2) of the Act are each amended by inserting after the heading in each paragraph the following—"This paragraph applies only to response actions for which a Record of Decision or other deci-

sion document is signed before the date of enactment of the Superfund Reform Act of 1994 and response actions covered by a contract or agreement for which a State has selected, pursuant to the option provided in subsection (c)(3)(C) (as added by the Superfund Reform Act of 1994), the funding requirements set forth in subsection (c)(3)(A) (as amended by Superfund Reform Act of 1994).";

(2) Section 114(a) of the Act is amended by striking "Nothing" and inserting—"Except as otherwise provided in this Act, nothing";

(3) Section 121(f)(1) of the Act is amended by striking the existing provisions and inserting—"The President may repeal, no earlier than one year after the promulgation of final regulations under sections 127(a)(3) and 127(b)(3), the regulations issued under this paragraph prior to the date of enactment of the Superfund Reform Act of 1994.";

(4) Section 121(f)(2) of the Act is amended by—

(A) striking "legally applicable or relevant and appropriate" from the second sentence of subparagraph (A); and

(B) striking "subsection (d)(4)" from the second sentence of subparagraph (A) and inserting "subsection (d)(5)(C)";

(5) Section 121(f)(3) of the Act is amended by—

(A) striking "legally applicable or relevant and appropriate" from the second sentence of subparagraph (A); and

(B) striking "subsection (d)(4)" from the second sentence of subparagraph (A) and inserting "subsection (d)(5)(C)".

(6) Section 302(d) of the Act is amended by striking "Nothing" and inserting—"Except as otherwise provided in this Act, nothing".

SEC. 202. TRANSFER OF AUTHORITIES.

Section 120(g) of the Act (42 U.S.C. 9620(g)) is amended by adding, after "the Environmental Protection Agency," the phrase "and except as provided in section 127,".

SEC. 203. STATE ROLE IN DETERMINATION OF REMEDIAL ACTION TAKEN.

Section 120(h)(3) of the Act (42 U.S.C. 9620(h)(3)) is amended by adding at the end thereof the following: "If the property being transferred is part of a facility subject to a State authorization or a referral under section

127, all demonstrations required by this paragraph to be made to the Administrator shall be made to the appropriate State official.".

SEC. 204. STATE ASSURANCES.

Section 104(c)(3) of the Act (42 U.S.C. 9604(c)(3)) is amended by—

(a) in the beginning of the paragraph after "(3)" inserting "State cost shares for response actions and programs for which Superfund funds may be allocated under this section or section 127 shall be as follows—";

(b) striking "The" before "President" and inserting "(A) For all remedial actions for which a Record of Decision is signed before the date of enactment of the Superfund Reform Act of 1994, the";

(c) redesignating subparagraphs (A), (B) and (C) of existing section 104(c)(3) as subparagraphs (1), (2) and (3) respectively; by striking "(i)", wherever it appears and inserting "(I)"; and striking "(ii)" wherever it appears and inserting "(II)";

(d) adding a new subparagraph (B) as follows:

"(B) Subject to the provisions of subparagraph (C), for the costs of all response actions for which a Record of Decision or other decision document is signed after the date that is one year after the effective date of final regu-

lations promulgated under section 127(a)(3) and section 127(b)(3), and for all program or other costs for which Fund money may be allocated to the State pursuant to this section or section 127, the President shall not provide or authorize funding from the Fund unless the State first enters into a contract or agreement with the President providing assurances deemed adequate by the President that the State will pay or assure payment of 15 percent of all such costs as required by section 127(d). The Administrator may provide funding authorized under this paragraph for a one-year or other period for all costs and facilities in a State; in that event, the State cost share requirement set forth above shall apply to all costs covered by such period."; and

(e) adding a new subparagraph (C) as follows:

"(C) Each State shall have the option of receiving funding for all response action costs and program or other costs for which funding is authorized under this section or section 127 pursuant to either subparagraph (A) or subparagraph (B) of this paragraph. The option selected by the State shall apply to all contracts and agreements signed pursuant to this section or section 127.".

SEC. 205. SITING.

Section 104(c)(9) of the Act (42 U.S.C. 9604(c)(9)) is amended to read as follows:

"(9) SITING.—Effective one year after the date of enactment of the Superfund Reform Act of 1994, the President shall not provide any remedial actions pursuant to this section unless the State in which the release occurs submits a report describing its plans for adequate disposal capacity for hazardous wastes, in accordance with guidelines issued by the Administrator.".

SEC. 206. THE NATIONAL PRIORITIES LIST.

(a) Section 105(a)(8)(B) of the Act (42 U.S.C. 9605(a)(8)(B)) is amended by striking "as part of the plan", and by inserting before "Within" the sentence "The National Priorities List, and any modifications to the National Priorities List, may be adopted administratively, and without rulemaking.".

(b) Section 105(a)(8) of the Act (42 U.S.C. 9605(a)(8)) is amended by adding after subparagraph (B) the following new subparagraph—

"(C) before determining that a facility is to be listed on the National Priorities List, the Administrator shall publish a notice proposing the facility for listing on the National Priorities List and shall provide an opportunity for public document. Public notice and opportunity for comment also shall be provided before a decision by the Administrator to remove a facility from the National Priorities List.

The Administrator shall establish a procedure under which any person may request that a facility be considered for listing on, or removal from, the National Priorities List. The Administrator has the sole discretion to list or remove a facility on the National Priorities List.".

SEC. 207. THE STATE REGISTRY.

Section 105(a)(8) of the Act (42 U.S.C. 9605(a)(8)) is amended by adding after subparagraph (C) (as added by this Act) a new subparagraph—

(D) STATE REGISTRY.—Each State shall maintain and make available to the public a list of facilities in the State that are believed to present a current or potential hazard to human health or the environment due to the release or threatened release of hazardous substances or pollutants or contaminants. Each State, in consultation with the Administrator and other appropriate federal agencies, shall prepare such listing, and shall, on an annual basis, publish the State Registry, specifying the governmental agency addressing the facility, and whether the facility is on the National Priorities List.".

TITLE III—VOLUNTARY RESPONSE

SEC. 301. PURPOSES AND OBJECTIVES.

The purposes and objectives of this title are to—

(a) significantly increase the pace of response activities at contaminated sites by promoting and encouraging the development and expansion of State voluntary response programs, and

(b) benefit the public welfare by returning contaminated sites to economically productive uses.

SEC. 302. STATE VOLUNTARY RESPONSE PROGRAM.

Title I of the Act is amended by adding after section 127 (as added by this Act) the following new section—

"§ 128. Voluntary response program

"(a) IN GENERAL.—The Administrator shall establish a program to provide technical and other assistance to the States to establish and expand voluntary response programs.

"(b) VOLUNTARY RESPONSE PROGRAM.—The Administrator shall assist States to establish and administer a voluntary program that—

"(1) covers all eligible facilities, as defined in subsection (c) of this section, within the State;

"(2) provides adequate opportunities for public participation, including prior notice and opportunity for comment, in selecting response actions;

"(3) provides opportunities for technical assistance for voluntary response actions;

"(4) has the capability, through enforcement or other mechanisms, of assuming the responsibility for completing a response action if the current owner or prospective purchaser fails or refuses to complete the necessary response, including operation and maintenance; and

"(5) provides adequate oversight and has adequate enforcement authorities to ensure that voluntary response actions are completed in accordance with applicable Federal and State laws, including applicable permit requirements and any on-going operation and maintenance or long-term monitoring activities.

"(c) ELIGIBLE FACILITIES.—

"(1) Except as provided in paragraph 2 of this subsection, the term 'eligible facility' means a facility or portion of a facility where there has been a release or threat of release of a hazardous substance, pollutant, or contaminant into the environment.

"(2) The term 'eligible facility' does not include any of the following—

"(A) a facility at which a remedial investigation and feasibility study is underway, unless the Administrator, in consultation with the

State, determines that it is appropriate to allow the response action at such a facility to proceed under a voluntary response program;

"(B) a facility with respect to which a Record of Decision has been issued under section 104 of this Act;

"(C) a facility with respect to which a corrective action permit condition or order has been proposed, issued, modified, or amended to require implementation of specific corrective measures under section 3004(u), 3004(v), or 3008(h) of the Solid Waste Disposal Act (42 U.S.C. 6924(u), 6924(v), or 6928(h));

"(D) a land disposal unit with respect to which a closure notification under subtitle C of the Solid Waste Disposal Act (42 U.S.C. 6921 et seq.) has been submitted;

"(E) a facility with respect to which an administrative or judicial order or decree concerning the response action has been issued, sought, or entered into by the United States under this Act, the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.), the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.), the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.),

the Toxic Substances Control Act (15 U.S.C. 2601 et seq.) or title XIV of the Public Health Service Act, commonly known as the Safe Drinking Water Act (42 U.S.C. 300(f) et seq.); and

"(F) a facility at which assistance for response activities may be obtained under subtitle I of the Solid Waste Disposal Act (42 U.S.C. 6991 et seq.) from the Leaking Underground Storage Tank Trust Fund established under section 9508 of the Internal Revenue Code of 1986.

"(3) A facility listed or proposed for listing on the National Priorities List may be an 'eligible facility' if—

"(A) the facility is not a facility identified in paragraph (2);

"(B) the State in which the facility is located has obtained a State authorization or referral under section 127 of this Act; and

"(C) the Administrator concurs in the State's determination to address the facility under its voluntary response program.

"(d) ANNUAL REPORTING.—The Administrator shall report, not later than 1 year after enactment of this Act

and annually thereafter, to the Congress on the status of State voluntary response programs including—

"(1) whether the State's voluntary response program continues to meet the criteria set forth in subsection (b) or (c);

"(2) whether the State has adopted procedures to ensure that all response actions completed or undertaken under the State's voluntary response program comply with all applicable Federal and State laws;

"(3) whether public participation opportunities have been adequate during the process of selecting a response action for each voluntary response;

"(4) whether voluntary response actions completed or undertaken under the State voluntary response program have been implemented in a manner that has reduced or eliminated risks to human health and the environment to the satisfaction of the State;

"(5) whether voluntary response actions completed or undertaken under the State voluntary response program at facilities listed or proposed for listing on the National Priorities List were conducted in accordance with section 121(d) of this Act; and

"(6) whether a voluntary response action has increased risk to human health or the environment, and whether a State has taken timely and appropriate steps to reduce or eliminate that risk to human health or the environment.

"(i) STATUTORY CONSTRUCTION.—This section is not intended—

"(1) to impose any requirement on a State voluntary response program existing on or after the date of enactment of this Act; or

"(2) to affect the liability of any person or response authorities afforded under any law (including any regulation) relating to environmental contamination, including this Act (except as expressly provided in section 101(39)(D) (42 U.S.C. 9601(39)(D)), section 107(a)(5)(C) (42 U.S.C. 9607(a)(5)(C)), the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.), the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.), the Toxic Substances Control Act (15 U.S.C. 2601 et seq.), or title XIV of the Public Health Service Act, commonly known as the "Safe Drinking Water Act" (42 U.S.C. 300(f) et seq.).".

SEC. 303. SITE CHARACTERIZATION PROGRAM.

Title I of the Act is amended by adding after section 128 (as added by this Act) the following new section:

"§ 129. Site characterization technical assistance program

"(a) IN GENERAL.—The Administrator shall establish a program to provide technical and other assistance to municipalities to conduct site characterizations for facilities at which voluntary response actions are being conducted or are proposed to be conducted pursuant to a State voluntary response program that meets the requirements described in section 127.

"(b) TECHNICAL ASSISTANCE.—In carrying out the program established under subsection (a), the Administrator may provide technical and other assistance to a municipality to conduct a site characterization of a facility within the jurisdiction of the municipality at which voluntary response actions are being conducted or are proposed to be conducted. A municipality requesting technical and other assistance shall provide to the Administrator the following information—

"(1) describing the facility at which voluntary response actions are being conducted or are proposed to be conducted;

"(2) demonstrating the financial need of the owner or prospective purchaser of such a facility for funds to conduct a site characterization;

"(3) analyzing the potential of the facility for creating new businesses and employment opportunities on completion of the response action;

"(4) estimating the fair market value of the site after the proposed or ongoing response action, if a response action is necessary;

"(5) regarding the economic viability and commercial activity on real property—

"(i) located within the immediate vicinity of the affected site at the time of consideration of the application; or

"(ii) projected to be located within the immediate vicinity of the affected site by the date that is 5 years after the date of the consideration of the application;

"(6) regarding the potential of the facility for creating new businesses and employment opportunities on completion of a response action;

"(7) regarding whether the affected site is located in an economically distressed community;

"(8) regarding the presence of multiple sources of risk as described in section 117(k) of this Act; and

"(9) in such form, as the Administrator considers appropriate to carry out the purposes of this section.".

TITLE IV—LIABILITY AND ALLOCATION

SEC. 401. RESPONSE AUTHORITIES.

(a) Section 104(e)(2) of the Act (42 U.S.C. 9604(e)(2)) is amended by deleting the word "cleanup" and inserting the phrase "response action", and inserting after subparagraph (C) the following:

"(D) The nature and extent of all activities and operations at such vessel or facility, including the identity of any persons engaged in, responsible for, controlling, or having the ability to control such activities or operations.

"(E) Information relating to the liability or responsibility of any person to perform or pay for a response action.

"(F) Information that is otherwise relevant to enforce the provisions of this Act.".

(b) Section 104(e)(7) of the Act (42 U.S.C. 9604(e)) is amended to read as follows:

"(7) ADMINISTRATIVE SUBPOENAS.—When it would assist in the collection of information necessary or appropriate for the purposes of implementing this Act, the President may by subpoena require

the attendance and testimony of witnesses and the production of reports, papers, documents, answers to questions, and other information that the President deems necessary. Witnesses shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In the event of contumacy or failure or refusal of any person to obey any such subpoena, any district court of the United States in which venue is proper shall have jurisdiction to order any such person to comply with such subpoena. Any failure to obey such an order of the court is punishable by the court as a contempt thereof.

"(8) CONFIDENTIALITY OF INFORMATION—

"(A) Any records, reports, or information obtained from any person under this section (including records, reports or information obtained by representatives of the President and records, reports or information obtained pursuant to a contract, grant or other agreement to perform work pursuant to this section, but not including documents, reports, compilations, summaries, or other analyses prepared by the President or representatives of the President which reference or incorporate information ob-

tained under this section) shall be available to the public, except as follows:

"(i) Upon a showing satisfactory to the President (or the State, as the case may be) by any person that records, reports or information, or any particular part thereof (other than health or safety effects data), to which the President (or the State, as the case may be) or any officer, employee, or representative has access under this section if made public would divulge information entitled to protection under section 1905 of title 18 of the United States Code, such information or particular portion thereof shall be considered confidential in accordance with the purposes of that section, except that such record, report, document or information may be disclosed to other officers, employees, or authorized representatives of the United States (including government contractors) concerned with carrying out this chapter, or when relevant in any proceeding under this chapter, or, if such records, reports or information are obtained or sub-

mitted to the United States (or the State, as the case may be) pursuant to a contract, grant or other agreement to perform work pursuant to this section, to persons from whom the President seeks to recover costs pursuant to this Act.

"(ii) This section does not require that information which is exempt from disclosure pursuant to section 522(a) of title 5 of the United States Code by reason of subsection (b)(5), subsection (b)(6), or subsection (b)(7) of such section, be available to the public, nor shall the disclosure of any such information pursuant to this section authorize disclosure to other parties or be deemed to waive any confidentiality privilege available to the President under any Federal or State law.".

SEC. 402. COMPLIANCE WITH ADMINISTRATIVE ORDERS.

(a) Section 106(a) of the Act (42 U.S.C. 9606(a)) is amended by—

(1) inserting after the phrase "hazardous substance" the phrase ", or pollutant or contaminant"; and

(2) by adding at the end thereof the following: "The President may amend such orders and issue additional orders, as appropriate, without a subsequent finding of an imminent and substantial endangerment, to complete response action undertaken in response to a release or substantial threat of a release, or to require additional response actions that are necessary or appropriate.".

(b) Section 106(b)(1) of the Act (42 U.S.C. 9606(b)(1)) is amended—

(1) by striking out the phrase "to enforce such order", and

(2) by inserting before the period ", or be required to comply with such order, or both, even if another party has complied, or is complying, with the terms of the same order or another order pertaining to the same facility, release or threatened release"; and

(3) by inserting at the end of the paragraph the following:

"For purposes of this title, a 'sufficient cause' requires—

"(A) an objectively reasonable belief by the person to whom the order is issued that the person is not liable for any response costs under section 107 of this title; or

"(B) that the action to be performed pursuant to the order is determined to be inconsistent with the national contingency plan.

The existence or results of an allocation process pursuant to section 122a of this title shall not affect or constitute a basis for a determination of 'sufficient cause.' ".

(c) Section 106(b)(2) is amended by moving the second sentence of subsection (b)(2)(A) and redesignating it as subsection (b)(4), and by striking the word "paragraph" in such newly designated subsection (b)(4) and replacing it with the word "subsection".

(d) Section 106(b)(2)(A) of the Act (42 U.S.C. 9602(b)(2)(A) is amended by striking out the phrase "completion of", and inserting the phrase "the President determines that such person has completed".

(e) Section 106(b)(2)(C) of the Act (42 U.S.C. 9606(b)(2)(C)) is amended by inserting after the words "Subparagraph (D)" the phrase ", or as may be authorized in a settlement entered into under section 122a of this title.

SEC. 403. LIMITATIONS TO LIABILITY FOR RESPONSE COSTS.

Section 107 of the Act (42 U.S.C. 9607) is amended—

(a) in subsection (a) by inserting—

"(5) Notwithstanding paragraphs (1) through (4) of this subsection, a person who does not impede the performance of response actions or natural resource restoration shall not be liable—

"(A) to the extent liability is based solely on subsection 107(a)(3) or 107(a)(4) of this Act, and the arrangement for disposal, treatment, or transport for disposal or treatment, or the acceptance for transport for disposal or treatment, involved less than five hundred (500) pounds of municipal solid waste (MSW) or sewage sludge as defined in sections 101(41) and 101(44) of this Act, respectively, or such greater or lesser amount as the Administrator may determine by regulation;

"(B) to the extent liability is based solely on subsection 107(a)(3) or 107(a)(4) of this Act, and the arrangement for disposal, treatment, or transport for disposal or treatment, or the acceptance for transport or disposal or treatment, involved less than ten (10) pounds or liters of materials containing hazardous substances or pollutants or contaminants of such greater or lesser amount as the Administrator may determine by regulation, except where—

"(i) the Administrator has determined that such material contributed significantly or could contribute to the costs of response at the facility; or

"(ii) the person has failed to respond fully and completely to information requests by the United States, or has failed to certify that, on the basis of information within its possession, it qualifies for this exception;

"(C) to the extent liability is based solely on subsection 107(a)(1) of this Act, for a release or threat of release from a facility, and the person is a bona fide prospective purchaser of the facility as defined in section 101(39);

"(D) to the extent the liability of a department, agency, or instrumentality of the United States is based solely on section 107(a)(1) or (2) with regard to a facility over which the department, agency, or instrumentality exercised no regulatory or other control over activities that directly or indirectly resulted in a release or threat of a release of a hazardous substance, and—

"(i) all activities that directly or indirectly resulted in a release of threat of a release of a hazardous substance during the period of ownership by the United States occurred prior to 1976;

"(ii) the activities either directly or indirectly resulting in a release or a threat of a release of a hazardous substance at the facility were pursuant to a statutory authority;

"(iii) such department, agency, or instrumentality of the United States did not cause or contribute to the release or threat of release of hazardous substances or pollutants or contaminants at the facility; and

"(iv) there are persons, other than the United States, who are both potentially liable for the release of hazardous substances or pollutants or contaminants at the facility and fully capable of performing or financing the response action at the facility; or

"(E) to the extent the liability of a Federal or State entity or municipality is based solely on its ownership of a road, street, or other right

of way or other public transportation route over which hazardous substances are transported, or the granting of a license or permit to conduct business; or

"(F) For more than 10 percent of total response costs at the facility, in aggregate, for all persons to the extent their liability is based solely on subsections 107(a)(3) or 107(a)(4) of this Act, and the arrangement for disposal, treatment, or transport for disposal or treatment, or the acceptance for transport for disposal or treatment involved only municipal solid waste (MSW) or sewage sludge as defined in sections 101(41) and 101(44), respectively, of this Act. Such limitation on liability shall apply only—

"(i) where either the acts or omissions giving rise to liability occurred before the date thirty-six (36) months after enactment of this paragraph, or the person asserting the limitation institutes or participates in a qualified household hazardous waste collection program within the meaning of section 101(43); and

"(ii) where the disposal did not occur on lands owned by the United States or any department, agency, or instrumentality therefore, or on any tribal land.".

(b) by inserting after subsection (m) the following:

"(n) PROSPECTIVE PURCHASER AND WINDFALL LIEN.—Where there are unrecovered response costs for which an owner of a facility is not liable by operation of subsection 107(a)(5)(C) of this Act, and a response action for which there are unrecovered costs inures to the benefit of such owner, the United States shall have a lien upon the facility for such unrecovered costs. Such lien—

"(1) shall not exceed the increase in fair market value of the property attributable to the response action at the time of a subsequent sale or other disposition of property;

"(2) shall be subject to the requirements for notice and validity established in paragraph (3) of subsection (l) of this section; and

"(3) shall continue until the earlier of satisfaction of the lien, or recovery of all response costs incurred at the facility."

(c) Section 120 of the Act (42 U.S.C. 9620) is amended by inserting before the word "facilities" in the title of the section the phrase "entities and".

(d) Section 120(a)(1) of the Act (42 U.S.C. 9620(a)(1)) is amended—

(1) after the word "title" in the first sentence by inserting the phrase "the right to contribution protection set forth in section 113 and 122, when such department, agency or instrumentality resolves its share of liability under this Act and liability for all federal civil and administrative penalities and fines imposed under this Act, regardless of whether such penalties and fines are punitive or coercive in nature or are imposed for isolated or continuing violations.";

(2) by inserting the word "other" before the phrase "person or entity" in the second sentence and by inserting after the second sentence the following new sentence:

"The waiver of immunity in this section does not encompass uniquely governmental actions such as—

"(A) any actions of any department, agency or instrumentality, except for official seizure of or holding title to a facility, taken pursuant

to Federal authority to regulate the economy in preparation for, during, or otherwise in connection with war through the use and implementation of national priority rating systems, national wage, profit and price incentives or controls, or otherwise to mobilize the national economy for war-related production; or

"(B) any actions of any department, agency, or instrumentality taken in response to a natural disaster pursuant to the Emergency Flood Control Work Act (33 U.S.C. 701(n)), or the Disaster Relief Act of 1974 (42 U.S.C. 5121 et seq.).";

(e) Section 120(a)(4) of the Act (42 U.S.C. 9620(a)(4)) is amended—

(1) by inserting "currently" before "owned" in the first sentence;

(2) by inserting after the word "United States" the phrase "in the following circumstances: (A)"; and

(3) by inserting after the word "List" "; (B) when such facilities are included on the National Priorities List but are specifically referred to the State by the Administrator pursuant to the provisions of section 127 of this Act;

or (c) when such laws are part of an authorized program approved by the Administrator pursuant to section 127 of this Act, and such facilities are included on the National Priorities List and are to be addressed by the State authorized program pursuant to section 127 of this Act. Each department, agency, or instrumentality of the United States shall be subject to State requirements, both substantive and procedural, respecting liability for the costs of responding to releases or threats of releases of hazardous substances at non-federally-owned facilities referred to the State pursuant to section 127 of this Act, or such requirements that are part of a State authorized program for non-federally-owned facilities being addressed under a State authorized program pursuant to section 127 of this Act.";

(4) after the word "preceding" by replacing the word "sentence" with "sentences";

(5) at the end of the section by adding "This waiver of immunity for such facilities shall include all civil and administrative penalties and fines imposed under such laws, regardless of whether such penalties and fines are

punitive or coercive in nature or are imposed for isolated or continuing violations. Neither the United States, nor any agent, employee or officer thereof, shall be immune or exempt from any process or sanction of any State or Federal Court with respect to the enforcement of any appropriate relief under such laws, but the United States shall be entitled to remove any action filed in state court against any department, agency, instrumentality, employee or officer of the United States to the appropriate Federal district court. No agent, employee, or officer of the United States shall be personally liable for any civil or administrative penalty under any Federal or State law with respect to any act or omission within the scope of the official duties of the agent, employee, or officer. All funds collected by a State from the Federal Government from penalties and fines imposed for violation of any substantive or procedural requirement referred to in this subsection shall be used by the State only for projects designed to improve or protect the environment or to defray the costs of environmental protection or enforcement.".

(f) Section 120(j)(1) of the Act (42 U.S.C. 9620(j)(1)) is amended before the phrase "with respect to the site" in the second sentence by inserting "or any State law applicable under section 120(a)(4)".

SEC. 404. LIABILITY.

(a) Section 107(a)(1) of the Act (42 U.S.C. 9607(a)(1)) is amended by striking the word "and" and inserting the word "or".

(b) Section 107(a)(3) of the Act (42 U.S.C. 9607(a)(3)) is amended by striking out the phrase "by any other party or entity,".

(c) Section 107(a)(4) of the Act (42 U.S.C. 9607(a)(4)) is amended—

(1) by inserting a blank line before the phrase "from which there is a release";

(2) by moving the phrase "from which there is a release" to the left margin; and

(3) inserting a comma after the phrase "threatened release".

(d) Section 107(a)(4)(A) of the Act (42 U.S.C. 9607(a)(4)(A)) is amended by inserting the phrase ", including direct costs, indirect costs, and costs of overseeing response actions conducted by private parties" before the phrase "incurred by the United States".

(e) Section 107(a)(4)(B) of the Act (42 U.S.C. 9607(a)(4)(B)) is amended—

(1) by striking out the word "other" both times it appears; and

(2) by inserting the phrase "other than the United States, a State or an Indian tribe" before the phrase "consistent with the national contingency plan".

(f) Section 107(c)(3) of the Act (42 U.S.C. 9607(a)(3)) is amended—

(1) by inserting the phrase "in addition to liability for any response costs incurred by the United States as a result of such failure to take proper action," after the world "person" the second time it appears;

(2) by striking out the phrase "at least equal to, and not more than" and inserting the phrase "up to";

(3) by striking out the comma after the word "times"; and

(4) by striking out the phrase "any costs incurred by the Fund as a result of such failure to take proper action" and inserting the phrase "such response costs".

(g) Section 107 of the Act (42 U.S.C. 9607(a)(4)(B)) is amended by inserting the phrase ", or pollutant or contaminant" after the term "hazardous substance" or "hazardous substances" wherever they appear in sections 107(a)(2), (3) and (4); 107(b); 107(c); 107(d)(1) and (2); 107(f)(1); 107(i); 107(j); and 107(k)(1)(B).

SEC. 405. CIVIL PROCEEDINGS.

(a) Section 113(a) of the Act (42 U.S.C. 9613(a)) is amended—

(1) by striking out the phrase "upon application by any interested person", and inserting the phrase "by any adversely affected person through the filing of a petition for review"; and

(2) by striking out the phrase "application shall be made", and inserting in lieu thereof "petition shall be filed".

(b) Section 113(b) of the Act (42 U.S.C. 9613(b)) is amended—

(1) before "without regard to the citizenship," by inserting the phrase "or in any manner limiting or affecting the President's ability to carry out a response action under this Title,"; and

(2) by inserting immediately after the first sentence the following sentence: "Any action initiated in any state or local court against the United States

(or any department, agency,or instrumentality, officer or employee thereof) pursuant to or under any provision of or authorized by this title may be removed by the United States to the appropriate federal district court in accordance with section 1446 of title 18 of the United States Code."

(c) Section 113(g) of the Act (42 U.S.C. 9613(g)) is amended by striking paragraphs (2) and (3) and inserting—

"(2) ACTIONS FOR RECOVERY OF COSTS.—Except as provided in paragraph (3) below, an initial action for recovery of costs referred to in section 107 of this title must be commenced—

"(A) for removal action, within three years after completion of all removal action taken with respect to the facility, including off-site disposal of any removed materials; except that if physical on-site construction of the remedial action is initiated within three years after the completion of all removal action taken with respect to the facility, costs incurred for removal action may be recovered in the cost recovery action brought under subparagraph (B); and

"(B) for a remedial action, within six years after initiation of physical on-site construction of the remedial action.

In any such action described in this subsection, the court shall enter a declaratory judgment on liability for response costs or damages that will be binding on any subsequent action or actions to recover further response costs or damages. A subsequent action or actions under section 107 of this title for further response costs at the vessel or facility may be maintained at any time during the response action, but must be commenced no later than three years after the date of completion of all response action. Except as otherwise provided in this paragraph, an action may be commenced under section 107 of this title for recovery of costs at any time after such costs have been incurred.

"(3) CONTRIBUTION.—An action by a potentially responsible party against another potentially responsible party for recovery of any response costs or damages must be commenced within the later of—

"(A) the time limitations set forth in paragraph (2) above, or

"(B) where recovery is sought for costs or damages paid pursuant to a judgment or settlement, three years after—

"(i) the date of judgment in any action under this Act for recovery of such costs or damages, or

"(ii) the date of any administrative order or judicial settlement for recovery of the costs or damages paid or incurred pursuant to such a settlement.".

(d) Section 113(g) of the Act (42 U.S.C. 9613(g)) is amended by inserting the following at the end thereof:

"(4) CLAIMS BY THE UNITED STATES, STATES OR INDIAN TRIBES.—Claims by the United States under section 106, and claims by the United States, a State or Indian tribe under section 107(a), of this Act shall not be deemed compulsory counterclaims in an action against the United States, a State or an Indian tribe seeking response costs, contribution, damages, or any other claim by any person under this Act.".

(e) Section 113(j)(1) of the Act (42 U.S.C. 9613(j)(1)) is amended—

(1) before the phrase "or ordered" by inserting the phrase "or selected by the President pursuant to this Act,"; and

(2) after the phrase "or ordered" by inserting the phrase "or sought".

SEC. 406. LIMITATIONS ON CONTRIBUTION ACTIONS.

Section 113 of the Act (42 U.S.C. 9613) is amended—

(a) by amending subsection (f)(1) as follows—

(1) by redesignating the paragraph as subparagraph "(1)(A),";

(2) before the phrase "may seek contribution" by inserting the phrase "who is liable or potentially liable under section 107(a) of this title";

(3) by striking out the phrase "during or following any civil action under section 106 of this title or under section 107(a) of this title", and inserting in lieu thereof the phrase "in a claim asserted under section 107(a)"; and

(4) by deleting the period at the end of the first sentence, and inserting the following: "except that there shall be no right of contribution where—

"(i) the person asserting the right of contribution has waived such rights in a settlement pursuant to this Act;

"(ii) the person from whom contribution is sought is liable solely under section 107(a)(3) of this Act, and contributed less than ten pounds or ten liters of material containing hazardous substances at the facility, or such greater or lesser amount as the Administrator may determine by regulation;

"(iii) the person from whom contribution is sought has entered into a final settlement with the United States pursuant to section 122(g).";

(5) before the phrase "this section and the Federal Rules" by inserting the phrase "section 107(a),"; and

(6) by striking out the sentence "Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 106 of this title or section 107 of this title.".

(b) by inserting after subparagraph (1)(A) the following subparagraph:

"(B) Any person who commences an action for contribution against a person who is not liable by

operation of subsection 107(a)(5) of this Act, or against a person who is protected from suits in contribution by this section or by a settlement with the United States, shall be liable to the person against whom the claim of contribution is brought for all reasonable costs of defending against the claim, including all reasonable attorney's and expert witness fees.".

(c) Section 113(f) of the Act (42 U.S.C. 9613(f)) is amended by striking out paragraph (2), and inserting the following:

"(2) SETTLEMENT.—A person that has resolved its liability to the United States in an administrative or judicially approved settlement shall not be liable for claims by other persons regarding response actions, response costs or damages addressed in the settlement. A person that has resolved its liability to a State in an administrative or judicially approved settlement shall not be liable for claims by persons other than the United States regarding response costs for damages addressed in the settlement for which the State has a claim under this title. Such settlement does not discharge any other potentially responsible persons unless its terms so provide, but it reduces the potential liability of such

other persons by the amount of the settlement. The protection afforded by this section shall include protection against contribution claims and all other types of claims, under federal or state law, that may be asserted against the settling party for recovery of response costs or damages incurred or paid by another person, if such costs or damages are addressed in the settlement, but shall not include protection against claims based on contractual indemnification or other express contractual agreements to pay such costs or damages.".

SEC. 407. SCOPE OF RULEMAKING AUTHORITY.

Section 115 of the Act (42 U.S.C. 9615), is amended by redesignating the text of the section as subsection "(a)" and adding a new subsection:

"(b) The authority conferred by this section includes, without limitation, authority to promulgate legislative regulations to define the terms and scope of sections 101 through 405 this Act, inclusive.

"(c) This section confirms, without limitation, authority to promulgate regulations to define the terms of this Act as they apply to lenders and other financial services providers, and property custodians, trustees, and other fiduciaries.".

SEC. 408. ENHANCEMENT OF SETTLEMENT AUTHORITIES.

Section 122 of the Act (42 U.S.C. 9622), is amended—

(a) by striking out subparagraph (e)(3);

(b) by redesignating subparagraphs (e)(4) and (5) as subparagraphs (e)(3) and (4), respectively;

(c) By redesignating subparagraphs (e)(6) as a new section 122(o) and by amending redesignated section 122(n)—

(1) by deleting "remedial investigation and feasibility study" and inserting in lieu thereof "response action"; and

(2) by deleting "remedial action" in both places where it appears and inserting "response action";

(d) by inserting at the end of Section 122 the following—

"(p) RETENTION OF FUNDS.—If, as part of any agreement under this chapter, the President will be carrying out any action and the parties will be paying amounts to the President, the President may retain such amounts in interest bearing accounts, and use such amounts, together with accrued interest, for purposes of carrying out the agreement.

"(q) Notwithstanding the limitations on review in section 113(h), and except as provided in subsection (g) of

this section, a person whose claim for response costs or contribution is limited as a result of contribution protection afforded by an administrative settlement under this section may challenge the cost recovery component of such settlement only by filing a complaint against the Administrator in the United States District Court within 60 days after such settlement becomes final. Venue shall lie in the district in which the appropriate Regional Administrator has her principal office. Any review of an administrative settlement shall be limited to the administrative record, and the settlement shall be upheld unless the objecting party can demonstrate on that record that the decision of the President to enter into the administrative settlement was arbitrary, capricious, or otherwise not in accordance with law.";

(e) by deleting subsection (f)(1) and inserting in lieu thereof:

"(1) FINAL COVENANTS.—The President shall offer potentially responsible parties who enter into settlement agreements otherwise acceptable to the United States a final covenant not to sue concerning any liability to the United States under this Act, including a covenant with respect to future liability, for response actions or response costs, provided that—

"(A) the settling party agrees to perform, or there are other adequate assurances of the performance of, a final remedial action for the release or threat of release that is the subject of the settlement;

"(B) the settlement agreement has been reached prior to the commencement of litigation against the settling party under section 106 or 107 of this Act with respect to this facility;

"(C) the settling party waives all contribution rights against other potentially responsible parties at the facility; and

"(D) the settling party pays premium that compensates for the risks of remedy failure; future liability resulting from unknown conditions; unanticipated increases in the cost of any uncompleted response action, unless the settling party is performing the response action; and the United States litigation risk with respect to persons who have not resolved their liability to the United States under this Act, unless all parties have settled their liability to the United States, or the settlement covers 100 percent of the United States response costs. The President shall have sole discretion to determine the ap-

propriate amount of any such premium, and such determinations are committed to the President's discretion. The President has discretion to waive or reduce the premium payment for persons who demonstrate an inability to pay such a premium.

"(2) DISCRETIONARY COVENANTS.—For all other settlements under this title, the President may, in his discretion, provide any person with a covenant not to sue concerning any liability to the United States under this title, if the covenant not to sue is in the public interest. The President may include any conditions in such covenant not to sue, including but not limited to the additional condition referred to in paragraph (5) of this subsection. In determining whether such conditions or covenants are in the public interest, the President shall consider the effectiveness and reliability of the response action, the nature of the risks remaining at the facility, the strength of evidence, the likelihood of cost recovery, the reliability of any response action or actions to restore, replace or acquire the equivalent of injured natural resources, and any other factors relevant to the protection of human health, welfare, and the environment.".

(f) by striking out the word "remedial", wherever it appears in paragraph (f)(2), and inserting the word "response";

(g) by deleting paragraphs (f)(3) and (f)(4);

(h) by redesignating existing paragraphs (f)(2), (f)(5), and (f)(6) as paragraphs (f)(3), (f)(4), and (f)(5), respectively;

(i) in redesignated subparagraph (f)(5)(A)—

(1) by striking out the word "remedial", and inserting in lieu thereof the word "response";

(2) by deleting "paragraph (2)" in the first clause of the first sentence and inserting "paragraph (1) or (3)" in lieu thereof;

(3) by deleting "de minimis settlements" and inserting "de minimis and other expedited settlements pursuant to subsection (g) of this section" in lieu thereof; and

(4) by striking the phrase "the President certifies under paragraph (3) that remedial action has been completed at the facility concerned", and inserting in lieu thereof the phrase "that the response action that is the subject of the settlement agreement is selected";

(j) by amending redesignated subsection (f)(5)(B)—

(1) by striking "In extraordinary circumstances, the" and inserting the word "The";

(2) by striking the phrase "those referred to in paragraph (4) and";

(3) by inserting "the agreement containing the covenant not to sue provides for payment of a premium to address possible remedy failure or any releases that may result from unknown conditions, and" before the phrase "the other terms"; and

(4) by inserting at the end the following: "The President may, in his discretion, waive or reduce the premium payment for persons who demonstrate an inability to pay such a premium."

(k) by deleting paragraph (g)(1)(A) and inserting in lieu thereof:

"(g) EXPEDITED FINAL SETTLEMENT.—

"(1) PARTIES ELIGIBLE FOR EXPEDITED SETTLEMENT.—Wherever practicable and in the public interest, and as provided in section 122a of this title, the President will as promptly as possible offer

to reach a final administrative or judicial settlement with potentially responsible parties who, in the judgment of the President, meet one or more of the following conditions for eligibility for an expedited settlement—

"(A) the potentially responsible party's individual contribution of hazardous substances at the facility is de minimis. The contribution of hazardous substance to a facility by a potentially responsible party is de minimis if—

"(i) the potentially responsible party's volumetric contribution of materials containing hazardous substances is minimal in comparison to the total volumetric contributions at the facility; such individual contribution is presumed to be minimal if it is one percent or less of the total volumetric contribution at the facility, unless the Administrator identifies a different threshold based on site-specific factors; and

"(ii) the potentially responsible party's hazardous substances do not present toxic or other hazardous effects that are

significantly greater than those of other hazardous substances at the facility; or";

(l) by inserting the following after subsection (g)(1)(B)—

"(C) The potentially responsible party's liability is based solely on subsection 107(a)(3) or 107(a)(4) of this title, and the arrangement for disposal, treatment, or transport for disposal or treatment, or the acceptance for transport for disposal or treatment, involved only municipal solid waste (MSW) or sewage sludge as defined in section 101(41) or 101(44), respectively, of this Act. The Administrator may offer to settle the liability of generators and transporters of MSW or sewage sludge whose liability is limited pursuant to section 107(a)(5)(A) of this title for up to 10 percent of the total response costs at the facility; or

"(D) The potentially responsible party is a small business or a municipality and has demonstrated to the United States a limited ability to pay response costs. For purposes of this provision:

"(i) In the case of a small business, the President shall consider, to the extent

that information is provided by the small business, the business' ability to pay for its total allocated share, and demonstrable constraints on its ability to raise revenues.

"(ii) In the case of a municipal owner or operator, the President shall consider, to the extent that information is provided by the municipality, the following factors: (1) the municipality's general obligation bond rating and information about the most recent bond issue for which the rating was prepared; (2) the amount of total available funds (other than dedicated funds); (3) the amount of total operating revenues (other than obligated or encumbered revenues), (4) the amount of total expenses; (5) the amounts of total debt and debt service; (6) per capita income; and (7) real property values. A municipality may also submit for consideration by the President an evaluation of the potential impact of the settlement on essential services that the municipality must provide, and the feasibility of making delayed payments or payments over time. If a mu-

nicipality asserts that it has additional environmental obligations besides its potential liability under this Act, then the municipality may create a list of the obligations, including an estimate of the costs of complying with such obligations. A municipality may establish an inability to pay through an affirmative showing that such payment of its liability under this Act would either (I) create a substantial demonstrable risk that the municipality would default on existing debt obligations, be forced into bankruptcy, be forced to dissolve, or be forced to make budgetary cutbacks that would substantially reduce current levels of protection of public health and safety, or (II) necessitate a violation of legal requirements or limitations of general applicability concerning the assumption and maintenance of fiscal municipal obligations.";

(m) by deleting paragraphs (2) and (3) of subsection (g) and inserting in lieu thereof:

"(2) The determination of whether a party is eligible for an expedited settlement shall be made on

the basis of information available to the President at the time the settlement is negotiated. Such determination, and the settlement, are committed to the President's unreviewable discretion. If the President determines not to apply these provisions for expedited settlements at a facility, the basis for that determination must be explained in writing.

"(3) ADDITIONAL FACTORS RELEVANT TO MUNICIPALITIES.—In any settlement with a municipality pursuant to this title, the President may take additional equitable factors into account in determining an appropriate settlement amount, including, without limitation, the limited resources available to that party, and any in-kind services that the party may provide to support the response action at the facility. In considering the value of in-kind services, the President shall consider the fair market value of those services.";

(n) by striking in paragraph (g)(4) "$500,000" and inserting "$2,000,000";

(o) by striking paragraph (g)(5) and redesignating paragraph (g)(6) and (g)(5);

(p) by amending paragraph (h) by striking—

(1) the title, and inserting the phrase "Authority to settle claims for penalties, punitive damages and cost recovery"; and

(2) by striking out the phrase "settlement authority";

(q) by amending paragraph (h)(1)—

(1) before the phrase "cost incurred" by inserting the phrase "past and future";

(2) before the phrase "by the United States Government" by inserting the phrase "or that may be incurred"; and

(3) by inserting after the phrase "if the claim has not been referred to the Department of Justice for further action", the following: "The head of any department or agency with the authority to seek, or to request the Attorney General to seek, civil or punitive damages under this Act may settle claims for such penalties or damages which may otherwise be assessed in civil administrative or judicial proceedings"; and by striking out "$500,000" and inserting in lieu thereof "$2,000,000"; and

(r) by striking paragraph (h)(4).

SEC. 409. ALLOCATION PROCEDURES

The Act is amended by inserting following section 122:

"§ 122a. Allocation at Multi-party facilities

"(a) SCOPE.—

"(1) Except as provided in paragraph (3) of this section, for each non-federally owned facility listed on the National Priorities List involving two or more potentially responsible parties, the Administrator shall—

"(A) initiate the allocation process established under this section for any remedial action selected by the President after the date of enactment of the Superfund Reform Act of 1994, and

"(B) initiate the allocation process established in subsections (c)(2) through (d)(3) of this section for any remedial action selected by the President prior to the date of enactment of the Superfund Reform Act of 1994, when requested by any potentially responsible party who has resolved its liability to the United States with respect to the remedial action or is performing the remedial action pursuant to an order issued under section 106(a) of this title, to assist in allocating shares among potentially

responsible parties. The allocation performed pursuant to this subsection shall not be construed to require—

"(i) payment of an orphan share pursuant to subsection (e) of this section; or

"(ii) the conferral of reimbursement rights pursuant to subsection (h) of this section.

"(2) Except as provided in paragraph (3) of this section, the Administrator may initiate the allocation process established under this section with respect to any other facility involving two (2) or more potentially responsible parties, as the Administrator deems appropriate.

"(3) The allocation process established under this section shall not apply to any facility where—

"(i) there has been a final settlement, decree or order that determines all liability or allocated shares of all potentially responsible parties with respect to the facility; or

"(ii) where response action is being carried out by a State pursuant to referral or authorization under section 104(k) of this title.

"(4) Nothing in this section limits or affects—

"(A) the Administrator's obligation to perform an allocation for facilities that have been the subject of partial or expedited settlements;

"(B) the ability of a potentially responsible party at a facility to resolve its liability to the United States or other parties at any time before initiation or completion of the allocation process; or

"(C) the validity, enforceability, finality or merits of any judicial or administrative order, judgment or decree issued, signed, lodged, or entered with respect to liability under this Act, or authorizes modification of any such order, judgment or decree.

"(b) MORATORIUM ON COMMENCEMENT OR CONTINUATION OF SUITS.—

"(1) No person may commence an action pursuant to section 107 of this Act regarding a response action for which an allocation must be performed under subsection (a)(1)(A) of this section, or for which the Administrator has initiated an allocation under subsection (a)(1)(B) or (a)(2) of this section, until 60 days after issuance of the allocator's report under subsection (d)(1) of this section.

"(2) If an action under section 107 of this Act regarding a response for which an allocation is to be performed under this section pending (A) upon date of enactment of the Superfund Reform Act of 1994, or (B) upon initiation of an allocation under subsection (a)(1)(B) or (a)(2) of this section, the action shall be stayed until 60 days after the issuance of an allocator's report, unless the court determines that a stay will not result in a just and expeditious resolution of the action.

"(3) Any applicable limitations period with respect to actions subject to paragraph (1) shall be tolled from the earlier of—

"(A) the date of listing of the facility on the National Priorities list; or

"(B) the commencement of the allocation process pursuant to this section, until 120 days after the allocation report required by this section has been provided to the parties to the allocation.

"(4) Nothing in this section shall in any way limit or affect the President's authority to exercise the powers conferred by sections 103, 104, 105, 106, or 122 of this title, or to commence an action where there is a contemporaneous filing of a judicial

consent decree resolving a party's liability; or to file a proof of claim or take other action in a proceeding under title 11 of the U.S. Code.

"(5) The procedures established in this section are intended to guide the exercise of settlement authority by the United States, and shall not be construed to diminish or affect the principles of retroactive, strict, joint and several liability under this title.

"(c) COMMENCEMENT OF ALLOCATION.—

"(1) RESPONSIBLE PARTY SEARCH.—At all facilities subject to this section, the Administrator shall, as soon as practicable but not later than 60 days after the earlier of the commencement of the remedial investigation or the listing of the facility on the National Priorities List, initiate a search for potentially responsible parties, using its authorities under section 104 of this title.

"(2) NOTICE TO PARTIES.—As soon as practicable after receipt of sufficient information, but not more than eighteen (18) months after commencement of the remedial investigation, the Administrator shall—

"(A) notify those potentially responsible parties who will be assigned shares in the allo-

cation process and notify the public, in accordance with section 117(d) of this title, of the list of potentially responsible parties preliminarily identified by the Administrator to be assigned shares in the allocation process; and

"(B) provide the notified potentially responsible parties with a list of neutral parties who are not employees of the United States and who the Administrator determines, in his or her sole discretion, are qualified to perform an allocation at the facility.

"(3) SELECTION OF ALLOCATOR.—The Administrator shall thereafter—

"(A) acknowledge the parties' selection of an allocator from the list, or select an allocator from the list provided to the parties if the parties cannot agree on a selection within 30 days of the notice;

"(B) contract with the selected allocator for the provision of allocations services; and

"(C) make available all responses to information requests, as well as other relevant information concerning the facility and potentially responsible parties, to the parties and to the allocator within 30 days of the appointment of

the allocator. The Administrator shall not make available any privileged or confidential information, except as otherwise authorized by law.

"(4) PROPOSED ADDITION OF PARTIES.—

"(A) For 60 days after information has been made available pursuant to paragraph 3(C), the parties identified by the Administrator and members of the affected community shall have the opportunity to identify and propose additional potentially responsible parties or otherwise provide information relevant to the facility or such potentially responsible parties. This period may be extended by the Administrator for an additional 30 days upon request of a party.

"(B) Within 30 days after the end of the period specified in paragraph (A) for identification of additional parties, the Administrator shall issue a final list of parties subject to the allocation process, hereinafter the 'allocation parties'. The Administrator shall include in the list of allocation parties those parties identified pursuant to paragraph (A) in the allocation process unless the Administrator determines and explains in writing that there is not a suffi-

cient basis in law or fact to take enforcement action with respect to those parties under this title, or that they have entered into an expedited settlement under section 122(g). The Administrator's determination is to be based on the information available at the time of the determination and is committed to the Administrator's unreviewable discretion.

"(5) ROLE OF FEDERAL AGENCIES.—Federal departments, agencies or instrumentalities that are identified as potentially responsible parties shall be subject to, and be entitled to the benefits of, the allocation process provided by this section to the same extent as any other party.

"(6) REPRESENTATION OF THE UNITED STATES.—The Administrator and the Attorney General shall be entitled to review all documents and participate in any phase of the allocation proceeding.

"(d) ALLOCATION DETERMINATION.—

"(1) SETTLEMENT AND ALLOCATION REPORT.—Following issuance of the list of allocation parties, the allocator may convene the allocation parties for the purpose of facilitating agreement concerning their shares. If the allocation parties do not agree to a negotiated allocation of shares, the allo-

cator shall prepare a written report, with a nonbinding, equitable allocation of percentage shares for the facility, and provide such report to the allocation parties and the Administrator.

"(2) INFORMATION REQUESTS.—To assist in the allocation of shares, the allocator may request information from the allocation parties, and may make additional requests for information at the request of any allocation party. The allocator may request the Administrator to exercise any information-gathering authority under this title where necessary to assist in determining the allocation of shares.

"(3) FACTORS IN THE ALLOCATION.—Unless the allocation parties agree to a negotiated allocation, the allocator shall prepare a nonbinding, equitable allocation of percentage shares for the facility based on the following factors:

"(A) The amount of hazardous substances contributed by each allocation party.

"(B) The degree of toxicity of hazardous substances contributed by each allocation party.

"(C) The mobility of hazardous substances contributed by each allocation party.

"(D) The degree of involvement of each allocation party in the generation, transportation,

treatment, storage, or disposal of the hazardous substance.

"(E) The degree of care exercised by each allocation party with respect to the hazardous substance, taking into account the characteristics of the hazardous substance.

"(F) The cooperation of each allocation party in contributing to the response action and in providing complete and timely information during the allocation process.

"(G) Such other factors that the Administrator determines are appropriate by published regulation or guidance, including guidance with respect to the identification of orphan shares pursuant to paragraph (3) of this subsection.

"(4) IDENTIFICATION OF ORPHAN SHARES.—The allocator may determine that a percentage share for the facility is specifically attributable to an orphan share. The orphan share may only consist of the following:

"(A) Shares attributable to hazardous substances that the allocator determines, on the basis of information presented, to be specifically attributable to identified but insolvent or de-

funct responsible parties who are not affiliated with any allocation party.

"(B) The difference between the aggregate shares that the allocator determines, on the basis of the information presented, are specifically attributable to contributors of municipal solid waste subject to the limitations in section 107(a)(5)(D) of this title, and the share actually assumed by those parties in any settlements with the United States pursuant to subsection 122(g) of this title, including the fair market value of in-kind services provided by a municipality.

"(C) The difference between the aggregate share that the allocator determines, on the basis of information presented, is specifically attributable to parties with a limited ability to pay response costs and the share actually assumed by those parties in any settlements with the United States pursuant to subsection 122(g) of this title.

The orphan share shall not include shares attributable to hazardous substances that the allocator cannot attribute to any identified party. Such shares shall be distributed among the allocation parties.

"(e) FUNDING OF ORPHAN SHARES.—From funds available in the Fund in any given fiscal year, and without further appropriation action, the President shall make reimbursements from the Fund, to eligible parties for costs incurred and equitably attributable to orphan shares determined pursuant to this section, provided that Fund financing of orphan shares shall not exceed $300,000,000 in any fiscal year. Reimbursements made under this subsection shall be subject to such terms and conditions as the President may prescribe.

"(f) TIMING.—The allocator shall provide the report required by subsection (d)(1) of this section to the allocation parties and the Administrator within 180 days of the issuance of the list of parties pursuant to subsection (c)(4)(B) of this section. Upon request, for good cause shown, the Administrator may grant the allocator additional time to complete the allocation, not to exceed 90 days.

"(g) SETTLEMENT FOLLOWING ALLOCATION.—

"(1) OBLIGATIONS OF THE UNITED STATES.—The President will accept a timely offer of settlement from a party based on the share determined by the allocator, if it includes appropriate premia and other terms and conditions of settlement, unless the Administrator, with the concurrence of the Attorney

General of the United States, determines that a settlement based on the allocator's determinations would not be fair, reasonable, and in the public interest. The Administrator and the Attorney General shall seek to make any such determination within 60 days from the date of issuance of the allocator's report. The determinations of the Administrator and the Attorney General shall not be judicially reviewable.

"(2) If the Administrator and the Attorney General determine not to settle on the basis of the allocation, they shall provide the allocation parties and members of the affected community with a written explanation of the Administrator's determination. If the Administrator and the Attorney General make such a determination, the parties who are willing to settle on the basis of the allocation are entitled to a consultation with an official appointed by the President, to present any objections to the determination, within 60 days after the determination.

"(3) Settlements based on allocated shares shall include—

"(A) a waiver of contribution rights against all parties who are potentially responsible parties for the response action;

"(B) covenants not to sue, consistent with the provisions of section 122(f) of this title, and provisions regarding performance or adequate assurance of performance of response actions addressed in the settlement;

"(C) a premium that compensates for the United States litigation risk with respect to potentially responsible parties who have not resolved their liability to the United States, except that no such premium shall apply if all parties settle or the settlement covers 100 percent of response costs;

"(D) contribution protection, consistent with sections 113(f) and 122(g) of this title, regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially responsible parties unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement; and

"(E) provisions through which the settling parties shall receive reimbursement from the Fund for any response costs incurred by such parties in excess of the aggregate of their allocated share and any premia required by the set-

tlement. Such right to reimbursement shall not be contingent on the United States recovery of response costs from any responsible person not a party to any settlement with the United States.

"(4) The President shall report annually to Congress on the administration of the allocation scheme, and provide information comparing allocation results with actual settlements at multiparty facilities.

"(5) The provisions of this section shall not apply to any offer of settlement made after commencement of litigation by the United States against the offering party under section 107 of this title.

"(h) AUTHORIZATION OF REIMBURSEMENT.—In any settlement in which a party agrees to perform response work in excess of its share, the Administrator shall have authority in entering the settlement to confer a right of reimbursement on the settling party pursuant to such procedures as the Administrator may prescribe.

"(i) POST-SETTLEMENT LITIGATION.—

"(1) IN GENERAL.—The United States may commence an action under section 107 against any person who has not resolved its liability to the United States following allocation, on or after 60

days following issuance of the allocator's report. In any such action, the potentially responsible parties shall be liable for all unrecovered response costs, including any federally funded orphan share identified in accordance with subsection (d)(4). Defendants in any such action may implead any allocation party who did not resolve its liability to the United States. The Administrator and the Attorney General shall issue guidelines to ensure that the relief sought against de minimis parties under principles of joint and several liability will not be grossly disproportionate to their contribution to the facility. The application of such guidelines is committed to the discretion of the Administrator and the Attorney General.

"(2) In commencing any action under section 107 following allocation, the Attorney General must certify, in the complaint, that the United States has been unable to reach a settlement that would be in the best interests of the United States.

"(3) ADMISSIBILITY OF ALLOCATOR'S REPORT.—The allocator's report shall not be admissible in any court with respect to a claim brought by or against the United States, except in its capacity as a nonsettling potentially responsible party, or for the determination of liability. The allocator's report,

subject to the rules and discretion of the court, may be admissible solely for the purpose of assisting the court in making an equitable allocation of response costs among the relative shares of nonsettling liable parties.

"(4) OTHER AUTHORITIES UNAFFECTED.—Nothing in this section limits or in any way affects the exercise of the President's authority pursuant to sections 103, 104, 105, or 106.

"(5) COSTS.—

"(A) The costs of implementing the allocation procedure set forth in this section, including reasonable fees and expenses of the allocator, shall be considered necessary cost of response.

"(B) The costs attributable to any funding of orphan shares identified by the allocator pursuant to subsection (d)(4) also shall be considered necessary costs of response, and shall be recoverable from liable parties who do not resolve their liability on the basis of the allocation.

"(6) REJECTION OF SHARE DETERMINATION.—In any action by the United States under this title, if the United States has rejected an offer of settle-

ment that is consistent with subsections (g)(1) and (g)(3) of this section and was presented to the United States prior to the commencement of the action, the offeror shall be entitled to recover from the United States the offeror's reasonable costs of defending the action after the making of the offer, including reasonable attorneys' fees, if the ultimate resolution of liability or allocation of costs with respect to the offeror, taking into account all settlements and reimbursements with respect to the facility other than those attributable to insurance or indemnification, is as or more favorable to the offeror than the offer based on the allocation.

"(j) PROCEDURES.—The Administrator shall further define the procedures of this section by regulation or guidance, after consultation with the Attorney General.".

TITLE V—REMEDY SELECTION AND CLEANUP STANDARDS

SEC. 501. PURPOSES AND OBJECTIVES.

The purposes and objectives of this title are to—

(a) ensure that remedial actions under the Act are protective of human health and the environment;

(b) provide consistent and equivalent protection to all communities affected by facilities subject to remedial action; and

(c) ensure that the national goals, national generic cleanup levels, and the national risk protocol required by this title are developed through a process based on substantial public input and, where appropriate, on consensual decisionmaking.

SEC. 502. CLEANUP STANDARDS AND LEVELS.

Section 121(d)(1)–(2)(C)(i) of the Act (42 U.S.C. 9621(d)) is amended to read as follows:

"(d) DEGREE OF CLEANUP.—

"(1) PROTECTION OF HUMAN HEALTH AND THE ENVIRONMENT.—A remedial action selected under this section or otherwise required or agreed to by the President under this Act shall be protective of human health and the environment. In order to provide consistent protection to all communities, the Administrator shall promulgate national goals to be applied at all facilities subject to remedial action under this Act.

"(2) GENERIC CLEANUP LEVELS.—The Administrator shall promulgate, as appropriate, national generic cleanup levels for specific hazardous substances, pollutants, or contaminants, based on the national goals established in paragraph (1). A cleanup level shall—

"(A) reflect reasonably anticipated future land uses,

"(B) reflect other variables which can be easily measured at a facility and whose effects are scientifically well-understood to vary on a site-specific basis, and

"(C) represent concentration levels below which a response action is not required.

"(3) SITE-SPECIFIC METHODS TO ESTABLISH CLEANUP LEVELS.—Notwithstanding the promulgation of national generic cleanup levels under subsection (d)(2) and nationally-approved generic remedies under subsection (b)(4) of this section, the Administrator may, as appropriate, rely on a site-specific risk assessment to determine the proper level of cleanup at a facility, based on the national goals established in paragraph (1) and the reasonably anticipated future land uses at the facility. This may occur if a national generic cleanup level has not been developed or to account for particular characteristics of a facility or its surroundings. In establishing site-specific cleanup levels, the President shall consider the views of the affected community in accordance with section 117 of this Act.

"(4) RISK ASSESSMENT.—The Administrator shall promulgate a national risk protocol for conducting risk assessments based on realistic assumptions. After promulgation, risk assessment underlying the degree of cleanup and remedy selection processes shall use the national risk protocol.

"(5) FEDERAL AND STATE LAWS.—

"(A) A remedial action shall be required to comply with the substantive requirements of—

"(i) any standard, requirement, criterion, or limitation under any federal environmental or facility siting law that the President determines is suitable for application to the remedial action at the facility; and

"(ii) any promulgated standard, requirement, criterion, or limitation under any state environmental law specifically addressing remedial action that is adopted for the purpose of protecting human health or the environmental with the best available scientific evidence through a public process where such a law is more stringent than any such federal cleanup standard, requirement, criterion, or limitation, or the

cleanup level determined in accordance with the requirements of this section.

"(B) Procedural requirements of federal and state standards, requirements, criteria, or limitations, including but not limited to permitting requirements, shall not apply to response actions conducted on-site. In addition, compliance with such laws shall not be required with respect to return, replacement, or disposal of contaminated media or residuals of contaminated media into the same medium in or very near existing areas of contamination on-site.

"(C) The President may select a remedial action meeting the requirements of paragraph (1) that does not attain a level or standard of control at least equivalent to the federal or State standards, requirements, criteria, or limitations as required by paragraph (A), if the President finds that—

"(i) the remedial action selected is only part of a total remedial action that will attain such level or standard of control when completed;

"(ii) compliance with such requirement at that facility will result in greater

risk to human health and the environment than alternative options;

"(iii) compliance with such requirements is technically impracticable from an engineering perspective;

"(iv) a generic remedy under section (b)(4) has been selected for the facility;

"(v) the remedial action selected will attain a standard of performance that is equivalent to that required under the standard, requirement, criterion, or limitation identified under (A)(i) and (A)(ii) through use of another approach;

"(vi) with respect to a State standard, requirement, criterion, or limitation, the State has not consistently applied (or demonstrated the intention to consistently apply) the standard, requirement, criterion, or limitation in similar circumstances at other remedial actions within the State; or

"(vii) in the case of a remedial action to be undertaken solely under section 104 using the Fund, a selection of a remedial action that attains such level or standard of control will not provide a balance be-

tween the need for protection of public health and welfare and the environment at the facility under consideration, and the availability of amounts from the Fund to respond to other facilities which present or may present a threat to public health or welfare or the environment, taking into consideration the relative immediacy of such threat.

The President shall publish such findings, together with an explanation and appropriate documentation.".

SEC. 503. REMEDY SELECTION.

Section 121(b) of the Act (42 U.S.C. 9621(b)) is amended to read as follows:

"(b) GENERAL RULES.—

"(1) SELECTION OF PROTECTIVE REMEDIES.—Remedies selected at individual facilities shall be protective of human health and the environment. Whether a response action requires remediation through treatment, containment, a combination of treatment and containment, or other means, shall be determined through the evaluation of remedial alternatives.

"(2) LAND USE.—In selecting a remedy, the President shall take into account the reasonably anticipated future uses of land at a facility as required by this Act.

"(3) APPROPRIATE REMEDIAL ACTION.—

"(A) The President shall identify and select an appropriate remedy utilizing treatment, containment, other remedial measures, or any combination thereof, that is protective of human health and the environment and achieves the degree of cleanup determined under section 121(d), taking into account the following factors:

"(i) The effectiveness of the remedy.

"(ii) The long-term reliability of the remedy, that is, its capability to achieve long-term protection of human health and the environment.

"(iii) Any risk posed by the remedy to the affected community, to those engaged in the cleanup effort, and to the environment.

"(iv) The acceptability of the remedy to the affected community.

"(v) The reasonableness of the cost of the remedy in relation to the preceding factors (i) through (iv).

"(B) INNOVATIVE REMEDIES.—If an otherwise appropriate treatment remedy is available only at a disproportionate cost and the President determines that an appropriate treatment remedy is likely to become available within a reasonable period of time, the President may select an interim containment remedy. A selected interim containment remedy shall include adequate monitoring to ensure the continued integrity of the containment system. If an appropriate treatment remedy becomes available within that period of time, that remedy shall be required.

"(C) HOT SPOTS.—In evaluating a facility for a permanent containment remedy, if the President determines, based on standard site investigation, that a discrete area within a facility is a 'hot spot' (as defined in this paragraph), the President shall select a remedy for the 'hot spot' with a preference for treatment, unless he determines, based on treatability studies and other information, that no treat-

ment technology exists or such technology is only available at a disproportionate cost. In such instances the President shall select an interim containment remedy for a 'hot spot' subject to adequate monitoring to ensure its continued integrity and shall review the interim containment remedy within five years to determine whether an appropriate treatment remedy for the 'hot spot' is available. For purposes of this paragraph, the term 'hot spot' means a discrete area within a facility that contains hazardous substances that are highly toxic or highly mobile, cannot be reliably contained, and present a significant risk to human health or the environment should exposure occur.

"(4) GENERIC REMEDIES.—In order to streamline the remedy selection process, and to facilitate rapid voluntary action, the President shall establish, taking into account the factors enumerated in subsection (b)(3)(A), cost-effective generic remedies for categories of facilities, and expedited procedures that include community involvement for selecting generic remedies at an individual facility. To be eligible for selection at a facility, a generic remedy shall be protective of human health and the environment at that

facility. When appropriate, the President may select a generic remedy without considering alternative remedies.".

SEC. 504. MISCELLANEOUS AMENDMENTS TO SECTION 121.

(a) Section 121(c) of the Act (42 U.S.C. 9621(c)) is amended by striking out the word "initiation", and inserting in lieu thereof the phrase "completion of all physical on-site construction".

(b) Section 121(d) of the Act is further amended by—

(1) redesignating paragraph (2)(C)(ii) as paragraph "(6)(A)";

(2) redesignating paragraph (2)(C)(iii) as paragraph "(6)(B)";

(3) striking "clauses (iii) and (iv)" in redesignated paragraph (6)(A) and inserting "subparagraph (B)";

(4) striking paragraph (2)(C)(iv);

(5) redesignating paragraph (3) as paragraph "(7)" and amending it to read as follows:

"(7) In the case of any removal or remedial action involving the transfer of any hazardous substance or pollutant or contaminant off-site, such hazardous substance or pollutant or contaminant shall be transferred to a facility which is authorized

under applicable Federal and state law to receive such hazardous substance or pollutant or contaminant and is in compliance with such applicable Federal and state law. Such substance or pollutant or contaminant may be transferred to a land disposal facility permitted under subtitle C of the Solid Waste Disposal Act only if the President determines that both of the following requirements are met:

"(A) The unit to which the hazardous substance or pollutant or contaminant is transferred is not releasing any hazardous waste, or constituent thereof, into the groundwater or surface water or soil.

"(B) All such releases from other units at the facility are being controlled by a corrective action program approved by the Administrator under subtitle C of the Solid Waste Disposal Act.

The President shall notify the owner or operator of such facility of determinations made under this paragraph."; and

(6) striking paragraph (4).

(c) Section 121(e) of the Act (42 U.S.C. 9621(e)) is amended by—

(1) in paragraph (1) inserting in the first sentence "or permit application" before "shall be required"; and by adding at the end thereof the following: "Furthermore, no Federal, State or local permit or permit application shall be required for on-site or off-site activities conducted under section 311(b).";

and

(2) striking paragraph (2).

(d) Section 121(f) of the Act (42 U.S.C. 9621(f)) is amended by adding after paragraph (3) (as amended by this Act) the following new paragraph:

"(4) A State may enforce only those Federal or State legally applicable standards, requirements, criterion, or limitations to which the Administrator has determined the remedial action is required to conform under this Act. Where the parties agree, the consent decree may provide for administrative enforcement. Each consent decree shall also contain stipulated penalties for violations of the decree in an amount not to exceed $25,000 per day. Such stipulated penalties shall not be construed to impair or affect the authority of the court to order compliance with the specific terms of any such decree.".

SEC. 505. RESPONSE AUTHORITIES.

(a) Section 104(b)(1) of the Act (42 U.S.C. 9604(b)(1)) is amended by—

(1) inserting "actions," before "studies";

(2) striking ", to recover the costs thereof, and" and inserting "or"; and

(3) striking the "." after "Act" and inserting "and shall be entitled to recover the costs thereof.".

(b) Section 104(j) of the Act (42 U.S.C. 9604(j)) is amended by—

(1) in paragraph (1) by striking "remedial", and inserting "response";

(2) striking paragraph (2);

(3) redesignating paragraph (3) as paragraph "(2)" and striking "estate" and inserting "property"; and

(4) by inserting after paragraph (2) (as redesignated by this Act) the following new paragraph:

"(4) DISPOSAL AUTHORITY.—The President is authorized to dispose of any interest in real property acquired for use by the Administrator under this subsection by sale, exchange, donation or otherwise and any such interest in real property shall not be subject to any of the provisions of section 120 except the notice provisions of Section 120(h)(1). Any mon-

eys received by the President pursuant to this subparagraph shall be deposited in the Fund.".

SEC. 506. REMOVAL ACTIONS.

(a) Section 104(c)(1) of this Act is amended in subparagraph (C) as follows—

(1) strike "$2,000,000" and insert "$6,000,000";

(2) strike "12 months" and insert "three years"; and

(3) strike "consistent with the remedial action to be taken" and insert "not inconsistent with any remedial action that has been selected or is anticipated at the time of the removal action.".

(b) Section 117 of the Act is amended by adding after subsection (k) (as added by this Act) the following new subsection:

"(l) REMOVAL ACTIONS.—Whenever the planning period for a removal action is expected to be greater than six months, the Administrator shall provide the community with notice of the anticipated removal action and a public comment period of no less than thirty days.".

SEC. 507. TRANSITION.

The provisions of this title shall become effective on the date of enactment of this Act and shall apply to all response actions for which a Record of Decision or other

decision document is signed after the date of enactment of the Act.

TITLE VI—MISCELLANEOUS

SEC. 601. INTERAGENCY AGREEMENTS AT MIXED OWNERSHIP AND MIXED RESPONSIBILITY FACILITIES.

Section 120(e) of the Act (42 U.S.C. 9620(e)) is amended by—

(a) inserting after paragraph (3) the following new paragraph:

"(4) A provision allowing for the participation of other responsible parties in the response action.;" and

(b) inserting after paragraph (6) the following new paragraphs:

"(7) EXCEPTION TO REQUIRED ACTION.—No department, agency, and instrumentality of the United States that owns or operates a facility over which the department, agency, or instrumentality exercised no regulatory or other control over activities that directly or indirectly resulted in a release or threat of a release of a hazardous substance shall be subject to the requirements of paragraphs (1) through (6) except (5)(F) and (G) of this subsection if the department, agency, or instrumentality dem-

onstrates to the satisfaction of the Administrator that—

"(A) no department, agency, or instrumentality was the primary or sole source or cause of a release or threat of release of a hazardous substance at the facility;

"(B) the activities either directly or indirectly resulting in a release or threat of a release of a hazardous substance at the facility were pursuant to a statutory authority and occurred prior to 1976; and

"(C) the person or persons primarily or solely responsible for such release or threat of release are financially viable, and capable of performing or financing the response action at the facility.

In the event the above conditions are not met, the applicable terms of section 120(e) apply to the department, agency, or instrumentality of the United States at the facility. Upon determination by the Administrator that a department, agency, or instrumentality qualifies for the exception provided by this paragraph, the head of such department, agency, or instrumentality may exercise enforcement authority pursuant under section 106 (in addition to any other

delegated authorities). To the extent a person who has been issued an order under the authority of this paragraph seeks reimbursement under the provisions of section 106, the relevant department, agency, or instrumentality, and not the Fund, shall be the source of any appropriate reimbursement. If the Administrator determines that the relevant department, agency, or instrumentality has failed to seek the performance of response actions by responsible parties within 12 months after the facility has been listed on the National Priorities List, the Administrator may void the exception provided by this paragraph and the applicable provisions or section 120(e) would apply to the department, agency or instrumentality at the facility.

SEC. 602. TRANSFERS OF UNCONTAMINATED PROPERTY.

Section 120(h)(4)(A) of the Act (42 U.S.C. 9620(h)(4)(A)) is amended by striking the words "stored for one year or more,".

SEC. 603. AGREEMENTS TO TRANSFER BY DEED.

Section 120(h) of the Act (42 U.S.C. 9620(h)) is amended by adding after paragraph (5) the following new paragraph:

"(6) AGREEMENTS TO TRANSFER BY DEED.—Nothing in this subsection shall be construed to pro-

hibit the head of the department, agency, or instrumentality of the United States from entering into an agreement to transfer by deed real property or facilities prior to the entering of such deed.".

SEC. 604. ALTERNATIVE OR INNOVATIVE TREATMENT TECHNOLOGIES.

Section 111(a) of the Act of 1980 is amended by adding after paragraph (6) the following new paragraph:

"(7) ALTERNATIVE OR INNOVATIVE TREATMENT TECHNOLOGIES.—

"(A) When a party potentially liable under this Act undertakes a response action pursuant to an administrative order or consent decree, and employs an alternative or innovative technology that fails to achieve a level of response required under this Act, the Administrator may use the Fund to reimburse no more than fifty percent of response costs incurred by the potentially liable party in taking other actions approved by the Administrator to achieve these required levels of response. The Administrator shall issue guidance on the procedures and criteria to be used in determining whether a remedial technology constitutes an alternative or innovative technology for purposes of this sub-

section, and the appropriate level of funding for response activities that are necessary to achieve a level of response required under this Act. The Administrator shall review and update such guidance, as appropriate.".

SEC. 605. DEFINITIONS.

Section 101 of the Act (42 U.S.C. 9601)) is amended by—

(a) in paragraph (1) striking the "." after "Act" and inserting "and includes the cost of enforcement activities related thereto.";

(b) in paragraph (10)(H) striking "subject to" and inserting "in compliance with";.

(c) in paragraph (14) inserting after "Congress" the phrase ", unless such waste contains a substance that is listed under any other subparagraph of this paragraph";

(d) in paragraph (20) by—

(1) in subparagraph (A) inserting after "similar means to" the phrase "the United States (or any department, agency, or instrumentality thereof), or";

(2) in subparagraph (D) by inserting—

(A) after "does not include" the phrase "the United States (or any depart-

ment, agency, or instrumentality thereof), or"; and,

(B) before "any State" the phrase "any department, agency, or instrumentality of the United States, or"; and

(3) in subparagraph (D) by striking "a" after "such" and inserting "department, agency, or instrumentality of the United States, or";

(4) by adding after subparagraph (D) the following new subparagraphs:

"(E) The term 'owner or operator' shall include a trust or estate, but does not include a person who holds title to a vessel or facility solely in the capacity as a fiduciary, provided that such person—

"(i) does not participate in the management of a vessel or facility operations that result in a release or threat of release of hazardous substances; and

"(ii) complies with such other requirements as the Administrator may set forth by regulation.

"(F) The term 'owner or operator' shall not include the United States or any department, agency or instrumentality of the United States or a conservator or receiver appointed by a department,

agency or instrumentality of the United States, which acquired ownership or control of a vessel or facility (or any right or interest therein)—

"(i) in connection with the exercise of receivership or conservatorship authority or the liquidation or winding up of the affairs of any entity subject to a receivership or conservatorship, including any subsidiary thereof; or

"(ii) in connection with the exercise of any seizure or forfeiture authority; or

"(iii) pursuant to an act of Congress specifying the property to be acquired:

Provided, That the United States, or conservator or receiver appointed by the United States does not participate in the management of the vessel or facility operations that result in a release or threat of release of hazardous substances and complies with such other requirements as the Administrator may set forth by regulation.";

(e) in paragraph (23) adding at the end of the paragraph the following: "The terms 'remove' or 'removal' are not limited to emergency situations and include actions to address future or potential exposures and, provided such actions are consistent with

the requirements of this Act, actions obviating the need for a remedial action.";

(f) in paragraph (25) striking "related thereto", and inserting "and oversight activities related thereto when such activities are undertaken by the President.";

(g) in paragraph (29) striking the "." after "Act" and inserting ", except that the term "hazardous substance" shall be substituted for the term "hazardous waste" in the definitions of "disposal" and "treatment.";

(h) in paragraph (33) striking "; except that the", and inserting ". The";

(i) adding after paragraph (38) the following new paragraphs:

"(39) BONA FIDE PROSPECTIVE PURCHASER.—The term 'bona fide prospective purchaser' means a person who acquires ownership of a facility after enactment of this provision, and who can establish by a preponderance of the evidence that—

"(A) all active disposal of hazardous substances at the facility occurred before that person acquired the facility;

"(B) the person conducted a site audit of the facility in accordance with commercially

reasonable and generally accepted standards and practices. The Administrator shall have authority to develop standards by guidance or regulation, or to designate standards promulgated or developed by others, that satisfy this subparagraph. In the case of property for residential or other similar use, a site inspection and title search that reveal no basis for further investigation satisfy the requirements of this subparagraph;

"(C) the person provided all legally required notices with respect to the discovery or release of any hazardous substances at the facility;

"(D) the person exercised due care with respect to hazardous substances found at the facility and took reasonably necessary steps to address any release or threat of release of hazardous substances and to protect human health and the environment. The requirements of due care and reasonably necessary steps with respect to hazardous substances discovered at the facility shall be conclusively established where the person successfully completes a response action pursuant to a State voluntary response

program, as defined in section 127 of this title; and

"(E) the person provides full cooperation, assistance, and facility access to those responsible for response actions at the facility, including the cooperation and access necessary for the installation, integrity, operation, and maintenance of any complete or partial response action at the facility; and

"(F) the person is not affiliated with any other person liable for response costs at the facility, through any direct or indirect familial relationship, or any contractual, corporate, or financial relationship other than that created by the instruments by which title to the facility is conveyed or financed.

"(40) FIDUCIARY.—

"(A) Except as provided in subparagraph (B), the term 'fiduciary' means a person who owns or controls property—

"(i) as a fiduciary within the meaning of section 3(31) of the Employee Retirement Income Security Act of 1974, or as a trustee, executor, administrator, custodian, guardian, conservator, or receiver

acting for the exclusive benefit of another person; and

"(ii) who has not previously owned or operated the property in a non-fiduciary capacity.

"(B) The term 'fiduciary' does not include any person described in subparagraph (A)—

"(i) who acquires ownership or control of property to avoid the liability of such person or any other person under this Act; or

"(ii) who owns or controls property on behalf of or for the benefit of a holder of a security interest.

"(41) MUNICIPAL SOLID WASTE.—The term 'municipal solid waste' means all waste materials generated by households, including single and multi-family residences, and hotels and motels. The term also includes waste materials generated by commercial, institutional, and industrial sources, to the extent such wastes (A) are essentially the same as waste normally generated by households or (B) were collected and disposed of with other municipal solid waste or sewage sludge as part of normal municipal solid waste collection services, and, regardless of

when generated, would be considered conditionally exempt small quantity generator waste under section 3001(d) of the Solid Waste Disposal Act (42 U.S.C. 6921(d)). Examples of municipal solid waste include food and yard waste, paper, clothing, appliances, consumer product packaging, disposable diapers, office supplies, cosmetics, glass and metal food containers, elementary or secondary school science laboratory waste, and household hazardous waste (such as painting, cleaning, gardening, and automotive supplies). The term 'municipal solid waste' does not include combustion ash generated by resource recovery facilities or municipal incinerators, or waste from manufacturing or processing (including pollution control) operations not essentially the same as waste normally generated by households.

"(42) MUNICIPALITY.—The term 'municipality' means a political subdivision of a State, including cities, counties, villages, towns, townships, boroughs, parishes, school districts, sanitation districts, water districts, and other public entities performing local governmental functions. The term also includes a natural person acting in the capacity of an official, employee, or agent of a municipality in the performance of governmental functions.

"(43) QUALIFIED HOUSEHOLD HAZARDOUS WASTE COLLECTION PROGRAM.—The term 'qualified household hazardous waste collection program' means a program established by an entity of the federal government, a state, municipality, or Indian tribe that provides, at a minimum, for semiannual collection of household hazardous wastes at accessible, well-publicized collection points within the relevant jurisdiction.

"(44) SEWAGE SLUDGE.—The term 'sewage sludge' means solid, semisolid, or liquid residue removed during the treatment of municipal waste water, domestic sewage, or other waste water at or by publicly-owned or federally-owned treatment works.

"(45) SITE CHARACTERIZATION.—The term 'site characterization' means an investigation that determines the nature and extent of a release or potential release of a hazardous substance, pollutant or contaminant, and that includes an onsite evaluation and sufficient testing, sampling and other field data gathering activities to analyze whether there has been a release or threat of a release of a hazardous substance, pollutant or contaminant, and the health and environmental risks posed by such a release or

threat of release. The investigation also may include review of existing information (available at the time of the review), an off-site evaluation, or other measures as the Administrator deems appropriate.

"(46) VOLUNTARY RESPONSE.—The term 'voluntary response' means a response action—

"(A) undertaken and financed by a current owner or prospective purchaser under a voluntary response program; and

"(B) with respect to which the current owner or prospective purchaser agrees to pay all State oversight costs.".

SEC. 606. CONFORMING AMENDMENT.

Section 126(a) of the Act (42 U.S.C. 9626(a)) is amended by adding, after "section 104(i) (regarding health authorities)," the phrase "section 127 (regarding State authority), section 120 (regarding voluntary response actions),".

TITLE VII—FUNDING

SEC. 701. AUTHORIZATION OF APPROPRIATIONS.

Section 111(a) of the Act is amended by striking "$8,500,000,000 for the 5-year period beginning on October 17, 1986, and not more than $5,100,000,000 for the period commencing October 1, 1991, and ending September 30, 1994" and inserting "$9,600,000,000 for the pe-

riod commencing October 1, 1994, and ending September 30, 1999".

SEC. 702. ORPHAN SHARE FUNDING.

Section 111(a) is amended by adding after paragraph (7) (as added by this Act) the following new paragraph:

"(8) ORPHAN SHARE FUNDING.—Payment of orphan shares pursuant to section 122a(e) of this Act.".

SEC. 703. AGENCY FOR TOXIC SUBSTANCES AND DISEASE REGISTRY.

Section 111(m) of the Act is amended to read as follows:

"(m) There shall be directly available to the Agency for Toxic Substances and Disease Registry to be used for the purpose of carrying out activities described in subsection (c)(4) of this section and section 104(i) of this Act not less than $80,000,000 per fiscal year for each of fiscal years 1995, 1996, 1997, 1998, and 1999. Any funds so made available which are not obligated by the end of the fiscal year in which made available shall be turned to the Fund.".

SEC. 704. LIMITATIONS ON RESEARCH, DEVELOPMENT, AND DEMONSTRATION PROGRAMS.

Section 111(n) of the Act is amended to read as follows:

"(1) SECTION 311(b).—For each of the fiscal years 1995, 1996, 1997, 1998, and 1999, not more than $20,000,000 of the amounts available in the Fund may be used for the purposes of carrying out the applied research, development, and demonstration program for alternative or innovative technologies and training program authorized under section 311(b) of this title (relating to research, development, demonstration) other than basic research. Such amounts shall remain available until expended.

"(2) SECTION 311(a).—From the amounts available in the Fund, not more than the following amounts may be used for the purposes of section 311(a) of this title (relating to hazardous substance research, demonstration, and training activities):

"(A) For fiscal year 1995 $40,000,000.

"(B) For fiscal year 1996 $50,000,000.

"(C) For fiscal year 1997 $55,000,000.

"(D) For fiscal year 1998 $55,000,000.

"(E) For fiscal year 1999 $55,000,000.

No more than 10 percent of such amounts shall be used for training under section 311(a) of this title for any fiscal year.

"(3) SECTION 311(d).—For each of the fiscal years 1995, 1996, 1997, 1998, and 1999, not more

than $5,000,000 of the amounts available in the Fund may be used for the purposes of section 311(d) of this title (relating to university hazardous substance research centers).".

SEC. 705. AUTHORIZATION OF APPROPRIATIONS FROM GENERAL REVENUES.

Section 111(p)(1) of the Act is amended to read as follows:

"(1) IN GENERAL.—The following sums are authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, to the Hazardous Substance Superfund:

"(A) For fiscal year 1995, $250,000,000.

"(B) For fiscal year 1996, $250,000,000.

"(C) For fiscal year 1997, $250,000,000.

"(D) For fiscal year 1998, $250,000,000.

"(E) For fiscal year 1999, $250,000,000.

In addition there is authorized to be appropriated to the Hazardous Substance Superfund for each fiscal year an amount equal to so much of the aggregate amount authorized to be appropriated under this subsection (and paragraph (2) of section 131(b) of this title) as has not been appropriated before the beginning of the fiscal year involved.".

SEC. 706. ADDITIONAL LIMITATIONS.

Section 111 of the Act is amended by adding after subsection (p) the following new subsections:

"(q) ALTERNATIVE OR INNOVATIVE TREATMENT TECHNOLOGIES.—For each of the fiscal years 1995, 1996, 1997, 1998, and 1999, not more than $40,000,000 of the amounts available in the Fund may be used for the purposes of subsection (a)(7) of this section (relating to alternative or innovative treatment technologies).

"(r) CITIZEN INFORMATION AND ACCESS OFFICES.—For each of the fiscal years 1995, 1996, 1997, 1998, and 1999, not more than $50,000,000 of the amounts available in the Fund may be used for the purposes of section 117(j) of this Act (relating to citizen information and access offices).

"(s) MULTIPLE SOURCES OF RISK DEMONSTRATION PROJECTS.—For the period commencing October 1, 1994 and ending September 30, 1999, not more than $30,000,000 of the amounts available in the Fund may be used for the purposes of section 117(k) if this Act (relating to multiple sources of risk demonstration projects).".

TITLE VIII—ENVIRONMENTAL INSURANCE RESOLUTION FUND

SEC. 801. SHORT TITLE.

This title may be cited as the "Environmental Insurance Resolution and Equity Act of 1994".

SEC. 802. ENVIRONMENTAL INSURANCE RESOLUTION FUND.

(a) ENVIRONMENTAL INSURANCE RESOLUTION FUND ESTABLISHED.—There is hereby established the Environmental Insurance Resolution Fund (hereinafter referred to as the "Resolution Fund").

(b) OFFICES.—The principal office of the Resolution Fund shall be in the District of Columbia or at such other place as the Resolution Fund may from time to time prescribe.

(c) STATUS OF RESOLUTION FUND.—Except as expressly provided in this title, the Resolution Fund shall not be considered an agency or establishment of the United States. The members of the Board of Trustees shall not, by reason of such membership, be deemed to be officers or employees of the United States.

(d) BOARD OF TRUSTEES.—

(1) IN GENERAL.—The Resolution Fund shall be administered by a Board of Trustees (Board).

(2) MEMBERSHIP.—The Board shall consist of the following:

(A) GOVERNMENTAL MEMBERS.—

(i) The Administrator of the Environmental Protection Agency.

(ii) The Attorney General of the United States.

(B) PUBLIC MEMBERS.—Five public members appointed by the President not later than 60 days after the date of enactment of this title, not less than two of whom shall represent insurers subject section ____ of the Internal Revenue Code of 1986, and not less than two of whom shall represent eligible persons defined in subsection (g)(2)(A). The public members shall be citizens of the United States.

(C) EX-OFFICIO MEMBER.—The Secretary of the Treasury shall serve as an ex officio member of the Board.

(3) CHAIR.—The Chair of the Board shall be designated by the President from time to time from among the members described in paragraph (2)(A). No expenditure may be made, or other action taken, by the Resolution Fund without the concurrence of the Chair of the Board.

(4) COMPENSATION.—Governmental members of the Board shall serve without additional compensation. Public members of the Board shall, while attending meetings of the Board or while engaged in duties related to such meetings or other activities of the Board pursuant to this title, be entitled to receive compensation at the rate of $200 per day, including travel time. While away from their homes or regular places of business, members of the Board shall be allowed travel and actual, reasonable and necessary expenses to the same extent as officers of the United States.

(5) TERM OF PUBLIC MEMBERS.—Public members of the Board shall serve for a term of 5 years, except that such members may be removed by the President for any reason at any time. A public member whose term has expired may continue to serve on the Board until such time as the President appoints a successor. The President may reappoint a public member of the Board, but no such member may consecutively serve more than two terms.

(6) VACANCIES.—A vacancy on the Board shall be filled in the same manner as the original appointment, except that such appointment shall be for the balance of the unexpired term of the vacant position.

(7) QUORUM.—Four members of the Board shall constitute a quorum for the conduct of business.

(8) MEETINGS.—The Board shall meet not less than quarterly at the call of the Chair. Meetings of the Board shall be open to the public unless the Board, by a majority vote of members present in open session, determines that it is necessary or appropriate to close a meeting. The Chair shall provide at least 10 days notice of a meeting by publishing a notice in the Federal Register and such notice shall indicate whether it is expected that the Board will consider closing all or a portion of the meeting. Nothing in this paragraph shall be construed to apply to informal discussions or meetings among Board members.

(e) OFFICERS AND EMPLOYEES.—

(1) CHIEF EXECUTIVE OFFICER; CHIEF FINANCIAL OFFICER.—

(A) The Resolution Fund shall have a Chief Executive Officer appointed by the Board who shall exercise any authority of the Resolution Fund under such terms and conditions as the Board may prescribe.

(B) The Resolution Fund shall have a Chief Financial Officer appointed by the Board.

(2) COMPENSATION.—No officer or employee of the Resolution Fund may be compensated by the Resolution Fund at an annual rate of pay which exceeds the rate of basic pay in effect from time to time for level I of the Executive Schedule under section 5312 of title 5, United States Code. No officer or employee of the Resolution Fund, other than a member of the Board, may receive any salary or other compensation from any source other than the Resolution Fund for services rendered during the period of employment by the Resolution Fund.

(3) POLITICAL TEST OR QUALIFICATION.—No political test or qualification shall be used in selecting, appointing, promoting, or taking other personnel actions with respect to officers, agents, and employees of the Resolution Fund.

(4) ASSISTANCE BY FEDERAL AGENCIES.—The Attorney General, the Secretary of the Treasury, and the Administrator of the Environmental Protection Agency, may to the extent practicable and feasible, and in their sole discretion, make personnel and other resources available to the Resolution Fund. Such personnel and resources may be pro-

vided on a reimbursable basis, and any personnel so provided shall not be considered employees of the Resolution Fund for purposes of paragraph (2).

(f) POWERS OF RESOLUTION FUND.—Notwithstanding any other provision of law, except as provided in this title or as may be hereafter enacted by the Congress expressly in limitation of the provisions of this paragraph, the Resolution Fund shall have power—

(1) to have succession until dissolved by Act of Congress;

(2) to make and enforce such bylaws, rules and regulations as may be necessary or appropriate to carry out the purposes of this title;

(3) to make and perform contracts, agreements, and commitments;

(4) to settle, adjust, and compromise, and with or without consideration or benefit to the Resolution Fund release or waive in whole or in part, in advance or otherwise, any claim, demand, or right of, by, or against the Resolution Fund;

(5) to sue and be sued, complain and defend, in any State, Federal or other court;

(6) to determine its necessary expenditures and the manner in which the same shall be incurred, allowed, and paid, and appoint, employ, and fix and

provide for the duties, compensation and benefits of officers, employees, attorneys, and agents, all of whom shall serve at the pleasure of the Board;

(7) to invest funds, through the Secretary of the Treasury, in interest bearing securities of the United States suitable to the needs of the Resolution Fund: *Provided,* that interest earned on such investments shall be retained by the Resolution Fund and used consistent with the purposes of this title;

(8) to hire or accept the voluntary services of consultants, experts, advisory boards, and panels to aid the Resolution Fund in carrying out the purposes of this title; and

(9) to take such other actions as may be necessary to carry out the responsibilities of the Resolution Fund under this title.

Nothing in this subsection or any other provision of this title shall be construed to permit the Resolution Fund to issue any evidence of indebtedness or otherwise borrow money.

(g) RESOLUTION OF DISPUTES BETWEEN INSUREDS AND INSURERS.—

(1) IN GENERAL.—The Resolution Fund shall offer a comprehensive resolution described in this

subsection with respect to all eligible costs of an eligible person at eligible sites.

(2) DEFINITIONS.—

(A) ELIGIBLE PERSON.—For purposes of this subsection, the term "eligible person" means any individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity or governmental unit (including any predecessor in interest or any subsidiary thereof) that satisfies the following criteria:

(i) STATUS AS POTENTIALLY RESPONSIBLE PARTY.—An eligible person—

(I) shall have been named at any time as a potentially responsible party pursuant to the Comprehensive Environmental Response, Compensation and Liability Act with respect to an eligible site on the National Priority List in connection with a hazardous substance that was disposed of on or before December 31, 1985; or

(II) is or was liable, or alleged to be liable, at any time for removal (as defined in section 101(23) of the Comprehensive Environmental Re-

sponse, Compensation and Liability Act (42 U.S.C. 9601(23)) at any eligible site in connection with a hazardous substance that was disposed of on or before December 31, 1985.

(ii) INSURANCE COVERAGE.—An eligible person shall have demonstrated, to the satisfaction of the Resolution Fund, that such person had entered into a valid contract for comprehensive general liability (including broad form liability, general liability, commercial general liability, and excess or umbrella coverage) or commercial multi-peril (including broad form property, commercial package, special multi-peril, and excess or umbrella coverage) insurance coverage—

(I) for any seven years in any consecutive 14 year period prior to January 1, 1986; or

(II) in the case of a person that has been in existence for less than 14 years prior to January 1, 1986, for at least one-half of such years of existence.

For purposes of this clause, a valid contract for insurance shall not include any contract for insurance with respect to which a person has entered into a settlement with an insurer providing, or where a judgment has provided, that the contract has been satisfied and that such person has no right to make any further claims under such contract.

(B) ELIGIBLE COSTS.—

(i) IN GENERAL.—For purposes of this subsection, the term "eligible costs" means costs described in clause (ii) or (iii) incurred with respect to a hazardous substance that was disposed of on or before December 31, 1958—

(I) for which an eligible person has not been reimbursed; or

(II) for which an eligible person has been reimbursed and that are the subject of a dispute between the eligible person and an insurer.

(ii) NPL SITES.—With respect to an eligible site described in subparagraph

(C)(i), eligible costs means costs described in clause (i)—

(I) of response (as defined in section 101(25) of the Comprehensive Environmental Response, Compensation and Liability Act (42 U.S.C. 9601(25));

(II) for natural resources damages; or

(III) to defend potential liability (including, but not limited to, attorney's fees, costs of suit, consultant and expert fees and costs, and expenses for testing and monitoring).

(iii) NON-NPL SITES.—With respect to an eligible site described in paragraph (C)(ii), eligible costs means costs described in clause (i)—

(I) of removal (as defined in section 101(23) of the Comprehensive Environmental Response, Compensation and Liability Act (42 U.S.C. 9601(23)); or

(II) to defend potential liability (including, but not limited to, attor-

ney's fees, costs of suit, consultant and expert fees and costs, and expenses for testing and monitoring).

(iv) LIMIT ON ELIGIBLE COSTS.—

(I) Except as provided in subclause (II), the eligible costs of an eligible person may not exceed—

(aa) $15,000,000 in the case of an eligible person that has demonstrated insurance coverage pursuant to subparagraph (A)(ii)(I); or

(bb) an amount equal to one-seventh of $15,000,000 for each year of insurance coverage, in the case of an eligible person that has demonstrated insurance coverage pursuant that has demonstrated insurance coverage pursuant to subparagraph (A)(ii)(II).

(II) The limitation on eligible costs provided in subclause (I) shall not apply to an eligible costs provided in subclause (I) shall not apply to an

eligible person that, when filing a request for a resolution offer with the Resolution Fund, presents evidence to the satisfaction of the Resolution Fund that the limits on valid contracts of insurance (including per occurrence, aggregate, primary, excess or other limits) of such eligible person prior to January 1, 1986, cumulatively exceed the amount determined pursuant to subclause (I) without reference to any time period. For purposes of this clause, a valid contract for insurance shall not include any contract for insurance with respect to which an eligible person has entered into a settlement with an insurer providing, or where a judgment has provided, that the contract has been satisfied and that such eligible person has no right to make any further claims under such contract.

(C) ELIGIBLE SITE.—For purposes of this subsection, the term "eligible site" means—

(i) any site or facility placed on the National Priority List at any time, at which a hazardous substance was disposed of on or before December 31, 1985; or

(ii) any site or facility subject to a removal (as defined in section 101(23) of the Act (42 U.S.C. 9601(23)) conducted pursuant to such Act at any time, at which a hazardous substance was disposed of on or before December 31, 1985.

For purposes of this subparagraph, the term "facility" shall have the same meaning as provided in section 101(9) of the Comprehensive Environmental Response, Compensation and Liability Act (42 U.S.C. 9601(9)).

(D) STATE.—For purposes of this subsection, the term "State" shall have the same meaning as provided in section 101(27) of the Comprehensive Environmental Response, Compensation and Liability Act (42 U.S.C. 9601(27)).

(3) RESOLUTION OFFERS.—

(A) IN GENERAL.—The Resolution Fund shall offer one comprehensive resolution to each eligible person. The offer shall—

(i) be for a percentage of all the eligible costs of such eligible person incurred in connection with all eligible sites, determined pursuant to paragraph (4); and

(ii) state the limitation on eligible costs, if any, applicable to the eligible person pursuant to paragraph (2)(B)(ii).

(B) REQUESTS FOR RESOLUTION OFFERS.—An eligible person shall file a request for resolution from the Resolution Fund in such form and manner as the Resolution Fund shall prescribe. No such request shall be deemed received by the Resolution Fund before the date final regulations concerning State percentage categories are published in the Federal Register pursuant to paragraph 4(B)(iii). The Resolution Fund shall make an offer of resolution, determined pursuant to paragraph (4), to each eligible person that has filed a request for an offer of resolution not later than 180 days after the receipt of a complete request as determined by the Resolution Fund.

(C) REVIEW OF RESOLUTION OFFERS.—No resolution offer made by the Resolution Fund shall be subject to review by any court.

(4) DETERMINATION OF RESOLUTION OFFERS.—

(A) IN GENERAL.—The Resolution Fund shall determine a resolution offer—

(i) in the case of an eligible person that has established only one State litigation venue pursuant to subparagraph (C), by applying the State percentage determined pursuant to subparagraph (B)(iii) to the established State litigation venue;

(ii) in the case of an eligible person that has established two or more State litigation venues pursuant to subparagraph (C), each site with respect to which a State litigation venue has been established shall be accorded equal value and the applicable percentage shall be the weighted average of all established State litigation venues; or

(iii) in the case of an eligible person that has not established any State litigation venue pursuant to subparagraph (C)—

(I) if the eligible person has potential liability in connection with only one hazardous waste site, by applying

the State percentage determined pursuant to subparagraph (B)(iii) to the State in which the site is located; or

(II) if the eligible person has potential liability in connection with more than one hazardous waste site, each site shall be accorded equal value and the applicable percentage shall be the weighted average of all States in which the sites are located.

(B) STATE PERCENTAGE.—

(i) IN GENERAL.—The Congress finds that as of January 1, 1994, State law generally is more favorable to eligible persons that pursue claims concerning eligible costs against insurers in some States, that State law generally is more favorable to insurers with respect to such claims in some States, and that in some States the law generally favors neither insurers nor eligible persons with respect to such claims or that there is insufficient information to determine whether such law generally favors insurers or eligible persons with respect to such claims. The Congress further finds that

considerations of equity and fairness require that resolution offers made by the Resolution Fund must vary to reflect the relative state of the law among the several States.

(ii) PROPOSED REGULATIONS.—The Resolution Fund shall examine the law in each State as of January 1, 1994. Not later than 120 days after the date of enactment of this title, the Resolution Fund shall publish in the Federal Register a notice of proposed rulemaking soliciting public comment for 60 days and classifying States into the following percentage categories:

(I) 20 percent, in the case of the ten States in which the Resolution Fund determines that State law generally is most favorable to insurers relative to the other States.

(II) 60 percent, in the case of the ten States in which the Resolution Fund determines that State law generally is most favorable to eligible persons relative to the other States.

(III) 40 percent, in the case of all other States.

(iii) FINAL REGULATIONS.—

(I) Not later than 60 days after the close of the public comment period, the Resolution Fund shall publish in the Federal Register final regulations providing State classifications.

(II) The State classifications provided in the final rule shall govern all resolution offers made by the Resolution Fund and shall not be subject to amendment by the Resolution Fund.

(III) Notwithstanding any other provision of law, the final regulations promulgated by the Resolution Fund pursuant to this clause shall not be subject to review by any court.

(C) LITIGATION VENUE.—For purposes of this subsection, litigation venue is considered established with respect to an eligible person if—

(i) on or before December 31, 1993, the eligible person had pending in a court

of competent jurisdiction a complaint or cross complaint against an insurer with respect to eligible costs at an eligible site; and

(ii) no motion to change venue with respect to such complaint was pending on or before January 31, 1994.

(5) ACCEPTANCE OR REJECTION OF RESOLUTION OFFER.—

(A) IN GENERAL.—

(i) An eligible person may, when submitting a request for a resolution to the Resolution Fund, make a written irrevocable election to accept any resolution to be made by the Resolution Fund.

(ii) An eligible person that does not make an election pursuant to clause (i) shall, within 60 days of the receipt of a resolution offer from the Resolution Fund, notify the Resolution Fund in writing of its irrevocable acceptance or rejection of such offer. An eligible person who does not so accept or reject a resolution offer within 60 days shall be deemed to have made an irrevocable election to reject the offer and

the provisions of subparagraph (C) shall apply.

(B) RESOLUTION OFFER ACCEPTED.—An eligible person that accepts a resolution offered by the Resolution Fund shall be subject to the provisions of this paragraph.

(i) WAIVER OF INSURANCE CLAIMS.—The Resolution Fund shall not make payments to an eligible person unless the eligible person agrees in writing, subject to reinstatement described in clause (ii)—

(I) to waive any existing and future claims against any insurer for eligible costs; and

(II) to stay or dismiss each claim pending against an insurer for eligible costs.

(ii) REINSTATEMENT OF INSURANCE CLAIMS.—

(I) If the Resolution Fund fails to timely fulfill its obligations to an eligible person under the terms of an accepted resolution offer, such eligible person shall be entitled to reinstate

any claim under a contract for insurance with respect to eligible costs.

(II) STATUTE OF LIMITATION TOLLED.—Notwithstanding any other provision of Federal or State law, any Federal or State statute of limitation concerning the filing or prosecution of an action by an eligible person against an insurer, or by an insurer against an eligible person, with respect to eligible costs shall be tolled during the pendency of the stay of pending litigation established by section 804(a).

(iii) PAYMENT OF RESOLUTION OFFERS.—

(I) PRE-RESOLUTION COSTS.—The Resolution Fund shall make equal annual payments over a period of eight years for eligible costs incurred by an eligible person on or before the date such person accepts a resolution offer pursuant to subparagraph (A) (i) or (ii), and interest shall not accrue with respect to such eligible costs. The Resolution Fund may,

in its sole discretion, make such payments over a shorter period if the aggregate eligible costs do not exceed $50,000. An eligible person shall submit to the Resolution Fund documentation of such costs as the Resolution Fund may require. The initial payment to an eligible person under this subclause shall be made not later than 60 days after the receipt of documentation satisfactory to the Resolution Fund.

(II) POST-RESOLUTION COSTS.—The Resolution Fund shall make payments for eligible costs incurred by an eligible person after the date such person accepts a resolution offer pursuant to subparagraph (A) (i) or (ii) to the eligible person, or to a contractor or other person designated by the eligible person, subject to such documentation as the Resolution Fund may require. Payments under this subclause shall be made not later than 60 days after the receipt of docu-

mentation satisfactory to the Resolution Fund.

(III) ADJUSTMENT FOR DEDUCTIBLE OR SELF INSURANCE.—In the case of an eligible person that has submitted to the Resolution Fund, as proof of status as an eligible person, a contract for insurance described in paragraph (2)(A)(ii) that is subject to a self-insured retention or a deductible, payment to such eligible person pursuant to a resolution shall be reduced by the amount of such self-insured retention or deductible, except that such reduction shall not exceed the amount of one self-insured retention or one deductible that the eligible person would have required to pay with respect to one claim for eligible costs under the terms of the contracts for insurance submitted. In the event that the eligible person submitted more than one contract for insurance, any such reduction shall be made with respect to the lowest of the amounts

of self-insured retentions and deductibles.

(IV) ADJUSTMENT FOR CERTAIN DUTY-TO-DEFEND COSTS.—If an insurer has incurred and paid costs pursuant to a duty-to-defend clause contained in a contract for insurance described in paragraph (2)(B), and such costs are the subject of a dispute between the eligible person and an insurer, the payment of a resolution to an eligible person shall be reduced by such amount, and the Resolution Fund shall pay such amount to the insurer. If such costs were paid by the insurer on or before the date the eligible person accepted a resolution offer made by the Resolution Fund, payment to an insurer under this subclause shall be made in equal annual installments over a period of eight years, and interest shall not accrue with respect to such costs. The Resolution Fund may, in its sole discretion, make such payments over a

shorter period if the aggregate costs do not exceed $50,000.

(C) RESOLUTION OFFER REJECTED; LITIGATION OF INSURANCE CLAIMS.—

(i) ADMISSIBILITY OF RESOLUTION OFFER.—No resolution offered by the Resolution Fund shall be admissible in any legal action brought by an eligible person against an insurer or by an insurer against an eligible person.

(ii) INSURER ACTION AGAINST ELIGIBLE PERSON.—Any eligible person that rejects a resolution offer, litigates a claim with respect to eligible costs against an insurer, and obtains a final judgment that is less favorable than the resolution offered by the Resolution Fund, shall be liable to such insurer for 20 percent of the reasonable costs and legal fees incurred by the insurer in connection with such litigation after the resolution was offered to the eligible person. The district courts of the United States shall have original jurisdiction of all such actions, without regard to amount or value. The court shall reduce

any award to an insurer in any such action by the amount, if any, of such costs and legal fees recovered by the insurer pursuant to State law or court rule. Nothing in this clause shall be construed to limit or affect in any way the application of State law, or the rule of any court, to such costs or legal fees.

(iii) REIMBURSEMENT TO INSURER.—In the case of an eligible person that rejects a resolution offer, litigates a claim with respect to eligible costs against one or more insurers, and obtains a final judgment against any such insurer, the Resolution Fund—

(I) shall reimburse to such insurer or insurers the lesser of the amount of the resolution offer made to the eligible person or the final judgment; and

(II) may, if the resolution offer exceeded the final judgment, reimburse the insurer or insurers for unrecovered reasonable costs and legal fees, except that the total reimburse-

ment under this subclause may not exceed the amount of the resolution offer to the eligible person.

Reimbursements pursuant to this clause shall be subject to such documentation as the Resolution Fund may require and shall be made by the Resolution Fund not later than 60 days after receipt by the Resolution Fund of a complete request for reimbursement as determined by the Resolution Fund.

(6) PAYMENTS CONSIDERED PURSUANT TO INSURANCE CONTRACT.—Payments made by the Resolution Fund pursuant to a resolution offer shall be deemed payments made by an insurer under the terms and conditions of a contract of insurance or in settlement thereof. Nothing in this paragraph shall be construed to affect in any way the issue of whether the liability limits of a contract of insurance has been satisfied.

(7) RESOLUTION PROCESS NOT ADMISSION OF LIABILITY.—No provision of this title, and no action by an eligible person undertaken in connection with any provision of this title shall in any way constitute

an admission of liability in connection with the disposal of a hazardous substance.

(8) REGULATIONS.—

(A) PROCEDURES AND DOCUMENTATION.—Not later than 120 days after the date of enactment of this title, the Resolution Fund shall publish in the Federal Register for public comment of not more than 60 days interim final regulations concerning procedures and documentation for the submission of requests for resolution offers and the payment of accepted resolution offers. Not later than 60 days after the close of the public comment period, the Resolution Fund shall publish in the Federal Register final regulations concerning such procedures and documentation, which may be amended by the Resolution Fund from time to time.

(B) OTHER REGULATIONS.—The Resolution Fund may prescribe such other regulations, rules and procedures as the Resolution Fund deems appropriate from time to time.

(C) JUDICIAL REVIEW.—No regulation, rule or procedure prescribed by the Resolution Fund pursuant to this paragraph shall be sub-

ject to review by any court except to the extent such regulation, rule or procedure is not consistent with a provision of this title.

(h) JURISDICTION OF FEDERAL COURTS.—Notwithstanding section 1349 of title 28, United States Code:

(1) The Resolution Fund shall be deemed to be an agency of the United States for purposes of sections 1345 and 1442 of title 28, United States Code.

(2) All civil actions to which the Resolution Fund is a party shall be deemed to arise under the laws of the United States, and the district courts of the United States shall have original jurisdiction of all such actions, without regard to amount or value.

(3) Any civil or other action, case or controversy in a court of a State, or in any court other than a district court of the United States, to which the Resolution Fund is a party may at any time before the trial thereof be removed by the Resolution Fund, without the giving of any bond or security, to the district court of the United States for the district and division embracing the place where the same is pending, or, if there is no such district court, to the district court of the United States for the district in which the principal office of the Resolution Fund is located, by following any procedure

for removal of causes in effect at the time of such removal.

(4) No attachment or execution shall be issued against the Resolution Fund or any of its property before final judgment in any State, Federal, or other court.

(i) REPORTS.—

(1) ANNUAL REPORTS.—The Resolution Fund shall report annually to the President and the Congress not later than January 15 of each year on its activities for the prior fiscal year. The report shall include—

(A) a financial statement audited by an independent auditor; and

(B) a determination of whether the fees and assessments imposed by section ____ of the Internal Revenue Code of 1986 will be sufficient to meet the anticipated obligations of the Resolution Fund.

(2) SPECIAL REPORTS.—The Resolution Fund shall promptly report to the President and the Congress at any time the Resolution Fund determines that the fees and assessments imposed by section ____ of the Internal Revenue Code of 1986 will be

insufficient to meet the anticipated obligations of the Resolution Fund.

(j) FALSE OR FRAUDULENT STATEMENTS OR CLAIMS.—

(1) CRIMINAL PENALTIES.—

(A) For purposes of section 287 of title 18, United States Code (relating to false claims), the Resolution Fund shall be considered an agency of the United States and any officer or employee of the Resolution Fund shall be considered a person in the civil service of the United States.

(B) For purposes of section 1001 of title 18, United States Code (relating to false statements or entries), the Resolution Fund shall be considered an agency of the United States.

(2) CIVIL PENALTIES.—Officers and employees of the Resolution Fund shall be considered officers and employees of the United States for purposes of section 3729 of title 31, United States Code (relating to false claims).

SEC. 803. FINANCIAL STATEMENTS, AUDITS, INVESTIGATIONS AND INSPECTIONS.

(a) IN GENERAL.—The financial statements of the Resolution Fund shall be prepared in accordance with gen-

erally accepted accounting principles and shall be audited annually by an independent certified public account in accordance with the auditing standards issued by the Comptroller General. Such auditing standards shall be consistent with the private sector's generally accepted auditing standards.

(b) INVESTIGATIONS AND OTHER AUDITS.—The Inspector General of the Environmental Protection Agency is authorized to conduct audits and investigations as the Inspector General deems necessary or appropriate. For purposes of the preceding sentence, the provisions of the Inspector General Act of 1978 shall apply to the Resolution Fund and to the Inspector General to the same extent as they apply to the Environmental Protection Agency.

SEC. 804. STAY OF PENDING LITIGATION.

(a) IN GENERAL.—

(1) Except as provided in this section, enactment of this title operates as a stay, applicable to all person other than the United States, of the commencement or continuation, including the issuance or employment of process or service of any pleading, motion, or notice, of any judicial, administrative, or other action with respect to claims for indemnity or other claims arising from a contract for insurance described in section 802(g)(2)(A)(ii) concerning in-

surance coverage for eligible costs as defined in section 802(g)(2)(B)(i).

(2) Nothing in paragraph (1) shall be construed to apply to the extent the issuance or employment of process or service of any pleading, motion, or notice, of any judicial, administrative, or other action with respect to claims for indemnity or other claims does not concern eligible costs (as defined in section 802(g)(2)(B)(i)) or a contract for insurance described in section 802(g)(2)(A)(ii). An eligible person (as defined in section 802(g)(2)(A)) may move to serve claims not involving eligible costs from claims involving eligible costs and may proceed with the prosecution of claims not involving eligible costs.

(b) TERMINATION OF STAY.—

(1) PENDING OFFER OF RESOLUTION.—The stay established by subsection (a) shall terminate with respect to an eligible person upon the earlier of—

(A) the rejection of a resolution offer by such eligible person pursuant to section 802(g)(5)(A); or

(B) the failure of the Resolution Fund to timely fulfill the terms of a resolution offer accepted by such eligible person.

(2) EXPIRATION OF RESOLUTION OFFERS.—No stay established by subsection (a) shall be effective after May 31, 2000.

(c) OTHER STAYS.—Nothing in this section shall be construed to limit or affect in any way the discretion of any judicial, administrative, or other entity to maintain or impose a stay that is not required by subjection (a) but that will otherwise serve the ends of justice by staying a judicial, administrative or other action pending the acceptance or rejection of a resolution offer pursuant to section 802(g)(5)(A).

(d) AUTHORITY OF UNITED STATES UNAFFECTED.—Nothing in this section shall be construed to limit or affect in any way the discretion or authority of the United States or any party to commerce or continue all allocation process, cost recovery, or other action pursuant to the authority of sections 101–122a of the Comprehensive Environmental Response, Compensation and Liability Act (42 U.S.C. 9601–9622a).

SEC. 805. SUNSET PROVISIONS.

(a) AUTHORITY TO ACCEPT REQUEST FOR RESOLUTION.—The authority of the Resolution Fund to accept requests for resolution shall terminate after September 30, 1999.

(b) AUTHORITY TO OFFER RESOLUTIONS.—The authority of the Resolution Fund to offer resolutions to eligible persons shall terminate after March 31, 2000.

(c) CONTINUING OBLIGATIONS.—Nothing in this section shall be construed to limit or affect in any way the authority of the Resolution Fund—

(1) to make payments pursuant to resolution offers made on or before March 31, 2000; or

(2) to reimburse insurers with respect to litigation commenced or continued in connection with a resolution offer made on or before March 31, 2000, that was rejected by an eligible person or not acted upon by an eligible person as provided in section 802(g)(5)(a).

SEC. 806. SOVEREIGN IMMUNITY OF THE UNITED STATES.

No obligation or liability of the Resolution Fund shall constitute an obligation or liability of the United States, or of any department, agency, instrumentality, officer, or employee thereof. No person shall have a cause of action of any kind against the United States, or any department agency, instrumentality, officer, or employee thereof with respect to any obligation, liability, or activity of the Resolution Fund.

SEC. 807. EFFECTIVE DATE.

The provisions of this title shall become effective on the date of enactment of this title.

TITLE IX—TAXES

SEC. 901. AMENDMENTS TO THE INTERNAL REVENUE CODE OF 1986.

(a) Section 59A(e)(1) of the Internal Revenue Code of 1986 (26 U.S.C. 59A(e)(1)) is amended by striking "January 1, 1996" and inserting instead "January 1, 2001".

(b) Section 4611(e) of the Internal Revenue Code of 1986 (26 U.S.C. 4611(e)) is amended—

(1) in paragraph (1), by striking "December 31, 1986" and inserting instead "December 31, 1995";

(2) in paragraph (2)—

(A) by striking "December 31, 1993 or December 31, 1994" and inserting instead "December 31, 1998 or December 31, 1999";

(B) by striking "December 31, of 1994 or 1995, respectively" and inserting instead "December 31 of 1999 or 2000, respectively"; and

(C) by striking "1994 or 1995" the last place it appears and inserting instead "1999 or 2000";

(3) in paragraph (3)(A), by striking "January 1, 1987, and ending December 31, 1995" and inserting instead "January 1, 1996, and ending December 31, 2000"; and

(4) in paragraph (3)(B)—

(A) in the title thereof, by striking "January 1, 1996" and inserting "January 1, 2001"; and

(B) by striking "Fund before January 1, 1996" and inserting instead "Fund before January 1, 2001".

SEC. 902. ENVIRONMENTAL FEES AND ASSESSMENTS ON INSURANCE COMPANIES.

(a) IN GENERAL.—The Internal Revenue Code of 1986 is amended by inserting after section ____ the following new section:

"§ . Environmental fees and assessments on insurance companies".

[RESERVED]

(b) CLERICAL AMENDMENTS.—The table of sections for chapter ____ of the Internal Revenue Code of 1986 is amended by inserting after the item relating to section ____ the following:

"§ . **Environmental fees and assessments on insurance companies".**

SEC. 903. FUNDING PROVISIONS FOR ENVIRONMENTAL INSURANCE RESOLUTION FUND.

(A) IN GENERAL.—

(1) Except as provided in section 802(f)(7) of this Act, all expenditures of the Resolution Fund shall be paid out of the fees and assessments imposed by section ____ of the Internal Revenue Code.

(2) Except as may be expressly authorized by the Secretary of the Treasury, all funds of the Resolution Fund shall be maintained in the Treasury of the United States. The Secretary may provide for the disbursement of such funds to the Resolution Fund or on behalf of the Resolution Fund under such procedures, terms and conditions as the Secretary may prescribe.

(b) TRANSFER TO RESOLUTION FUND.—The Secretary of the Treasury shall transfer to the Resolution Fund on October 1 of fiscal year 1995, 1996, 1997, 1998 and 1999, an amount equal to the fees and assessments anticipated to be collected pursuant to section ____ of the Internal Revenue Code of 1986 during the then current fiscal year.

(c) ADJUSTMENTS.—In each succeeding fiscal year the Secretary of the Treasury shall adjust the amounts

transferred pursuant to paragraph (2) to reflect actual collections of fees and assessments during the prior fiscal year, except that with respect to the transfer made on October 1, 1999, the Resolution Fund shall reimburse the Secretary the amount of such transfer subsequently determined by the Secretary to have exceeded actual collections of fees and assessments during such fiscal year.

SEC. 904. RESOLUTION FUND NOT SUBJECT TO TAX.

The Resolution Fund, including its capital, reserves, surplus, security holdings, and income shall be exempt from all taxation now or hereafter imposed by the United States (including any territory, dependency or possession thereof) or any State, county, municipality or local taxing authority.

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Mr. SWIFT. And, with that, I recognize the Ranking Republican, the gentleman from Ohio for an opening statement.

Mr. OXLEY. Thank you, Mr. Chairman.

I first want to commend you for beginning this set of hearings on the administration's Superfund reauthorization proposal.

Our hearings last year clearly demonstrated that Superfund needs serious and substantial reform. Too much is squandered on unnecessary litigation and administrative costs. Many remedies are overly expensive and vastly out of proportion with a realistic assessment of the risks posed.

I think all of our witnesses at last year's hearings agreed on the need for substantial changes. Simple reauthorization is not the objective—meaningful reform is.

Mr. Chairman, I share your concern and disappointment at the pace of the administration's efforts in providing legislative language. The promises of last summer to provide language in the fall have faded to the frozen dead of winter, leaving little time. Such a listless effort belies the clear statements of the President in two consecutive State of the Union addresses for Superfund reform in this Congress.

I am particularly disappointed in the abandonment of the bipartisan congressional staff review process. One of the reasons given for delay from this administration was the need for an open process.

I committed our minority committee staff to a series of meetings in late November and December at the invitation of the administration. Unfortunately, this process was completely abandoned, apparently because of the release of the report of the Keystone Superfund Commission.

Let me send this message to the administration: If you are going to begin a bipartisan process, then follow through on your commitment. All you have to do is look at the vote yesterday on the rule, and I think that the straws are clearly in the wind.

Instead, the recent Keystone Commission report has been used as an excuse to stop the bipartisan review process. Over the last several weeks, the administration has apparently had direct negotiations with the Keystone Commission members, rather than complete discussions with congressional staff.

Minority staff has not been asked to comment on the Keystone Commission remedy selection proposals, several of which have been adopted in the administration proposal, or on the critical issue of liability reform. I believe this is a great mistake in the process, is a great mistake on the substance, and created additional obstacles towards meaningful Superfund reform in this Congress.

My staff has reviewed the Keystone Commission report and have serious concerns about the recommendations on remedy selection. It is unclear whether these recommendations would, on balance, be better than the status quo, let alone represent substantial improvements.

The Keystone Superfund Commission involved a closed process. Business representatives were told not to discuss the substance of negotiations with other businesses. I am unaware of any business group, outside of a handful on the Keystone Commission, that has endorsed these recommendations.

Several major business groups have written letters to the President and congressional representatives expressing deep concerns and disagreement with the Commission recommendations on remedy selection. The groups disavowing the Commission recommendations include the National Association of Manufacturers and an additional list of 12 major trade associations. And if indeed the chairman is right that one particular group can torpedo this process, then it seems to me we have got a lot of work to do. I would like to submit their letters for the record.

Moreover, an additional Keystone Commission member, Ben Chavis, quit the Keystone discussion and has advanced several proposals with certain local government and business groups.

I am disappointed with the actions of the administration last month in precluding meaningful input with the minority staff. I plan to evaluate the proposed legislation and proposals with strong concerns about the need to address realistic risks, set realistic priorities, reduce cleanup and transaction costs, promote economic redevelopment and voluntary cleanups and provide for meaningful delegation of the program to States with sufficient capabilities. There is, obviously, much work to be done.

I thank the Chair, and I look forward to hearing from today's witnesses.

Mr. SWIFT. I recognize the gentleman from Louisiana for an opening statement.

Mr. TAUZIN. Thank you, Mr. Chairman.

I think that, after $30 billion, an awful and unfortunate truism has emerged from the Nation's Superfund efforts, and that truism is simply that everyone's most notorious Superfund site is our local Federal courthouse. That is where the battle is being fought, unfortunately, instead of on a ground where the sites are still left to threaten the health and the safety of humans and families across the country.

That is a sad truth, and we ought to do something about it. And we ought not let any interest group stand in the way, Mr. Chairman, of accomplishing reform this year that will lead to spending the Nation's Superfund assets in an efficient manner that cleans up the maximum number of sites across this country.

There is a new theme about the place this year, the theme called environmental justice. Let me give you my definition of environmental justice. Environmental justice is not wasting Superfund assets in a courtroom, not gold plating a cleanup in one community while other communities wait and wait and wait for relief.

Environmental justice is making sure that remedy selection and health care standards are designed in such a way that we can go from one site to the next as rapidly as possible, cleaning up those sites and reaching every Member's constituent districts in this country with at least some Superfund cleanup this year and every year thereafter.

Now, how do we achieve that, Mr. Chairman? I suggest to you that yesterday's vote in the House, and the prior vote in the Senate ought to be a ringing announcement, a huge statement to this administration that the Congress wants the administration to look seriously at risk assessment and cost analysis in the implementation of this program and every program that the EPA and other agen-

cies of our government regulate for us on behalf of our environment.

It is clear from that statement yesterday and from the Senate's unambiguous statement earlier on the Bennett Johnston amendment that Americans want to see cost analysis and risk assessment done in all of our programs, not only so that we can all feel comfortable that Federal dollars and private dollars are being well managed but so that we can know that regulations are meaningful, responsible and that more is done to clean up the environment, not less, because we haggle about it in courts across America.

Mr. Chairman, the most serious point that I will try to make during these debates, during these markups is that in every community where someone is lucky enough to get on the priority list, which I hope we can rework, redesign in this reform session, that in every community lucky enough to have a Superfund cleanup that we have some mechanism in this bill that prevents the decision being made to choose a costlier remedy than the remedy available that satisfies the applicable health standard in that community. We ought to go for least cost to make sure that other sites get attention.

And every rural site, every site in an impoverished, less-populated area of this country, like the ones I represent in Louisiana, is waiting in that long line and demands us to do something about making sure that some communities don't soak up all the assets while others wait and wait for relief. That, I think, is our challenge, Mr. Chairman.

The message yesterday on the House Floor, I hope, has been well received by the administration. It was not a message sent in anger. It was not a message sent in confrontational tones. It was a message sent, I think, from the heart of America saying, let's make regulations responsible. Let's get about the business of setting down some rules that everyone who is a user, everyone who is affected by these regulations is a cooperative agent rather than a defendant in a lawsuit so that we can work together to begin cleaning up this country.

That, I hope, is the message that has been received. It is certainly the message I think the Congress meant to send just yesterday.

Again, Mr. Chairman, I am anxious to work with you on an expedited schedule, in a bipartisan way,.

Mr. Oxley, you and I have a great interest in another committee hearing going on right now. We are both here because we know the importance of trying to resolve this issue this year.

I hope, Mr. Chairman, we can build a bipartisan coalition to reform this thing in a way that environmentalists, business interest groups, communities and particularly those waiting in line all feel like we achieved the goal of moving this program forward instead of marring it down in timely, legal battles.

If, for a lawyer, time is money, let me assure you, the Superfund cleanups and—to all of us who wait for our turn, time is excessive money, and the sooner we get about reform, the happier I will feel.

Thank you, Mr. Chairman.

Mr. SWIFT. I thank the gentleman. I would note that at the news conference just prior to the hearing the question was asked of me

as to whether I thought we needed Republican cooperation and support to pass the legislation. The answer was absolutely.

I recognize the gentleman from Ohio for an opening statement.

Mr. GILLMOR. Thank you, Mr. Chairman. I am going to waive an opening statement.

Mr. SWIFT. I thank the gentleman.

The gentleman from Colorado.

Mr. SCHAEFER. Thank you, Mr. Chairman.

I am not going to waive my opening statement.

Mr. SWIFT. I don't thank you.

Mr. SCHAEFER. I first want to commend the Chair for his diligent efforts in trying to resolve a very, very difficult question. And it has been a long process already, and I know we still have a long ways to go.

But I want to add my voice to that of the Ranking Republican Member, my good friend, Mr. Oxley, regarding the administration's handling of this reauthorization process. I fully understand that many complex and difficult issues frame our current debate and that any consensus-building process will hit a number of snags from time to time. However, it is clear that this administration has been less than cooperative with the subcommittee in moving ahead with a reauthorization package.

This is especially true of the White House's pledge to include both sides of the aisle in drafting the administration's bill. I won't belabor the point, but suffice it to say that I am disappointed that the White House chose not to operate in a true bipartisan fashion in this particular process.

Having said that, I am hopeful that the administration package being presented today will be a positive starting point for Superfund reform. This reform is badly needed, and I think all parties certainly recognize that fact.

I realize that we are still in the early stages of reviewing this proposal, but a couple of items that have already jumped to my attention.

The first is the proposed move towards national cleanup standards and standardized risk assessment. I have serious doubts about the ability of a system of national standards to address site-specific conditions. Every site is different, whether it is in the high desert valleys in Colorado, a swamp area in the south or a permafrost location in Alaska. Each site's unique circumstances should have a strong influence on which remedy is applied. National standards, I am afraid, will not provide this needed flexibility.

Another area of concern is a retreat from seeking permanent cleanup of sites.

Unfortunately, Colorado has a dubious distinction of having a fair number of Superfund sites. I can tell you flat out what my constituents want from the cleanups. First, they want to be assured that significant health and safety risks will not exist at the sites; and, second, they want to know that the problem has been taken care of once and for all, to the greatest extent certainly possible and as fast as possible.

We should be guided by these concerns rather than moving toward making it easier to delay cleanups and pass our problems on to future generations.

And, last, Mr. Chairman, I would like to comment on the importance of finding a solution to the municipal waste problem. I specifically want to thank the chairman for holding a hearing on this particular issue and for his strong interest in its resolution. This is certainly one problem that must be resolved once and for all so that municipalities, which are now spending large amounts of money in litigation, can begin directing those resources to more productive purposes.

So I thank the Chair again. I know this is just the beginning of the process, and I certainly pledge myself to help in any way that I possibly can to move forward with responsible reforms of the Superfund program. I thank the Chair.

Mr. SWIFT. I thank the gentleman and recognize the gentlelady from Arkansas for an opening statement.

Ms. LAMBERT. Thank you, Mr. Chairman.

I, too, would like to thank the chairman for his diligence and his hard work on this issue and other issues that we have taken up in the subcommittee and for especially holding the hearing today.

I feel like we are all quite frustrated and anxious with the slow progress that we have made so far; and I, like many others, fear that we are running out of time. We in Congress have certainly attempted to work with the administration and others to draft comprehensive legislation solutions. All of the interested parties have come to the table willing to negotiate—industry, the environmentalists, municipalities, small businesses, insurance companies. Yet we have been unable to address the concerns and to reach a consensus.

I would like to state today that I hope the administration is fully committed to come to the table, to help us come to a consensus, to come up with a bill that we can all move forward on. Certainly, without the administration's support, any bill would be dead in the water.

It seems to me that we will all stand to lose if we lose this unique opportunity that we have right now to push a bill forward. We have a very capable and hard-working chairman willing to move forward. We have all of the parties willing to negotiate. We have the impetus to go ahead because of the impending expiration of the Act's authorization and taxing authority. And all we need is the commitment from the administration to pledge to stand firmly behind the bill and to throw its support behind comprehensive reform of the Superfund program.

I don't think any of us truly realizes the mess we will all be in if we don't dedicate ourselves to the Superfund reauthorization. The authorization will expire and will thwart EPA's ability to contract, thus completely shutting down the Superfund program. I don't think that this is something that any of us want.

We have heard the cries from industry, communities and environmentalists alike that the current system does not work. Superfund is not achieving what it originally set out to do, which is to clean up our Nation's worst contaminated sites. No one is truly benefiting from this program but the lawyers in litigation suits. Right now, anything is better than the status quo.

We must move forward together. What I ask from the administration and others alike is to work with us, the subcommittee and

this Congress, to focus on what we have in front of us. There is very little time left to work on this bill, but there is still hope if we have the pledge and full commitment from the administration and others to work it out.

We are very interested in the honest opinion today of the administration and others concerning the support for this bill and whether the commitment is there from other administrative agencies, Treasury, OMB and the economic advisors as to what we can accomplish.

I look forward to examining the details of the administration's proposal today, and I thank you very much for your willingness to be here today to work with us.

Thank you, Mr. Chairman.

Mr. SWIFT. I thank the gentlelady.

I recognize the gentleman from Idaho for an opening statement.

Mr. CRAPO. Thank you, Mr. Chairman.

The points that I wanted to see made have already been made very well by the others who have made opening statements, and so I will waive my opening statement at this time.

Mr. SWIFT. I thank the gentleman and recognize the gentleman from New York.

Mr. PAXON. I will just say ditto, Mr. Chairman.

Mr. SWIFT. Thank you very much.

Mr. SWIFT. With that, I want to commend our first witness for his patience and also for the enormous amount of work he has already put into this on the other side of the Capitol and recognize Frank Lautenberg, a Senator from New Jersey and chairman of the subcommittee that will be dealing with this, for whatever statement you would like to provide to the committee.

STATEMENT OF HON. FRANK R. LAUTENBERG, A U.S. SENATOR FROM THE STATE OF NEW JERSEY

Senator LAUTENBERG. I thank you very much, Mr. Chairman, members of the subcommittee. I am pleased to have the opportunity to be among the first to testify in relation to the proposal that we have for the reform of Superfund.

Mr. Chairman, I couldn't agree with you more about the need to enlist bipartisan support to move this legislation. It obviously is going to involve discussion, negotiation and encouragement by all parties who want to see Superfund working more efficiently at less cost. Senator Baucus and I were able on our side to get the senators involved, Senator Chafee, who is the Ranking Member of the Environment Committee, and Senator Durenberger from Minnesota, who is the Ranking Member of the subcommittee which I Chair, to join us in a letter to the President asking him to look urgently at the Keystone proposal.

So we thought that was a significant first step. And, while we don't have their endorsement at this point, certainly we are committed to working together, and I think the spirit has been very positive.

As chairman of the Senate Superfund subcommittee—and I listened with interest to all of our colleagues talking about the State of Colorado, a State I am very familiar with—I have a son living there. And I travel there and hike and climb there. And when I see

that wonderful expanse that you have, and I look at my State of New Jersey, the most densely populated State in the country with, unfortunately, the largest number of Superfund sites in the Nation, I believe that this legislation is an important step toward providing comprehensive relief to the communities, businesses, environmentalists, State and local governments who are affected by the program and whose recommendations are reflected in this bill.

And, as you know, Mr. Chairman, the Environmental Protection Agency has so far discovered over 1,300 Superfund sites around the Nation. But the belief is that there are significantly larger numbers in existence. Seventy-three million Americans live within 4 miles of these sites, and numerous studies have shown that people living near these sites suffer significantly higher risks of cancer, birth defects and other serious health problems.

In my own State, which relies heavily on groundwater, it is imperative that we reform the program and continue moving forward with the cleanup.

The Superfund law was supposed to provide that relief, but due to a combination of factors of which we are all, unfortunately, too familiar, the law has clearly fallen short of its promise.

In its first few years, EPA administrator Anne Gorsuch resigned and the head of the EPA Superfund program, Rita Lavelle, went to jail because of charges that the Reagan administration was trying to gut the program. To put it mildly, it was hardly an auspicious beginning.

In 1986, Congress extended the law with numerous improvements but only over administration objections, which stalled action until the program's authority lapsed and cleanups were forced to a standstill.

When I assumed the chairmanship of the Senate Superfund subcommittee in 1987, I held the first of 23 oversight hearings, revealing major problems in the implementation of the program. During that time, I also commissioned numerous GAO and EPA Inspector General investigations based on complaints from communities and businesses about the way the program was being run.

In 1989, Senator Durenberger and I issued a major report which included recommendations for reforms in the program. Our work fell on deaf ears in the Reagan and Bush administrations, and it is only since last year that the White House and EPA have shown a willingness and an interest in reforming the program.

Hearings in my subcommittee and similar hearings held by you, Mr. Chairman, have shown both accomplishments and problems with the Superfund program. With the new administration, we have already seen improvements in the way EPA is implementing the program. Administrator Browner has been an excellent administrator, and she has devoted substantial resources to strengthening enforcement and management of the program and early committed this administration to bringing affected parties together to fix Superfund in a manner that is fair and will channel more resources to cleanups and less to litigation.

This has already made a major difference. Without the Clinton administration's commitment to reform and better management, which was missing in previous years, we would not be sitting here today. And I salute the President and the Vice President and the

staff they have assigned to this effort: Carol Browner, Bob Sussman, Elliott Laws, Kathleen McGinty and others for their commitment to joining us and working together so hard at bringing all of the parties to the table.

I also want to commend the outstanding contribution of Jonathan Lash and the Keystone Superfund Commission.

When I began Superfund reauthorization hearings last year in the Senate, I announced four principles that would guide me and which continue to guide me as we revamp the law. The principles are simple: To speed the cleanups; to make the law fairer, particularly for municipalities and small businesses; to spend more money on cleanups and less on lawyers and litigation; and to eliminate, as much as possible, waste, fraud and abuse from the program.

The legislation that we are introducing today represents a giant step forward toward accomplishing those four goals.

As this inevitably controversial measure moves forward, we should all remember what this is all about. This isn't about arguing fine points of law. This measure is about the health of our people, about what happens when people contract cancer and when there are birth defects and miscarriages and all of the financial and emotional trauma of being continually exposed to the chemicals that are causing these problems. I know that you share my desire, Mr. Chairman, to reform the system and to allow our citizens to get on with their lives.

I urge our colleagues on both sides of the aisle and the environmental and business community to build on the consensus that has been developed so far and to enact a new Superfund law by the end of this year. And if we fail to do so and permit gridlock to reign again, the program will suffer the same disruptions and the loss of momentum that was the occasion during the last round of Superfund deliberations.

Mr. Chairman, I thank you again. You have been indispensable to the progress that we have made to date, and I am honored to kick off your hearing.

Mr. SWIFT. Thank you very much, Senator. I would note that we have already been working very, very closely, both personally and at a staff level, to move ahead.

I would like to complete any questions we have for the Senator prior to going and doing the journal vote. So at this point I would recognize anyone who would—the gentleman from Ohio.

Mr. OXLEY. Thank you, Mr. Chairman.

Senator, would you concede that, even though part of the problem was with enforcement, that part of the problem really is with the statute itself?

Senator LAUTENBERG. Mr. Oxley, in all due respect, obviously, this reform is not simply pointed at enforcement. There are problems because of the complicated nature of things, because of the early experience.

You know it took us some significant time to understand how this program would work. In our first—the first iteration of Superfund, I wasn't in the Congress at that time, I was in business. And we allocated a billion or a billion and a half—a billion, $600 million—to the 5-year cleanup program. In the second round with a lot of debate, a lot of discussion, we went to $8.5 billion.

Since Superfund's origination, over $8 billion has been recovered from responsible parties, and there has been progress.

I take the time to visit some of these sites, and you begin to see knowledge and experience really building toward an accelerated pace of getting the cleanups under way. So there are problems in the statute and we are trying to fix that, and problems in enforcement, and we are going to try to fix it all.

I look forward to working with you.

Mr. OXLEY. Well, you know, the President has mentioned it twice in the State of the Union. This has not been something that all of a sudden somebody just realized was a problem. It has been a problem for a long time.

You have been chairman of that committee for quite some time. The problems were obvious and I think all of us share a certain degree of responsibility for that. Hopefully, now we can start to operate and to change things that were badly flawed.

I think all of us would agree that the pendulum has swung far too greatly in one direction and, as a matter of fact, has caused a major dysfunction in the Superfund program.

Senator LAUTENBERG. You are right, sir, that I have been chairman for a number of years, but I was chairman during a period of time when there was less than enthusiastic support from the presiding administrations, and we had a devil of a time persuading the EPA management to get on with the task.

And I must say that I am grateful to the President for having brought Superfund's need for reform to our attention, for lending his support, for committing the administration, for soliciting views from so many different parties and for arriving at some form of consensus from business and environmentalists and community activists.

The fact is that there is an open invitation, and I think that the President is trying very hard to enlist support from both parties to get on with it.

Mr. OXLEY. Thank you, Mr. Chairman.

Mr. SWIFT. Thank you very much, Senator.

The subcommittee will stand in recess very briefly so that we can do the journal vote and come right back and get on with our second panel.

[Brief recess.]

Mr. SWIFT. The subcommittee will come to order.

Mr. Oxley indicated that he was going to drop in on another committee that is doing some important work and will be joining us again very shortly.

I am extraordinarily pleased to welcome to the table the Administrator of the Environmental Protection Agency, Carol Browner. She is accompanied by Steve Thorne, and she will introduce him when she has completed her direct testimony. We will reserve questions until both have presented their testimony to the committee.

And, incidentally, I am going to ask unanimous consent that the statements of all of our witnesses today be submitted to the record in full. Without objection, so ordered.

STATEMENTS OF CAROL M. BROWNER, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY; AND STEVEN THORNE, ON BEHALF OF THE NATIONAL ADVISORY COUNCIL ON ENVIRONMENTAL POLICY AND TECHNOLOGY

Ms. BROWNER. Thank you, Mr. Chairman. And I want to begin by recognizing your leadership on this and many other important environmental issues and your willingness to work with us over the last year as we moved forward to craft solutions and recommendations to the Congress.

I also want to assure all of the members of this committee of our strong desire to work in a bipartisan manner as we move forward. As the chairman said earlier today, and as Senator Lautenberg has said, these changes will not occur unless there is bipartisan cooperation, and you have my personal commitment that we will work in a bipartisan manner.

Mr. Chairman, I think that we would all agree with your statements and the statements made by many of the others here today that this will not be easy. But I think we all also believe that it is absolutely essential, that it is time to fix Superfund.

We appreciate the opportunity to appear before you today and to testify about the Clinton administration's Superfund reform proposal. The Environmental Protection Agency has worked very hard for almost a year now to reach this point, and I am proud of the work of my colleagues, both at the Environmental Protection Agency, within the White House and across the administration, and their efforts to develop this proposal.

I also want to thank you, Mr. Chairman, your staff and the staff of the subcommittee for working with us over the last several months to bring this package of legislative reforms to fruition.

We come before you today, Mr. Chairman, with a package that fundamentally will change the way Superfund works. The package is the result of unprecedented outreach to, and involvement of, a broad range of groups interested in Superfund, including industry, environmentalists, community groups, environmental justice advocates, State and local governments and the insurance industry. The package that the administration submits to you today has strong support among these groups, and I look forward to working with you all in a bipartisan manner to see it enacted.

Mr. Chairman, when I appeared before you last May, I set out a plan for reforming Superfund. While I made it clear at that time that legislative changes would be needed to reform the program, I also said that at EPA we would work to implement a series of administrative reforms. Those reforms are currently being implemented.

But, at the same time, we initiated an effort to gather and consolidate the data needed to make educated decisions about possible changes in Superfund, and that exercise is now complete.

We convened a group of Superfund stakeholders, people who work with the Superfund program on a regular basis. They came to the table with a broad range of backgrounds, people who had traditionally been adversaries in this process, and they were able to develop a series of proposals, of changes needed to make the Superfund law more fair and efficient.

The group, under the auspices of the National Advisory Council on Environmental Policy and Technology (NACEPT), was chaired by John Sawhill of the Nature Conservancy. They worked throughout the summer and early fall to develop a package of consensus recommendations, which were presented in early October. These consensus recommendations formed the cornerstone of the administration's package, and I want to personally thank all of the people who were involved in that process. It was a substantial commitment of time and energy.

At the same time that the NACEPT process was moving forward, another group was working under the auspices of the Keystone Center and the Vermont Law School to develop a consensus proposal for Superfund. This group, called the National Commission on Superfund, was chaired by Jonathan Lash. It also involved people with real experience in how Superfund has worked and in many instances failed to work. Their report came to conclusions that were very similar to the conclusions reached by the NACEPT group.

These two proposals outlined a comprehensive, detailed approach to Superfund reform. The administration has benefited greatly from the input of both of these groups, and it is our hope that, because of these efforts, we have increased significantly the prospects for passing Superfund reform legislation in this Congress.

Mr. Chairman, as you know, Superfund was enacted in 1980 in response to public outcry over Love Canal in New York and the Valley of the Drums in Kentucky. The original expectation of the universe of sites needing cleanup was a few hundred and that the program would require only relatively modest resources.

Since 1980, the expectations for Superfund have increased dramatically. More than 1,300 sites are now on the National Priorities List for Superfund cleanup. It is estimated that a total of 3,000 eventually will require Federal cleanup. Approximately one of every four Americans live within a few miles of an active Superfund site.

To date, Superfund has completed long-term cleanups at more than 220 contaminated sites, and more than 1,000 sites are in various stages of cleanup. Thirty-five hundred emergency removal actions have been taken. As a result of Superfund enforcement actions, responsible parties now are performing 70 percent of all cleanups, and they have committed $7.4 billion for cleanups.

But despite these accomplishments, Superfund's weaknesses are recognized by virtually all stakeholders, and they threaten to undermine the efficacy of the statute.

Let me briefly detail what I think are the six categories of criticisms of the Superfund program:

Number one, inconsistent and inadequate cleanups. The current law does not specify a standard level of cleanup nationwide. Instead, it relies on a complex cleanup framework under which applicable and relevant and appropriate State and Federal standards are used to set cleanup levels. The result: Cleanup goals, remedies and costs differ site-by-site across the country. There is uncertainty, protracted site-by-site evaluation, debate over cleanup goals and higher cleanup costs.

The second problem, high transaction costs. I think everyone agrees that the Superfund cleanups generate high transaction costs in private party contribution litigation. What do we mean by that? Responsible parties suing other responsible parties over how much they each owe. Then there is the follow-up litigation between the responsible parties and their insurance carriers.

While these transaction costs that we all talk about have generally not been incurred in litigation with the United States or at the expense of the trust fund, they do have an adverse social impact, and they are particularly burdensome to small business. A 1993 Rand Corporation study estimates that transaction costs represent approximately 19 to 27 percent of total costs per cleanup.

The third problem, an unfair liability scheme. The Superfund liability scheme is often criticized as unfair and economically inefficient. Superfund liability is strict, and, when the harm is indivisible, joint. When parties are jointly and severally liable, response costs are using traditional common law principles of fairness. This means that solvent parties can be compelled to pay the costs attributable to unknown or insolvent liable parties. This scheme has resulted in responsible parties, large and small, being forced in some circumstances to pay more than their fair share of cleanup costs.

The fourth problem, overlapping Federal and State relationships. Under the current law, the Federal Government has primary responsibility for implementing the Superfund program. Yet State standards apply to all cleanups, and States must pay a share of cleanup costs at non-Federal facility sites. In addition, States have significant input in selecting and carrying out cleanups.

What is happening is there are a lot of people—a lot of government people at each site. It is causing confusion.

The fifth problem, inadequate community involvement. Many communities near Superfund sites, including low-income, minority, and Native American communities, are not provided with an opportunity to participate fully in the Superfund process. These and other communities believe that the program does not address local circumstances adequately when evaluating risk or determining the method and level of cleanup.

The sixth and final category of complaints, impediments to economic redevelopment. Current law extends liability to both past and prospective owners of contaminated sites. As a result, the market value of older industrial sites can be depressed because the specter of Superfund liability diminishes the attractiveness of investing in industrial sites. Many claim that prospective owners who want to develop property have an economic incentive to use undeveloped or green field sites to avoid potential Superfund liability, thereby contributing to suburban sprawl and exasperating chronic unemployment often found in inner city and industrial areas.

Mr. Chairman, this administration is committed to new Superfund legislation that protects human health and the environment more efficiently and more fairly than does the current law. To achieve these goals, the administration has been guided by four objectives:

First, reduce the time and cost needed to clean up sites; second, make the liability scheme more fair and efficient; third, involve communities that live near sites in Superfund decisions; and,

fourth, remove impediments to economic redevelopment of contaminated properties.

These objectives are the fundamental building blocks of a successful reauthorization proposal, and the Clinton administration proposal, we believe, achieves these goals.

The administration proposal will shorten the time required to conduct cleanups and will make cleanups less expensive by establishing national cleanup standards and generic remedies, eliminating duplication of State and Federal activities and streamlining the remedy selection process. Transaction costs will be reduced, and greater fairness achieved by instituting a cost-share allocation process and by offering more opportunities for mixed funding whereby EPA funds some portion of the orphan share.

By exempting the tiny, tiny parties, the *de micromis* parties, by expediting settlements for the *de minimis* parties, we will get them out of the system. The small businesses will get out more quickly and those parties with an inability to pay for cleanup cost. By providing settlers with greater finality, and capping the liability of generators and transporting of municipal solid waste, we believe our proposal achieves greater fairness and reduces transaction costs.

Providing responsible parties with a mechanism for settling coverage disputes with their insurers through the insurance settlement fund holds the potential for significantly reducing the number of disputes that end up in court and also thereby reducing transaction costs for insurers and responsible parties.

The administration proposal encourages beneficial reuse of contaminated properties by removing disincentives for property transfers and cleanups and by facilitating voluntary cleanups. It will lead to a more positive relationship between the Federal Government and the States, and it will increase the use of State resources by providing Superfund resources to qualified States and authorizing those States to conduct cleanups of sites of Federal concern. Right now, that is not available. This is a major change for the States.

In addition, it will accomplish more cleanups by more effectively leveraging the combined resources of EPA, other Federal agencies, States, local governments and private parties.

Our proposal also addresses the concerns of disadvantaged communities by building environmental justice criteria into the process for elevating sites—for evaluating sites to be placed on the National Priorities List and by making conscious efforts to address contamination that does not pose a substantial enough risk to warrant direct Federal involvement but does discourage economic redevelopment and contributes to the environmental risks faced by many communities.

The administration proposal provides a strong role for the local community in future land use determinations and remedy selection decisions, thereby making those communities more effective participants in the system.

Again, Mr. Chairman, I want to thank you for your leadership on this issue. We look forward to working with you and all of the members of this subcommittee to see the Superfund program fixed, and to see a program that is responsive to the communities across this country who have waited far too many years to see their local sites cleaned up.

[Testimony resumes on p. 210.]

[The prepared statement of Ms. Browner follows:]

STATEMENT OF
CAROL M. BROWNER
ADMINISTRATOR
U.S. ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE
SUBCOMMITTEE ON TRANSPORTATION AND HAZARDOUS MATERIALS
OF THE COMMITTEE ON ENERGY AND COMMERCE
U.S. HOUSE OF REPRESENTATIVES

FEBRUARY 3, 1994

Introduction

Mr. Chairman and members of the Subcommittee: Thank you for inviting me to come before you today to testify about the Clinton Administration's Superfund reform proposal. The Environmental Protection Agency and numerous other departments and agencies have worked hard for the last nine months to reach this day. I am very proud of my staff and the teamwork shown within the Administration that enabled us to develop this proposal. I also wish to thank you, Mr. Chairman, and the members and staff of the Subcommittee for working with us over the last several months to help bring this package of legislative reforms to fruition. I come before you today with a legislative package that fundamentally will change the way Superfund works. This package is the result of unprecedented outreach to and involvement of a broad range of groups interested in Superfund, including industry, environmentalists, community groups, environmental justice advocates, state and local governments, and the insurance industry. The package the Administration submits to you today has strong support among these groups, and I look forward to working with you over the coming year to see it enacted into law.

When I appeared before this Subcommittee last May, I set out my plan for reforming

Superfund. While I made clear at the time that legislative changes would be needed to reform the program, I also committed to announcing and implementing a series of administrative reforms to the Superfund program. In June, we announced a list of major improvements to push the program to achieve as much fairness and efficiency as is possible under the current law. These reforms currently are being implemented. We also initiated an effort to gather and consolidate the data needed to make educated decisions about possible changes in Superfund. That effort is now complete.

Most importantly, I convened a group of Superfund stakeholders from a broad range of backgrounds to advise me on legislative changes needed to make Superfund more fair and efficient. This group, under the auspices of the National Advisory Council on Environmental Policy and Technology and chaired by John Sawhill of the Nature Conservancy, worked throughout the summer and early fall to develop a package of consensus recommendations, which were presented to me in early October. These consensus recommendations formed the cornerstone of the Administration's package, and I wish to thank all the people who participated in the NACEPT process for giving substantial time and effort to make it work.

While the NACEPT process was moving forward, an outside group working under the auspices of the Keystone Center and the Vermont Law School also was working hard to develop a consensus proposal for Superfund reform. This group, called the National Commission on Superfund and chaired by Jonathan Lash of Vermont Law School, presented its conclusions in a report issued last month. This report came to conclusions that were very similar to the NACEPT group's recommendations.

These two proposals outline a comprehensive detailed approach to Superfund reform. The Administration has benefitted greatly from the input of both of these groups, and I think

the prospects for passing Superfund reform legislation in this Congress are far greater because of their efforts.

The Current State of Superfund

Let me start out by briefly outlining the current state of the program and then move into the specifics of the Administration proposal.

Superfund was enacted in 1980 in response to public outcry over Love Canal in New York and the Valley of the Drums in Kentucky, which had become symbols of a widespread environmental problem that needed national attention. The uncontrolled dumping of hazardous wastes in some cases was posing serious risks to human health and safety and threatening valuable natural resources such as groundwater aquifers.

The original expectation was that the universe of sites needing cleanup would be only a few hundred, and the program would require relatively modest resources and would be paid for primarily by responsible parties (original budget: $1.6 billion over five years). Cleanup was to be paid for by the parties responsible for the contamination or, if they couldn't be found, by a trust fund generated through business taxes, particularly on the chemical and petroleum industries.

Since 1980, the expectations for Superfund have increased dramatically. Approximately 1300 sites are on the National Priorities List for Superfund cleanup. It is estimated that a total of 3,000 eventually will be a federal cleanup priority. Approximately one of every four Americans lives within a few miles of an active Superfund site.

Superfund has had many successes during its 13 year tenure. To date, Superfund has

completed long-term cleanups at more than 220 contaminated sites, and another 1100 sites are in various stages of completion. Additionally, in more than 3500 actions at 2700 different sites across the country, Superfund has led to the emergency removal of hazardous substances that were posing immediate health and safety risks to neighboring communities.

Superfund was structured on the principle that polluters should pay for cleanup. As a result of Superfund enforcement actions, responsible private parties now are performing 70 percent of all cleanups, and they have committed $8.3 billion to reduce threats to public health and the environment, clean up groundwater, and restore sites to productive use. In addition, through Superfund over 1600 public health assessments have been completed at hazardous waste sites, and significant advances have been made in basic and applied research related to hazardous substances. Superfund also has spurred advances in cleanup technology. In cooperation with industry and other Federal agencies, EPA has identified more than 150 innovative technologies now being used to treat contaminated soil, groundwater, sludge, and sediments.

Despite these accomplishments, Superfund's weaknesses are recognized by virtually all stakeholders, and they threaten to undermine the efficacy of the statute. Criticisms of Superfund fall into six broad categories:

1. Inconsistent cleanups: The law currently does not specify a standard level of cleanup nationwide; instead, it establishes a complex cleanup framework under which applicable and relevant and appropriate state and federal standards are used to set cleanup levels. Consequently, cleanup goals, remedies, and costs differ site-by-site

across the country. This inconsistency contributes to uncertainty, protracted site-by-site evaluation, debate over cleanup goals, and higher cleanup costs.

2. High transaction costs: Most of the private sector costs not directly associated with cleanup activities are considered "transaction costs." While transaction costs for the government have been relatively low, there is wide-spread agreement that Superfund cleanups generate high transaction costs in private party contribution litigation and in follow-up litigation between those parties and insurance carriers. While high transaction costs generally have not been incurred in litigation with the United States or at the expense of cleanup actions, they do have an adverse social impact. These costs are particularly burdensome to small businesses.

3. Perceived unfairness in the liability scheme: Given the nature of the waste and the information available at most hazardous waste sites, the harm is often "indivisible." Principles of joint and several liability have been essential to reaching the current levels of cleanup work and cost recovery from private parties at sites involving these "toxic soups." However, the liability scheme has often been criticized as being unfair and economically inefficient. The retroactive component of the liability scheme has been criticized for penalizing private parties for actions they took that may have been legal at the time and for encouraging litigation between private parties and their insurers. With regard to joint and several liability, the parties who initially bear the cost of cleanup complain that they are forced under the current scheme to bring additional litigation against other parties. The process in which costs are then allocated among multiple parties, either by courts or in settlement

negotiations, has led to endless, and enormously expensive, disputes. This results in needless litigation and tremendous uncertainty among responsible parties, large and small, about how much of the response costs they will have to bear.

4. Overlapping federal/state relationship: The federal government has primary responsibility for implementing the Superfund program, and it has exclusive access to the money in the Superfund. States, however, play a significant role in the program's implementation. Certain state standards apply to all cleanups, and states must pay a share of cleanup costs at non-federal facility sites. In addition, states have significant input in selecting and carrying out cleanups. Due to this overlapping authority and responsibility, federal and state governments often disagree over the degree to which sites should be cleaned up, the remedy to be used, and the allocation of costs. These disagreements contribute to the cost and duration of cleanups, and they result in substantial confusion among all stakeholders.

5. Inadequate community involvement: Many communities near Superfund sites, including low income, minority, and Native American communities, are not provided with the opportunity to participate fully in the Superfund process. These and other communities believe the program does not address local circumstances adequately when evaluating risk or determining the method and level of cleanup. Consequently, communities may conclude that the resulting cleanup is overly conservative or insufficiently protective.

6. Impediments to economic redevelopment: Current law extends liability to both past and prospective owners of contaminated sites. As a result, the market value of older

industrial sites can be depressed, because the specter of Superfund liability diminishes the attractiveness of investing in industrial areas. Many claim that prospective owners who want to develop property have an economic incentive to use undeveloped, or "greenfield", sites to avoid potential Superfund liability, thereby contributing to suburban sprawl and exacerbating chronic unemployment often found in inner-city industrial areas.

A Vision of the New Superfund

The Clinton Administration is committed to new Superfund legislation that protects human health and the environment more efficiently and more fairly than does the current law. To achieve this goal, the Administration has been guided by four objectives: 1) reduce the time and costs needed to clean up sites; 2) make the liability scheme more fair and efficient; 3) greater involvement of communities that live near sites in Superfund decisions; and 4) remove impediments to economic redevelopment of contaminated properties. These objectives are the fundamental building blocks of a successful reauthorization proposal, and the Clinton Administration proposal achieves these goals.

The Administration proposal will shorten the time required to conduct cleanups and will make cleanups less expensive by establishing national cleanup levels and generic remedies, eliminating duplication of state and federal activities, and streamlining the remedy selection process. Transaction costs will be reduced and greater fairness achieved by instituting an allocation process and by offering more opportunities for mixed funding whereby EPA funds some portion of the orphan share. Joint and several liability will be

retained for those parties who do not accept their allocation and settle with the government. By exempting "de micromis" parties (truly tiny contributors), expediting settlements for "de minimis" parties (those whose contribution is small relative to other parties) and certain parties with an inability to pay for cleanup costs (such as bankrupt parties and small businesses), providing settlers with greater finality, and capping the liability of generators and transporters of municipal solid waste, the Administration proposal achieves greater fairness and reduces transaction costs. The Environmental Insurance Resolution Fund, an idea developed by insurers and potentially responsible parties (PRPs) will provide responsible parties with a mechanism for resolving coverage disputes with their insurers through the insurance resolution fund holds the potential for significantly reducing the number of disputes that end up in court, thereby reducing transaction costs for insurers and responsible parties.

The Administration proposal encourages beneficial reuse of contaminated properties by removing disincentives for property transfers and cleanups and by facilitating voluntary cleanups. It will lead to a more positive relationship between the federal government and the states, and it will increase the use of state resources by providing Superfund resources to qualified states and authorizing those states to conduct cleanups of sites of federal concern. In addition, it will accomplish more cleanups by more effectively leveraging the combined resources of EPA, other federal agencies, states, local governments, and private parties.

The Administration proposal addresses the concerns of disadvantaged communities by building environmental justice criteria into the process for evaluating sites to be placed on the National Priorities List and by authorizing EPA to undertake a series of environmental justice demonstration projects. The Administration proposal provides a strong role for the local

community in future land use determinations and remedy selection decisions, thereby making those communities more effective participants in the system.

Though provisions concerning improvements to the natural resource damage assessment process are not included in this bill, the Administration is committed to such improvements. The Administration is in the process of evaluating and developing recommendations on these issues and will be providing them at the appropriate time.

I would now like to go into a little more detail on each of the provisions of the proposal, and then I would gladly yield to questions. The detailed priorities of the Administration proposal are as follows:

1. Speeding Cleanups, Cutting Costs

The heart of Superfund reform has to be speeding the pace and lowering the cost of cleanup. Whether one talks to responsible parties, community groups, environmentalists, or other interested parties, all agree that the process for studying sites and evaluating, selecting and implementing remedies simply takes too long and costs too much today. Before we can improve this process, we must decide once and for all: how clean is clean?

The Administration's proposal is premised on the principle that all communities are entitled to receive the same protection from potential health hazards associated with Superfund sites. The proposal will reduce cleanup costs by setting national goals for the protection of health and the environment and setting national cleanup levels consistent with these goals to be used at individual sites. EPA would set clear national cleanup levels for those contaminants found most commonly at sites. These standards would save significant

time and money currently spent on site-specific studies. Some site-specific evaluation still will be necessary at every site and this evaluation could lead to a modified standard at a particular site. However, the cleanup levels would allow EPA to standardize much of the process that currently must be done over and over at each site.

Site-specific risk assessment will continue to be used in certain circumstances where either national cleanup levels have not been promulgated or where they do not apply to a particular site. EPA will be promulgating a national risk protocol for conducting risk assessments based on realistic assumptions.

The proposal also would provide a menu of cost effective generic remedies that could be used at certain types of sites without lengthy study. This menu of generic remedies has evolved out of EPA's thirteen years of experience running the Superfund program. At certain types of sites, we can be relatively certain of the type of remedy most effective for cleaning up the particular contaminants and media involved. We therefore can avoid "reinventing the wheel" and save time and money.

At the site-specific level, EPA would base cleanup decisions on future land use. A community working group that is representative of the affected community would recommend to EPA a post-cleanup use for the site and develop a site reuse plan. In order to make the most efficient use of our limited resources, consultation with the community about future land use is essential. Where a property is located in an industrial area and the community determines that a factory should be sited on the property after cleanup, there is no reason to clean the site to residential levels. We must work with communities to design cleanups that meet their needs and their reasonably anticipated future uses for sites.

The requirement for cleanups to meet all relevant and appropriate requirements would

be eliminated. Applicable state and federal requirements would be retained. Relevant and appropriate requirements have proven to be a source of delay and expense in selecting remedies. They also have proven to be a significant cause of inconsistency in cleanup levels around the country. The national cleanup levels would provide much more consistency and ensure that cleanup standards are risk-based.

The statutory preference for permanence and treatment would be eliminated and replaced by the concept of long-term reliability and a preference for treatment of hot spots. Long-term reliability would provide EPA with an impetus to select durable remedies, but it would not restrict the Agency from considering other factors such as community acceptance of the remedy, the reasonableness of its cost, and the availability of other treatment technologies. The preference for treatment of hot spots will ensure that the most contaminated areas at sites and other areas where contamination cannot be readily contained will receive treatment.

In making its final remedy selection decision at a site, EPA would weigh the costs of each alternative cleanup method. Where EPA determines that current cleanup technologies are not practicable for a particular waste, EPA could defer final cleanup while new cleanup technologies are being developed, provided the site has been stabilized and protection of public health has been ensured by addressing immediate risks.

2. Reducing Transaction Costs and Increasing Fairness

The Administration proposal represents a strong commitment to greatly reducing transaction costs. The proposal provides special accommodation for small businesses and contributors of small amounts of waste. It will maintain the current level of cleanups managed by PRPs, and it addresses the on-going litigation between insurers and policy

holders with cleanup responsibilities. It achieves all these goals without introducing new litigation issues or expensive administrative adjudication procedures.

Generators and transporters of negligible amounts of waste ("de micromis" parties), including many small businesses, would be exempt from liability. Generators and transporters of small amounts of waste ("de minimis" parties), and parties unable to pay their full responsibility for Superfund cleanups, would be provided an early opportunity to settle their liability with a full release from the government and protection against suits by third parties. These provisions include an expedited settlement process for small businesses and other parties who are financially unable to bear their full share of liability. In addition, generators and transporters of municipal solid waste would have the opportunity to settle with the government before the allocation process commences. The liability of these parties would be capped at 10 percent of costs at the site. Owners and operators of municipal solid waste landfills would be able to settle early as well, and the amount of their payment would be subject to an ability-to-pay analysis crafted specifically to consider the special liabilities of municipal governments.

At every multi-party site where the EPA has taken action, an allocations process would be conducted by a neutral professional with Superfund expertise to recommend a share of responsibility for each identified PRP. Let me emphasize here that the Administration proposal relies on an informal process to perform these allocations. The Administration does not want to see the allocations process turn into an overly bureaucratic, "big government" solution. Specifically, we believe an informal process managed by experienced allocators is preferable to the establishment of a formalistic, legalistic system based on federal administrative law judges.

Potentially responsible parties would be provided an opportunity to settle their liability to the United States based on the recommended allocation and obtain protection against future liability. Such parties also would have the opportunity to pay a premium and receive a settlement from the United States absolving them of future liability. To ensure that neither the allocation process, nor litigation against recalcitrants, will slow the pace of cleanup, EPA will still retain its authority to issue cleanup orders in all cases. To facilitate settlements, Superfund resources would be used to cover all the recommended shares attributable to clearly liable parties that can be identified but are no longer in business or able to pay their share. The agreement of the government to pay a large portion of the orphan share demonstrates this Administration's commitment to reducing litigation and increasing the fairness in this program.

In order to greatly reduce ongoing private litigation, the United States would pursue non-settling parties to require site response activities, compel the payment of allocated shares, and recover expended funds. Such actions would be premised on joint and several liability for the non-settlers, and they could result in the recovery of some or all of the orphan share if the United States prevails. The retention of joint and several liability is essential to the new liability scheme to ensure that responsible parties resolve their liability through the allocation and settlement process rather than through litigation. Again, the agreement of the government to take on the responsibility of pursuing non-settling parties represents a commitment to reducing transaction costs and litigation for private parties. Pursuing non-settlers will be difficult and costly in some cases, but it provides settling parties with the certainty that they can settle with the government for their share and not concern themselves with going after other parties for contribution or being sued by other parties.

A new Environmental Insurance Resolution Fund (EIRF) would be established with the objectives of ensuring resolution of insurance claims related to Superfund liability for pre-1986 disposal of waste, and ensuring interstate equity in such resolutions. The litigation over these claims is currently a major source of litigation related to Superfund -- costing approximately $ 300 million per year. Based on recommendations from the insurance industry, the EIRF would be financed by fees and assessments on the insurance industry. The EIRF will be structured to ensure that neither the Superfund nor general revenues may be used in the claim resolution process.

3. Expanding State Authority

The Administration proposal would enhance the state role in Superfund and limit the overlap between the federal and state governments at specific sites by establishing the principle that only one governmental entity would have responsibility for each site. States would be offered the opportunity to assume responsibility and authority for the cleanup of specific sites within their boundaries. States could elect to take on cleanup responsibilities for all sites, a few sites, or no sites, depending upon their interest and the capabilities of their program. EPA would work with the states to help them develop the capacity to take on more responsibility under the program. To obtain a larger role, a state would be required to have in place a cleanup program substantially consistent with the federal program. States would be provided federal cleanup funds under certain conditions, but they would have to pay a percentage of the costs at these sites. While states could require cleanups to meet more stringent standards, they would have to pay the incremental costs entailed in seeking cleanups in excess of these standards.

4. Involving Communities

The Administration proposal is based on the principle that communities must be involved in the cleanup process from the time a site is discovered to the time it is finally cleaned up. Superfund, after all, is first and foremost a local program. The Administration proposal sets out several innovative mechanisms for getting communities involved in the cleanup process.

Community workgroups would be established as advisory bodies at Superfund sites. These advisory groups would reflect the racial, ethnic, and economic makeup of the community, and they would include all community elements affected by the cleanup. The advice and preferences of these groups would be solicited at every stage of the cleanup process. The role of the community would be especially important in defining future uses of restored sites, which will be an important criterion for determining cleanup levels and technologies.

EPA would help set up and fund community information and access offices in each state. These offices would serve as information clearinghouses for all the sites in a state. I believe these offices will provide community groups with the information and assistance they need to be full players in the cleanup process.

The Administration proposal also would greatly simplify the process for applying for technical assistance grants to ensure that this important source of funding is more widely available to community groups who need financial assistance. Communities suffering disproportionate risks would be eligible for environmental justice demonstration projects, which would analyze aggregate risk, site rankings, and response activities at specific sites.

5. Encouraging Economic Redevelopment

The Administration's proposal is designed to reduce current Superfund-related obstacles to the redevelopment of contaminated sites. Economic redevelopment and community involvement are two of my personal priorities in this package. The flight of industry from urban brownfields to suburban and rural greenfields is often noted in the press these days. Inner cities lose jobs and industry, while previously virgin green space is converted to industrial uses or suburban sprawl. The Administration proposal addresses this issue head on.

Currently, parties can be liable under Superfund if they own a piece of contaminated property, whether or not they owned the property when the contamination occurred or contributed to the contamination. Although the current statute provides for an innocent landowner defense, this provision of the law has not functioned effectively. Superfund liability for current owners has discouraged prospective purchasers from buying contaminated property and banks from lending money for such purchases.

The Administration proposal would provide an exemption from Superfund liability for bona fide prospective purchasers of contaminated property, so long as they did not worsen the contamination at the site and agreed to either clean up the property or allow the government or responsible parties access to the site to clean it up. Lenders and trustees (such as bankruptcy and testamentary trustees) also would be given protection from liability under certain conditions to remove the current disincentive to making loans and assuming a fiduciary role with respect to potentially contaminated property.

National cleanup levels also would facilitate economic redevelopment of contaminated properties by reducing the uncertainty and costs associated with cleanup. National cleanup

levels and generic remedies would encourage parties to clean up sites independent of government supervision. As a result, cleanups would be faster, and remediated sites would be returned to economic use more quickly.

6. Encouraging Advances in Science and Technology

The Administration proposal would improve the scientific basis for evaluating risks to public health and the environment posed by hazardous waste sites through a strong technology development program. It would encourage the development, demonstration, and commercialization of innovative, efficient, and cost-effective cleanup technologies. Environmental technology development must be nurtured and encouraged if we are to make great strides in the coming years. Government must share some of the risk in this area. Under the Administration proposal, the government would share with private parties the risk of employing innovative technology to cleanup sites. Specifically, the Superfund trust fund would contribute a percentage of the costs of any additional remedial action required due to a failed innovative remedy, as opposed to placing that burden entirely on private parties.

Conclusion

In conclusion, the Clinton Administration has developed a package of Superfund reforms with the cooperation of a broad range of interested parties. We believe our proposal would make the program more efficient and fair, increase community involvement in the program, and remove the barriers to economic development that currently exist in the statute. The Administration is committed, and I personally am committed, to working with the Congress over the coming months to ensure that meaningful reform of Superfund is passed this year.

Mr. Chairman, thank you for this opportunity to address the Subcommittee. Now I will be happy to answer any questions you may have.

Ms. BROWNER. Mr. Chairman, I am pleased to have with me today the vice-chair of the National Advisory Council on Environmental Policy and Technology (NACEPT), Goddard professor of forestry and environmental resource conservation at Penn State University.

He worked with John Sawhill of the Nature Conservancy in the NACEPT process, the group we brought together from across this country made up of a very diverse group of individuals, all of whom had firsthand experience with the Superfund program. It might be appropriate if he would offer a few words.

Mr. SWIFT. I am happy to welcome you to the committee.

STATEMENT OF STEVEN THORNE

Mr. THORNE. Thank you, Mr. Chairman.

I am Steve Thorne, and I am a Goddard professor at Penn State University, as the Administrator just informed you.

Last May, I was asked to participate in the Superfund Evaluation Committee of the National Advisory Council for Environmental Policy and Technology. As the Administrator has also mentioned, this Council, which advises the Administrator of EPA, is designed to solicit views and ideas from a broad spectrum of constituencies on many different environmental issues.

The Administrator created the committee to ensure that the EPA was fully informed of the views and concerns of key stakeholder groups. She asked it to develop recommendations for improving Superfund generally and specifically to explore reforms in the areas of remedy selection, liability, municipal liability, role of the States and environmental justice and public participation. John Sawhill, as she said, was the chair, and I served as the vice-chair.

The members of the committee were indeed a diverse group. They came from industry, both large and small, academia, States, municipalities and environmental and special interest groups. We held seven meetings between the end of June and the first week of November. Committee members also organized several work groups which met separately to develop detailed recommendations for the committee in each of the five issues areas.

By the way, I should just add that when I had the first meeting of this group, if I had been a betting person and were asked to lay any kind of a bet on whether we would come up with any kind of consensus recommendations, I would have given odds that we wouldn't. It was a very difficult task. People had very divergent views, and we struggled, frankly, throughout all of the meetings to try to find common ground, and we really felt early on that we probably wouldn't. In fact, the Administrator asked us to come up with, at best, a range of options and some evaluations. I think we were able to do a little bit better than that, and I will talk about that.

We thought that we had a special opportunity because of our diversity to explore areas of potential agreement. Our committee members agreed that this would help advance the debate and ensure that any resulting proposals would be recognized as a product of this broader constituency.

For example, at a key point during the deliberations on the issue of liability, a subgroup of the committee, consisting of members

from industry and environmental groups and local governments, appeared before the interagency group responsible for developing the administration's proposal. They confirmed that the work group recommendations did reflect how they collectively viewed these issues.

I think it would be worthwhile to spend a little time describing the areas where the committee did reach agreement. This is especially important because many of the recommendations that grew out of the committee's debates did influence the administration's position and also the conclusions of the National Commission on Superfund. In fact, several of the committee members also served on the national commission.

With regard to remedy selection, the committee recommended adoption of national standards for soil and groundwater based on the use of the site or resource and other site-related factors, all of which would be determined by a negotiated rulemaking. Site-specific factors which would be easily measured could be considered where appropriate.

We recommended that, first, future land use should be a major factor in determining the remedy; second, ARAR's should be eliminated, but the role of uniformly applied State standards should be clarified in the process; third, treatment may be appropriate for the most highly contaminated hot spot materials at a site, but the practical difficulties in defining, locating and responding to hot spots needed further evaluation; fourth, the feasibility and use of a proven versus innovative technology must be addressed; and, fifth, EPA should develop demonstrated control measures sufficient to satisfy the remedial standard for types of sites with commonly encountered and well-understood characteristics.

On liability, committee members expressed a variety of views ranging from supporting the current system, through accepting the system with key changes in the allocation scheme, to arguing the liability system is fundamentally flawed.

The committee evaluated two different approaches: One—which was favored, by the way, by a significant majority of the committee—would retain major elements of the current liability scheme but would establish an allocation system to reduce transaction costs, expedite settlements and provide greater certainty for responsible parties.

A key issue in the group's acceptance of this approach hinged on the government's ability to pay for some portion of the cost of orphan shares so as not to take away fund money allocation for cleanup.

The second approach—which was rejected by a majority of the committee, I might add—called for eliminating retroactive liability for waste legally disposed of at multiparty sites prior to January 1st, 1987, and provide proportional liability after that date. It suggested paying for these changes through tax and fee increases on the business community.

The committee considered a number of options regarding municipal liability reform, but it was not able to reach a consensus on this issue. The municipal representatives maintained throughout the process a very strong support for the Lautenberg bill on this subject.

The committee did agree that the State role in implementing Superfund should be increased and proposed a dual-track approach for allowing States to manage sites. Under the first track, a State could request full authorization for managing the Superfund program in its State. The State would manage CERCLA cleanups under State law using State processes. The second track would be a site-by-site determination of a State's ability to do the job.

Regarding environmental justice and community issues, everyone agreed that truly meaningful community participation in Superfund decision-making as well as nondiscriminatory implementation and enforcement are essential. The committee recommended that these goals should be accomplished through a number of initiatives, including the establishment of a community working group at each site and simplification and greater availability of the technical assistance grant process.

In summary, we found that this process—this exercise—that we went through as a committee was extremely valuable and productive. Key stakeholders were able to present their own views, understand the range of views and identify areas where consensus was possible.

I know that committee members would be pleased to make themselves available to you and the Agency as the debate proceeds. The committee will, by the way, be meeting one more time to review its recommendations and to consider how we can help move the process forward.

Thank you for the opportunity to speak. If you have any questions, I would certainly be glad to answer them.

Mr. SWIFT. Thank you very, very much. I think that the NACEPT process was also enormously valuable in starting to formulate a center around which compromises can be built, and I want to congratulate you for your work.

Ms. Browner, I would just like to run through a few questions that would help expand on your explanation of the administration's proposal.

In what areas do you think the administration's bill is going to most significantly improve the current remedy selection process?

Ms. BROWNER. Several areas I think represent significant change in terms of remedy selection.

First is the establishment of national generic cleanup levels. Let me see if I can simplify that. The ability to get a standard, if you will, or a recipe on how to proceed at a particular site. There are similarities across sites. We need to look at those similarities. We need to learn from those similarities. And I think that, through establishing these standards, it will allow site cleanup to be expedited.

I also think dealing with the ARAR's, which has been the source of a fair amount of discussion over the years, is a significant change. ARAR's are the—let me see if I can get this right—applicable and—I want to get the right words—we only refer to them at EPA as ARAR's all the time—applicable, relevant or appropriate requirements. What that has led to is a whole mishmash of standards, if you will, being applied at individual sites and confusion.

We would propose that applicable standards be retained if States choose to adopt standards specifically for Superfund cleanups, and

those would be applicable standards, but that anything that has not been specifically adopted, which is what is now covered in the relevant category, would not be available in terms of standards. That is a tremendous clarification and I think will lead to expedited cleanups.

Mr. SWIFT. The National Commission on Superfund recommended that remedies be required to be a 10 to the minus 6 risk standard, and the administration does not put that number in the bill. Could you just discuss that whole issue a bit for us?

Ms. BROWNER. Well, we—the administration does endorse the establishment of a clear national goal for Superfund cleanups, one that will provide consistent and equivalent protection for all communities. We think that is extremely important, and we are committed to doing that.

Mr. SWIFT. It seems to me that this is a classic example where, if both sides get hung up on 10 to the minus 6 as a symbol, it is going to be difficult to get at what each side really wants. One side wants some flexibility; the other side wants some assurances. And it seems to me that we can probably achieve that, unless either side or both sides sees 10 to the minus 6 as some kind of a symbol that they either must have or can't have.

I think I understand the importance of both points of view. You have to have a standard so that you know that cleanup is being done appropriately. Having some flexibility in how you achieve that is what is going to get the costs down and have you do the right thing at the right place.

You know, I don't think this issue is going to go away just because it is not in the administration's proposal. But I think it is one of the things that we have a chance of resolving if we don't let the number become of too much symbolic importance.

Can you just say why you felt—the administration felt that they would leave it out of their bill?

Ms. BROWNER. The establishment of a specific number, 10 to the minus 6, in environmental statutes is not something this administration has supported. We believe that the goal of our environmental statutes must be to provide equal protection to all, to protect the public's health equally across the country, and that can be achieved in the language we have recommended to the committee.

But, as you said, this is, obviously, an issue that many have strong feelings on, and we want to work together with the committee and others to achieve the outcome.

You know, the desired outcome, if you talk to everyone who has been involved in this process and as I listen to what was said by the members of the subcommittee this morning, is to see the process changed at local sites, to see the sites get cleaned up more quickly, to see communities involved.

And it would be, I think, unfortunate if we were not able to achieve that because we got polarized by other issues that don't necessarily, at the end of the day, affect what happens at a local site, and I think that there is a way to work through this issue that should be agreeable to all involved.

Mr. SWIFT. This bill would create a mandatory spending entitlement for orphan funding of $300 million. The question is, what

happens if the orphan funding exceeds $300 million in any given fiscal year? What are your contingency plans in that regard?

Ms. BROWNER. Mr. Chairman, in working with the Office of Management and Budget to understand all of the fiscal implications of the proposals, we believe that the $300 million is the amount that will be necessary to cover the orphan share. The orphan share coverage is a very significant part of one of the changes that we suggest to you all, but we are certainly willing to work with anyone who would suggest that there is other information available in terms of analyzing what is the appropriate number.

Mr. SWIFT. Well, I think the question is going to be asked, and we probably need some kind of an answer, and all of the answers are kind of difficult ones. You slow down the cleanup process, take it out of the general fund. You know, none of those are fun alternatives. But I think we need to think through a little bit a good answer.

I am perfectly willing to accept that the best judgment is it is not going to exceed, but we are in a business in which the best judgments go awry all the time, and I think that question will be raised, and we will need to work on some answer for that.

Could you describe the role of cost in setting the national cleanup standards in selecting remedies?

Ms. BROWNER. Cost will absolutely have a role to play in the development of the standards and of specific cleanup plans.

The simple way to think about this is that there will almost be a matrix available. At a site that has particular characteristics, you will look at the matrix to determine, based on involvement from the local community, future land use. A very significant change that we propose is the inclusion of future land use in reaching a final cleanup plan.

But that you would look at a matrix that involves a variety of factors in determining what is that appropriate cleanup cost being one of the standards that have been set, and being another, the availability of technology hot spots, all of these factors would be brought into play.

Mr. SWIFT. And what is the role of risk assessment in selecting remedies?

Ms. BROWNER. Risk assessment would be a factor used in establishing those standards.

Mr. SWIFT. Could you explain how the nonbinding—the nonbinding system of allocation in the administration's bill would work? There are a lot of people that would like to see those to be binding.

Ms. BROWNER. Right. The allocation—let me back up for just a second to explain who is not in the allocation process and then who is in.

I think one of the frustrations that we have all felt in the Superfund program is that, increasingly, small businesses have found themselves in the list of response—potentially responsible parties. Even in some instances home owners whose garbage was delivered to a local landfill have received letters saying that they have a liability as relates to the cleanup of that particular Superfund site.

No one intended those things to happen. The proposals that we recommend make that absolutely clear. Anybody that sent 500 pounds of municipal solid waste or less is out of this. They are not even at the table. They are gone. They are protected. Lenders and trustees, they are gone, they are protected. Those people are taken out. People who really, I don't think, anyone ever intended to be part of the Superfund program.

Then there is an opportunity for what we call early settlements. Small businesses who may find themselves with some liability. They can come into the process and settle out early. They can demonstrate an inability to pay that will be taken into account.

Municipalities that were the generators and transporters of solid waste, their liability would be capped at 10 percent. For municipalities that were the owners and operators of municipal solid waste facilities, they could also, as could a small business, demonstrate an inability to pay. That is the second category of people.

The first category is out. The second, there is an opportunity for early settlement.

The third category, then, would be everyone else, and we are proposing an allocation scheme, rather than what occurs today. What occurs today is that as PRP's—potentially responsible parties—are located, they are notified of their potential liability and then they begin the process of looking for other potentially responsible parties, and litigation ensues between these parties. Significant transaction costs are associated with that litigation, with that process.

The allocation proposal that we make would bring everyone to a table, take it out of the legal system, out of the judge's chambers and say, let's understand what happened. Let's understand what people contributed. Let's see if we can't come to a resolution of how much each person is going to be responsible for, and how much each business is going to be responsible for.

At the end of that process, the allocator—and it is a 180-day process with an opportunity for a 90-day extension. It is a rapid process. At the end of that process, the allocator, who is a trained professional with expertise in this area, would issue a report saying these parties have this responsibility or have agreed to assume these shares in terms of the cleanup.

That report would be presented to EPA and to the Department of Justice, and, essentially, a settlement would be entered into.

Orphan shares, those parts or those shares of the cleanup for which there is not a party or for which—there is several categories within the orphan share program, but, essentially, there would be an opportunity to use the fund.

The result of all of this is, one, a reduction in transaction costs and, two, an expedited cleanup.

A significant amount of time is used up in this process right now, the current process which is one that involves many lawyers, lots of litigation. This allocation process, we believe, will significantly reduce that. And there is an incentive for people to participate in the allocation system, and that is the retention of joint and several liability. If you come into the allocation system, you can avoid joint and several liability. If you choose to stay out rather than to cooperate, you can find yourselves responsible not just for what your

share would have been in the allocation process but also for the orphan share.

Mr. SWIFT. Was there also a constitutional question about making it mandatory that was raised?

Ms. BROWNER. There are questions associated with binding versus nonbinding allocation schemes. I don't want to speak for the Department of Justice who are the real experts on what is constitutional or what is not. We would appreciate working with the committee to further educate you on these matters and to see if perhaps there is a resolution.

Mr. SWIFT. The last question: The issue of environmental justice has been receiving a good deal of attention lately, and I think that is appropriate. Could you describe a little more fully the provisions in the bill that relate to that issue?

Ms. BROWNER. I think the most significant provision in this bill relating to those communities across the country who feel left out of the process is the opportunity for early and real involvement. We would propose that at every site there be created or established a community working group made up of 20 people who live by the site, have knowledge of the site, have experience with the site.

That working group, they would be involved from the beginning. I mean, it is not a question of waiting until there is a listing to bring these people in. From the beginning they would be involved in all of the decision-making, as opposed to what happens now, which is frequently the local communities are not involved until we are well through the process.

It is a frustrating issue for these communities, and I think that if we are going to address the very legitimate concerns raised by communities the best way to do it is to bring them into the process early.

There are also—these groups would be eligible for what we call the TAG grants, which are currently available Technical Assistance Grants, so that they can employ their own experts, so that they can have their own analysis of some of the very difficult and complex scientific and technical issues that have to be dealt with surrounding a cleanup. That money would be available to them earlier in the process than it currently is.

Finally, two things. The opportunity for the local community to make recommendations as to the land use. That doesn't happen right now. That decision is made really without local community involvement. There is a decision made within the current EPA process relevant to land use, and then the community is informed, rather than the reverse, the community saying, this is what we think makes sense for our community.

Here is what we think should happen in our neighborhood. We would allow that—we would encourage that kind of participation.

Finally, there are created—we would propose a creation of environmental justice demonstration projects at several sites across the country to further explore opportunities for how we deal with the very legitimate concerns raised by these communities.

Mr. SWIFT. I was asked a question after the news conference by a reporter who said, you know, a lot of people in the community have difficulty dealing with government gobbledygook when you try to get in the process. And, you know, if it is just pure old

bureaucratese, it is nice to translate it into English. But there also appear some difficult concepts, technical and so forth. What you are saying is part of this program is to provide a means by which local citizens can get up to speed on the technical concepts they need to understand in order to effectively participate?

Ms. BROWNER. Precisely. And that is the whole purpose of the Technical Assistance Grants, to allow them to develop that expertise.

Mr. SWIFT. Excellent. Thank you very much.

I recognize the gentleman from Ohio.

Mr. OXLEY. Thank you, Mr. Chairman.

Administrator Browner, CBO has recently released a report indicating that the current remedy selection provisions of Superfund will cost about $463 billion in public and private sector outlays to clean up the worst 7,800 non-Federal waste sites. The billions we are spending on Federal facility cleanups will have to be added on top of this figure.

I noticed that your statement describes inconsistent cleanups as the main reason for Superfund costs and not the cost of cleanups themselves. Is there an inconsistency there, or am I just missing something?

Ms. BROWNER. No. I would agree with you that the cost of cleanups are a big factor and that the proposals that we make today we think will significantly reduce the cost of individual cleanups. Through the establishment of the national generic clean-up levels, through the innovative technology opportunities, we see real reductions in clean-up costs.

Mr. OXLEY. The article in the Wall Street Journal today indicates that the administration feels that the changes in the Superfund statute will reduce costs by some 25 percent?

Ms. BROWNER. Yes. That is an estimate that was provided after extensive analysis by the Office of Management and Budget.

Mr. OXLEY. Are you committed to maintaining that goal throughout the process?

Ms. BROWNER. Mr. Oxley, we agree with everyone who would say that the cost of cleanups have been far too high, and we are committed to doing everything we can to see the cost of cleanups reduced and the transaction costs reduced. I mean, there are a variety of costs, some of which fall to the fund, some of which fall to the Federal Government.

The Federal Government, through the Department of Energy and the Department of Defense, has some of the largest responsibility, some of the largest sites in this country. They will also benefit from the cost savings because this law will also apply to them and their activities.

According to the OMB estimates, if I might just share them with you on a more precise basis, there is $1.4 billion to $1.9 billion per year in net social savings. That is looking at all of the savings associated with the proposal we make. $1 billion of that is in savings to Federal facilities—the DOD cleanups, the DOE cleanups. The remedy selection—the remedy process will result, we believe, in $100 to $200 million private sector savings because of land use, because of national clean-up levels, and the allocation scheme we propose between $400 and $500 million in savings.

Mr. OXLEY. Is it realistic, then, for us when we deal with the markup of this bill to keep that 25 percent target in front of us and, indeed, to craft the legislation with those cost savings in mind? Twenty-five percent is a pretty worthy goal, obviously, and it is a rather high goal. If we could save $1 in every $4 in the program, we will have done a substantial service to our constituents.

Ms. BROWNER. Well, Mr. Oxley, we will do everything we can to work with you and the other members of this subcommittee to ensure real savings, not just in the cleanups, but in all facets of the program. I mean, this is a complex program, and there are costs incurred at a variety of stages, and we want to ensure that we are reaping all of the cost reductions possible throughout the program.

Mr. OXLEY. I want to ask you about the discussion that has taken place this past fall between the members of the administration and committee staff. And at several points along the way we stated a desire to have a single master for the cleanup process, and I think we are in agreement that management by both State and Federal regulators is a waste of resources and leads to a situation where you have got too many cooks in the kitchen.

Section 302 also contains a provision entitled Statutory Construction, which seems to indicate that, even where a cleanup has been conducted under a qualified State voluntary program, EPA retains all rights to second-guess the cleanup. How does your proposal ensure that we will really have a single master and not have a situation where we have got Monday morning quarterbacking going on at the Federal level?

Ms. BROWNER. Well, I think the most significant way in which we address the very legitimate concern that you raise is the opportunity, which does not presently exist, for States to assume responsibility within their borders for the Superfund program. States can come to the administration, as they can do in other environmental statutes, but not in the existing Superfund law. This opportunity is not available for States.

If they demonstrate that they have a substantially consistent program with the Federal program, then they can assume within their State borders that responsibility, and the Federal Government will have an oversight function but not a day-to-day management responsibility, as we do right now. I mean, we don't disagree with your analysis that there are too many cooks in the kitchen. We want to see that changed.

Second, because we recognize that some States would not have the ability on an expedited basis to take the entire program within their States, individual site referrals would be available. A State can demonstrate that they have the skills, they have the expertise, they have the law to handle a specific site, and we will turn that site over to them.

All of this will not only deal with solving the problem as it relates to the National Priorities List, but also as it relates to the problem that you raised of voluntary cleanups.

The other way that the voluntary cleanup issue is addressed is in the establishment of the national standards. When I talk to business people across this country associated with contaminated sites, business people who are interested in undertaking a voluntary cleanup, they are concerned that, if they do that, there isn't

enough certainty. Those cleanup standards should provide them certainty so that they will act, and that is good for local communities, and it is good for businesses.

Mr. OXLEY. Well, I am glad to hear that.

What would be the role then, if any, of the States, assuming that this proposal were to be enacted? Would the States have to do anything legislatively or administratively to make certain that these plans dovetail?

Ms. BROWNER. Well, there would be a meeting between EPA and the States on an annual basis to ensure that there is an understanding of the work plan of how the State is going to proceed.

If the States were interested in seeing particular standards applied, more stringent standards applied to cleanups within their State, then they would have to ensure that those standards had been adopted in a public forum in which the public had opportunity for participation and were based on best available science.

Again, a lot of the confusion that results right now is the variety of standards that can apply to an individual site. This streamlines it. This would clarify it.

And, you know, I want to be sure that I have explained the EPA's role in all of this. Consistent with all of our environmental programs, it would be, important to the Congress that EPA retain some flexibility, some oversight, if you will, so that if there is a particular problem that needs to be addressed, there is that flexibility for EPA to act on behalf of the Congress and the people.

But we have, I think, a fair amount of confidence that, as States seek to develop these programs, as we work with them to develop capacity and put in place all of the tools necessary to run programs, that you will see many States come forward and assume this responsibility.

Mr. OXLEY. I agree with you, and I think that they will come forward if they understand that if they do the right things early on they don't risk the potential for the Feds coming back and second guessing and nitpicking their efforts.

That is why I was probing on this for the record so that we can establish the legislative history correctly. Because, obviously, the States have a tremendous interest in this.

We have had testimony last fall from local government and State officials about that very problem, and I salute you for addressing that issue because it is absolutely critical to get some credibility in the program and know that we can accomplish some things without the benefit of Monday morning quarterbacking, and I appreciate your testimony.

I yield back the balance of my time. Thank you, Mr. Chairman.

Ms. BROWNER. Mr. Chairman, if I might just say to Mr. Oxley——

We worked very closely with the people in the States who run these type of programs on the State level. There is something like 15 States who have either adopted or are in the process of adopting programs. And I think we understand the concerns they have. We understand what they thought was the best way to address those concerns, and, hopefully, our proposal reflects that.

I can tell you, as a former State director, I would think this was wonderful if I was still serving in that capacity. This is a huge step forward.

Mr. OXLEY. Thank you.

Mr. SWIFT. Thank you very much.

I recognize the gentleman from Louisiana.

Mr. TAUZIN. Thank you, Mr. Chairman.

Ms. Browner, you point out in your written statement that the administration proposal encourages beneficial use of contaminated properties by removing disincentives for property transfers and cleanups. Exactly how do you do that?

Ms. BROWNER. The most significant piece of our proposal in that regard relates to prospective purchaser liability.

You probably know people who have been interested in acquiring a piece of property. They are concerned that they will assume the liability associated with the contamination of that property, and, therefore, they don't enter into that purchase.

We would propose that people seeking to buy property for which they have no responsibility vis-a-vis the contamination that they would not find themselves liable for the contamination. We would think it appropriate that they be required to exercise due care so that the contamination is not made worse, that there be access allowed for cleanup.

And should a windfall occur after the cleanup—in other words, if the value of the property were to jump significantly due to the cleanup—that there would be a capture on behalf of the taxpayers.

Mr. TAUZIN. So EPA is going to recommend that, by virtue of your regulatory process, if somebody's property increases in that value, you are going to take that value. But if, by virtue of somebody's value going down, you resist that they be compensated of that value. That is an odd——

How about banks? Banks have made the argument that when they foreclose on property and that had a Superfund liability that the Federal Government, which ensures their accounts, their investors and depositors ought not end up with this liability. Do you——

Ms. BROWNER. We agree.

As I said before, there is a category of people who have found themselves covered by the Superfund law that I don't think anyone intended to be covered. This clarifies that they are not covered—individual owners, families who may have sent their garbage, small businesses.

Mr. TAUZIN. I don't want to nitpick, but 500 pounds is a lifetime ceiling? Or is it yearly?

Ms. BROWNER. It is for the site.

Mr. TAUZIN. So if you are having your garbage collected at your house over a year and you exceed that 500 pound limit, you can still be liable under this plan?

Ms. BROWNER. Mr. Tauzin, our intent is to take individual families out of the program. If someone would suggest that 500 pounds doesn't do that, we certainly are willing to have that discussion. Based upon our examination, we felt that was a reasonable line, but we want to achieve the goal of taking families out.

Mr. TAUZIN. Well, you have to understand that people in Louisiana eat a lot of crawfish.

Ms. BROWNER. We may need a crawfish exemption.

Mr. TAUZIN. We also have a phrase in courtrooms in Louisiana that you not only deny the allegation, you resent the allegator. In this case, are we going to have people saying we deny the allocation and resent the allocator? Is there going to be appeals or when they submit to allocation, is that binding? There are no appeals?

Ms. BROWNER. I think there are two different issues here. What is traditionally being referred to as binding, nonbinding, involves the issue that when people enter the room and agree to the processes the outcome of that one that is not—how do I say this—available for judicial review. That by agreeing to come to the table, you have agreed to limit your other opportunities for argument.

Mr. TAUZIN. It is a quid pro quo. You are avoiding the unlimited, unrestricted joint and several liability by coming to agree that you will not appeal or go to court once the allocation is established in that meeting, is that right?

Ms. BROWNER. That is what binding and nonbinding would refer to.

But in the proposal that we make by someone coming into the allocation process and participating in the process and then signing the settlement agreement, we, the United States Government, do offer to provide them protection. And, in fact, they can, for a small increase, avoid any problems, litigation in the future. So that is available to them.

The question of binding or nonbinding——

Mr. TAUZIN. Is that about sale?

Ms. BROWNER. Yes.

Mr. TAUZIN. A la carte. You can buy your way out of court in the future.

Ms. BROWNER. It is significantly less than the transaction costs now associated with the program.

Mr. TAUZIN. I understand. We are going—as I understand your description from ARAR's, applicable——

Ms. BROWNER. Relevant——

Mr. TAUZIN [continuing]. —Relevant and appropriate requirements, to ARs, applicable requirements.

You said two things which sounded inconsistent, and I want to help understand it. You indicated that, so long as the State had a program that was consistent with the Federal program, you would let them implement it under agreement with the State. But you also said that States could adopt much more stringent standards in their program than the Federal program, is that correct?

Ms. BROWNER. These are two different issues.

Mr. TAUZIN. OK.

Ms. BROWNER. The issue of a State receiving the right to run the Superfund program within their State——

Mr. TAUZIN. The running it has to be consistent with——

Ms. BROWNER. Right. They have to make sure they have a statute.

Mr. TAUZIN. But they can have a tougher standard.

Ms. BROWNER. That goes to cleanups.

Mr. TAUZIN. Right.

Ms. BROWNER. Not to whether they can assume responsibility for the program but to the actual cleanup standards.

Mr. TAUZIN. Right. I got it.

Here is the problem I have, and the chairman again touched on it when he talked about the tension between those who want a national standard for cleanup and those who want the flexibility to ensure that a different cleanup occurs on different sites because of different circumstances, et cetera.

Here is the problem: If this was a highway program we were talking about and there were a limited amount of highway funds and all of us needed a highway in our State and in our districts and we allowed one State to design their own highway program to set standards for that program at as high a level as they wanted to and they happened to be first on the priority list, we might have to wait a long time for a highway in Louisiana, right?

Ms. BROWNER. Right.

Mr. TAUZIN. Here is my problem.

Ms. BROWNER. We solve your problem, I think.

Mr. TAUZIN. I hope you do.

Here is the problem: If the States can adopt much stricter standards and a so-called national goal I think you called it, other than a standard—I think there is probably a difference in there somewhere, and I am not sure what it is—but if the States can adopt a much higher standard and then use the Federal funds to put their program together, use the orphan shares or use the funds, if there is no one available at all to attach in this orphan site, doesn't that give the State a run on the Federal fund and doesn't that imply that others waiting down the line are going to have to wait a little longer before they can get some Superfund cleanup done in their States?

Ms. BROWNER. Under our proposal, I don't believe that will happen, and let me explain why. You are correct that we are proposing that States who document a program that we find acceptable will have access to the trust fund. They don't presently have that.

However, States will have the responsibility, whether they have accepted the program or not, as it relates to individual sites, to pay for the incremental difference in attaining cleanups in excess of applicable standards.

Mr. TAUZIN. So that if a State does adopt standards higher than the national agreed-upon goal or whatever you call it, that they are going to be responsible for whatever extra cost is involved in cleaning up the site?

Ms. BROWNER. To the incremental costs associated with those standards that are different than the applicable State and Federal standards.

Mr. TAUZIN. Got it.

Here is the other tension I see in the proposal.

When the proposal talks about—I am going to try to reach quickly for it. When the proposal talks about one, two, three—Mr. Thorne—when it talks about site-specific factors being involved here and community involvement, so that we all achieve this, I think, goal that we all want to see of the people in the area being involved locally, being involved earlier, land-use decisions being made in that process, is there a possibility that we will see the same thing happening that I am concerned about on the State level happening on a community basis?

Is it possible that communities interested in a particular land use resolution, interested in a particular set of appropriate site-specific requirements will end up soaking more of the fund than it would ordinarily need to guarantee the so-called national goal or standard of cleanliness?

Ms. BROWNER. I don't think the problem you are concerned about will occur.

But let me just back up for a second to make sure that I have been clear about one point. The responsible parties, as they do today, will continue to pay the lion's shares of the costs associated with cleanups. The orphan share is for that portion for which there is a nonviable responsible party. It covers that.

Mr. TAUZIN. That is right.

Ms. BROWNER. The fund is not available in some new way beyond that for individual cleanups.

Mr. TAUZIN. Let me first assure you I support that notion.

When we first fought this battle 5 years ago I was one of a minority on this committee then—Mr. Florio chaired it—who objected to the notion of this deep-pockets theory, and we predicted then that it would result in incredible lawsuits that never ended and that the fund ought to be an orphan share fund. That was what it was designed for, designed for people who couldn't contribute a percent of the cleanup. That is what the fund we thought should have been designed to do. It was not.

I support your notion that you go back to that principle, that polluters pay for what they contributed and that the site, the fund itself, which is a collection of taxes from the generators of the resources that end up in the waste stream, make up the orphan accounts. I understand that. I appreciate that.

What I am concerned about now is, if we do that—and we should—that community by community—communities can make judgments based upon their own individual land-use decisions, their own individual demands for specific site-by-site on a cleanup, that I was concerned about on a State standard-setting that they end up costing this particular cleanup a great deal more than it ought to cost because of the particular demands, requirements of the community in this case, rather than the standards set by the State.

In short, I guess what I am saying is, couldn't the community do what you are telling me you are preventing the States from doing and that is require costlier cleanup than they should?

Let me tell you my reason again. I am not against communities getting the good cleanup. I am concerned about one community getting an extraordinarily good cleanup at the expense of others never getting any.

Ms. BROWNER. No, and we agree. And we believe that the proposal we have made will allow us to move on many more sites simultaneously than we are currently able to do.

Mr. TAUZIN. I believe that is true, Ms. Browner. I am still concerned about how you control—how you—what mechanism you put into the proposal. I haven't seen one yet. And that is what I am asking about.

Is there a mechanism in your proposal to ensure that—the fear I have that communities will dictate the amount of money spent on

a site far in excess of what might be required to meet national standard of cleanliness?

Ms. BROWNER. I don't think that will occur for several reasons. If we could just look at what happens at a specific site today, I think that is the best way to understand why that won't occur.

There is the opportunity for a State, if they have accepted the program, or for EPA to have final decision over what a community working group recommends. But, as we said before, there is equal protection afforded to all who live around these sites. That is very important. It is important to those people. But——

Mr. TAUZIN. But you understand that doesn't happen if you never get to some sites.

Ms. BROWNER. I agree. And I want to see more sites gotten to.

When you bring in the land use, that doesn't change the level of protection that is afforded; it changes the nature of the clean-up plan.

An example would be if you have a site in a local community where the local community wants to see a parking lot. That is the best use for that community of that site. Then your cleanup plan would reflect that, and perhaps an asphalt cap would be laid, as opposed to a site where the community says we want that to be a park.

Mr. TAUZIN. Or a playground.

Ms. BROWNER. Or a playground.

Mr. TAUZIN. You have set up a good example for me.

If the community can decide that it wants an industrial site here, and another community says it wants a playground site here, I assume that the remedies selected for the playground site are going to be a dickens more expensive than the site for another industry. I just make that assumption.

Ms. BROWNER. They have to be appropriate. That is right.

Mr. TAUZIN. I am probably right in that assumption, and, therefore, my concern. If the community can dictate the ultimate land-use decisions that are made, it can have a profound effect upon the amount of money spent in cleanup on a given site. And unless there is some check on that decision-making, I am afraid some communities will never see this economic justice argument fulfilled, that poor, unsophisticated communities who can't make these extraordinary propositions come true will never see themselves get a cleanup. That is what I am worried about.

Ms. BROWNER. Mr. Tauzin, land use is one of several factors to be considered in developing the cleanup. It is one that is given strong preference, but it is not the only one. And, as I said before, there is the opportunity for review of the community working group's recommendation.

Mr. TAUZIN. We will want to talk more. I think my time has expired. I thank you very much. I yield back the balance of my time, if I had any.

Mr. SWIFT. I thank the gentleman.

The gentleman from Colorado has very kindly said that we could recognize the gentleman from Massachusetts for a question before we recess.

Mr. STUDDS. I thank the gentleman. And I particularly appreciate it. I will be very, very brief.

Ms. Browner, I notice that what we thought was going to be a provision on natural resource damages is snagged—temporarily, I hope.

And then I just did notice in your transmittal letter to the Speaker you say, although provisions concerning improvement to the natural resources damage assessment process are not included in this bill, the administration is committed to such improvements. The administration, I quote, is in the process of evaluating and developing recommendations on these issues and will be providing them at the appropriate time.

I just want to reflect for the record at this point our concern. As you know, this matter is shared between this committee and the Merchant Marine Committee, on which six members of the gentleman's subcommittee also sit. We, too, believe that there is a need for addressing that subject matter, and we hope that—I gather you do intend to work with us on that, and we very much want to do that with you.

Ms. BROWNER. Yes. I think that the letter that you make reference to reflects the state of where we find ourselves on this issue. It is a difficult issue and one that we are still seeking to resolve within the administration.

Mr. STUDDS. I appreciate that. We look forward to working with you.

I thank the gentleman very much.

Mr. SWIFT. I would also say to the gentleman in that regard—and I had a conversation with him on the Floor sometime before the end of the last session—that I think the natural resource damages portion of this is very important. What I am leery of and, very frankly, I have been pushing hard on the administration is that we don't, with only 70 days left to legislate, get ourselves into jurisdictional snarls so that we get nothing done.

But that is utterly without any hostility toward your committee doing its work in its area of jurisdiction or, for that matter, in most instances on the substance. If we can find some point down the line where, you know, we can work something out——

Mr. STUDDS. I appreciate that. As the gentleman knows, I personally have a keen allergy to jurisdictional snarls. I hate them. So I can assure you that there will be none in this instance, and I appreciate it.

Mr. SWIFT. Good.

What I think we will do at this point is we will adjourn very briefly to catch this vote and come back and recognize the gentleman from Colorado for his questions.

[Brief recess.]

Mr. SWIFT. The subcommittee will come to order.

I recognize the gentleman from Colorado.

Mr. SCHAEFER. Thank you, Mr. Chairman, Administrator Browner.

A couple of questions, and I want to follow up a little bit on what our friend had to say here on this community participation, and you expounded on that a bit.

If these 20 people, of which you indicated do come in and make their recommendations and suggestions on what they want to do with a particular site, what assurance do they have that this is

going to be put into proper language or whatever? I mean, what assurance are they going to have?

And let me expound just a bit, because I know there is one particular community in Colorado—Leadville—that doesn't particularly want EPA in there at all. If they would make that recommendation, what would happen?

Ms. BROWNER. Well, as it relates to a specific request that the Environmental Protection Agency not be involved, there is a responsibility on the part of the government to see these sites cleaned up.

As I said before, we would encourage States to assume responsibility either on a Statewide basis or on an individual, site-specific basis. And if the State in that particular instance had the appropriate tools and the appropriate laws to do so, then we would work with the State to give them the responsibility.

Mr. SCHAEFER. So it would revert them to the State?

Ms. BROWNER. It could. That opportunity is available where it is not now.

Mr. SCHAEFER. It could.

Ms. BROWNER. The State would have to solicit it, and they would have to come to us and show that they had the tools to do the job.

Mr. SCHAEFER. I see. I see. OK.

Ms. BROWNER. On the other part of your question, Mr. Schaefer—and, in fact, I would appreciate it, Mr. Chairman. I wanted to clarify an answer that I had given to Mr. Tauzin. And if I might just take a minute, I think it will answer your question, also.

Mr. SCHAEFER. Sure.

Ms. BROWNER. This goes to the question of remedy selection.

You are dealing with a specific site. There is a community working group that will make recommendations in terms of land use. The language that we would suggest in the statute would require that a substantial weight be given to that community working group's proposal in terms of land use. If there was not a consensus within the community working group, then substantial weight would be given to residents of the affected neighborhood, those people who live most closely to the site. That is one factor that is then used in selecting an appropriate remedy.

And if I might just tell you very quickly what the other factors are: effectiveness of remedy, long-term reliability of remedy, risks posed by the cleanup to the community and the people associated with the cleanup activities, acceptability of the remedy to the community and reasonableness of cost in relationship to all other factors.

And that is the second point that I want to clarify. Previously, when we spoke of cost I think I may have suggested that cost would be provided—would be considered in establishing the national generic clean-up levels. In fact, cost would be considered where it is most appropriate and that is in the development of a specific clean-up plan for a specific site. That is where that information is most readily and appropriately available.

Mr. SCHAEFER. So, if this community decided on a parking lot and it was not what EPA said would do the job to get the exact remedy that they need, then EPA would require more than just a parking lot regardless of what the community wanted?

Ms. BROWNER. If the local community wants a parking lot and there is consensus within the working group—the community working group—that a parking lot is what is best for that community, significant deference will be given to that.

The only issue would be if you had—let's say you had a situation where when you looked at all of the zoning—current zoning requirements, the current land use and adjacent land use, and what you saw is this is a residential area for 10 miles around, and a community said we wanted a parking lot, there would be an opportunity to say to the community working group, is that what you really want? Did you want a parking lot? I mean, everything else is residential here. Maybe what you want is residential or a park, right?

Mr. SCHAEFER. I was just looking at—I think this was put out by the administration—Title I, Community Participation and Human Health Concerns, et cetera.

Ms. BROWNER. Yes.

Mr. SCHAEFER. On page 12 you are talking about the municipal standards. I just wanted to clarify. It seems to me that the Keystone Report and this, at least from what I have seen so far as far as the administration is talking, they are basically similar? With a 10 percent cap?

Ms. BROWNER. You are referring to the——

Mr. SCHAEFER. Municipal liability caps.

Ms. BROWNER. I don't want to speak for Keystone. As I remember it, if we are not taking an identical position, I think we are very, very close on this provision.

Mr. SCHAEFER. Well, without seeing the language in the legislation and just picking it up on here, I just wanted to see if—I seemed to think it was pretty close.

Ms. BROWNER. In fact, it may be identical. Everyone who has looked at this issue of the families who have been scooped up into the Superfund program, the municipal governments, particularly the small communities across this country, agrees that these problems have got to be resolved. And I think that most people have come to the same recommendation on how best to resolve those.

Mr. SCHAEFER. Mr. Chairman, we have another vote going, do we?

Mr. SWIFT. We do have a vote on the rule.

Well, I have a few more questions here. I don't know if I can get it done in time.

Mr. SWIFT. Why don't we try to get it done in time, and then we can let Ms. Browner go.

Mr. SCHAEFER. On the ARAR's, I am sure you are familiar with the recent 10th Circuit Court decision pertaining to the State of Colorado and the Rocky Mountain Arsenal——

Ms. BROWNER. Yes.

Mr. SCHAEFER. In that case, the court reacted favorably to the State of Colorado. Tell me about national standards—what effect is this going to have on a State's ability to help dictate cleanup of Federal sites?

Ms. BROWNER. Federal sites under our proposal would be treated in the same way that non-Federal sites are treated.

And the case that you make reference to—as I understand what happened out there is you had a lot of people involved, State government and Federal Government, in making decisions or attempting to make decisions as it related to that specific site.

Again, we don't want—we don't think that is the solution, and the proposal that we make in terms of States assuming responsibility should resolve that. There should be either the Federal Government at the site or the State at a site.

Mr. SCHAEFER. Not both.

Ms. BROWNER. Right.

Mr. SCHAEFER. Is there any duality between the RCRA statute and in the administration's proposal on Superfund? Take, for example, a situation like Rocky Flats where we have had proven RCRA violations in the past—how is Superfund going to interact with that?

Ms. BROWNER. If it is OK with the chairman, perhaps we could provide an answer in writing. RCRA is a very complicated law, and I don't pretend to be able to weave through it as relates to that specific site right now. So if it would be OK if we could provide that for the record.

Mr. SCHAEFER. That would be fine, Ms. Browner.

This is a very touchy subject out in my State. We know the facility has had tremendous problems. I want to make sure that there are not going to be any conflicts caused by the administration's Superfund—with either RCRA or the Federal Facility Compliance Act.

Ms. BROWNER. Well, as you know, the President has been very clear in his commitment that the Federal agencies, the Federal Government, will comply with environmental laws and has signed an executive order to that effect. That is not something that has happened previously, but it is something this administration is striving for.

Mr. SCHAEFER. Well, if we could make sure we get an answer on that.

Ms. BROWNER. Yes.

[The following information was received:]

EPA RESPONSE TO CONGRESSMAN SCHAEFER

Your letter of February 9 noted the effect of the Clinton administration's Superfund reauthorization proposal on the ability of States to use other enforcement authorities, such as RCRA, at sites being cleaned up under CERCLA.

You expressed concern that the bill would have the effect of overruling the Tenth Circuit's decision in *United States* v. *State of Colorado.* In that case, the court held that Colorado could issue and enforce cleanup orders against the Army under its State hazardous waste laws (part of the program authorized under RCRA), even though a federally-led cleanup was also proceeding at the same site under CERCLA. Therefore, you are correct that the bill would have the effect of overruling the decision. Part of section 201 of the bill (enacting new section 127(1) of CERCLA) states that:

"A State does not have the authority, except pursuant to this section, to take or order a response action, or any other action relating to releases or threatened releases, at any facility listed or proposed for listing on the National Priorities List."

This provision is consistent with the approach of new section 127, which is to provide States with a much greater opportunity to lead the cleanup at sites, and leave the Federal Government in charge at sites that States do not handle. This approach reflects the policy concern that dual Federal-State regulation, under separate legal authorities, can delay cleanups and complicate settlements. It is the administration's view that disagreements between regulatory agencies over the precise manner

of cleaning up a site can have the unfortunate effect of delaying any action. This is also consistent with the bill's general aim of reducing the resources spent on litigation and focusing efforts on cleanup.

The administration's goal is to expand the role of States, and the proposal would substantially broaden the potential State role and allow States to take the sole lead for cleanups and receive Federal funding for doing so. Sites addressed by States could include Federal facilities (although not those already under an interagency agreement). Moreover, under the proposal, States would retain the ability to influence Federal remedy decisions by reviewing and commenting on the proposed remedy just as under the current statute.

It should also be noted that the administration's proposal contains a requirement that all CERCLA cleanups comply with Federal environment laws (such as RCRA and the Clean Water Act) that are suitable for application at the facility, and with State requirements that specifically address remedial action. While these would be complied with through the CERCLA process, rather than through separate enforcement actions under State law, the State retains its right under current law to file suit if a remedy is selected that does not attain such a requirement. This right is unique under CERCLA, which otherwise does not allow pre-enforcement review of remedy selection. Finally, States would retain the power to enforce the requirements applicable to a Federal cleanup, if the United States failed to enforce them.

By requiring that State laws be complied with while providing a single administrative process through which the laws are applied, we believe that the bill fairly integrates the interests of the States and avoids administrative burdens.

Finally, you expressed concern that the bill would adversely impact the Federal Facilities Compliance Act of 1992, which authorized States to recover fines and penalties from Federal agencies for violations of RCRA. Nothing in this bill relieves Federal agencies from having to comply with RCRA for activities outside the Superfund cleanup, and to pay penalties for violations in such cases. This bill only affects the ability of the State to use RCRA to order cleanup work while a CERCLA cleanup is also going on. For the reasons discussed above, it is the administration's judgment that in such cases the regulatory duplication is undesirable.

Mr. SCHAEFER. One final thing. If, for example, the State of Colorado or any other State would have very strict standards that would go beyond what the national generic standard of the Federal Government is, and that cleanup would have to be enacted on those stricter State standards, who is going to bear the burden of the difference in the cost?

Ms. BROWNER. The State would have to bear the burden, if they were relevant or appropriate requirements. State applicable requirements would be paid for by PRP's or the Fund.

Mr. SCHAEFER. The difference in the cost of the higher standards.

Ms. BROWNER. Right. The incremental difference.

Mr. SCHAEFER. That is all I have, Mr. Chairman.

Mr. SWIFT. Thank you very much.

Ms. Browner, Mr. Thorne, thank you very much.

Ms. BROWNER. Mr. Chairman, could I make just one brief closing comment here?

Mr. SWIFT. Absolutely.

Ms. BROWNER. This is, obviously, a very difficult and complicated statute. It is hard to understand. We are proposing radical changes. We believe they do fix the Superfund program. To make sure that everyone is clear as it relates to the remedy, that is where a great deal of our discussion has focused this morning.

We would be required under the recommendations we make to you all to establish, first, national goals. Those would be for carcinogens and noncarcinogens. The process that would be used would be an inclusive, exhaustive process. It would bring people—all people—into it. All analyses would be looked at.

Mr. Chairman, the first question that you asked me, you spoke of 10 to the minus 6. While, obviously, we don't know what the

process will result in, it is conceivable that at the end of the process 10 to the minus 6 could well be the appropriate goal.

I will tell you that what happens at Superfund sites right now is a 10 to the minus 6, 10 to the minus 4 range, but we believe it is appropriate to set national goals, and we will work towards that end, and those national goals will be designed to provide equal protection to all who live near a Superfund site.

The second step in the process will then be to develop national generic clean-up levels, and the best way to describe that is it is the parts per million that has to be achieved at a particular site. Land use will be a factor in determining what that is. We are in the process of doing some of these right now.

I think Keystone in their recommendation believes that it may be necessary to set a hundred or so of these, and we are working to understand what is the appropriate number. But that is the second step, which is to give responsible parties, to give communities, if you will, a blueprint for how to deal with a site, based on the knowledge we have gained over the last 12 years.

The third category in terms of remedies will allow for site-specific risk assessment, the establishment of a national risk protocol, if you will, for how to deal with a site where perhaps there is a contaminant, that there was not a generic clean-up level set for, and that will occur.

We think we can deal with most sites in the generic, but there will be some that we cannot, and then they would be under a site-specific scenario, and there would be a national risk protocol established.

The purpose of all of this is to ensure that remedies attain consistent and equivalent protection, as I said before, to all communities and all affected sites.

Mr. Chairman, I thank you for the opportunity to be here today. We look forward to working in a bipartisan manner as this moves forward, and we are available round the clock to do whatever is necessary to see the Superfund program fixed.

Mr. SWIFT. Well, I appreciate that, and I am glad we are finally off. And we are going to do everything we can to get a bill on the President's desk, let's say by fall. The committee will stand in recess until after this vote.

[Brief recess.]

Ms. LAMBERT [presiding]. In the interests of time, if we can have your attention, we would like to resume the hearing.

We would like to welcome the second panel and thank you for your patience. These always take longer than we think.

Running into the chairman in the hallway, he said, please try and keep everyone to 5 minutes. We will also make that request again, and we will go ahead and get started.

We would like to start first with Mr. Jonathan Lash, the chairman of the National Commission on Superfund and president of World Resources Institute.

STATEMENTS OF JONATHAN LASH, CHAIRMAN, NATIONAL COMMISSION ON SUPERFUND; ROBERT BURT, CHAIRMAN, FMC CORP.; FLORENCE ROBINSON, NORTH BATON ROUGE ENVIRONMENTAL ASSOCIATION; MIKE PIERLE, VICE PRESIDENT, ENVIRONMENTAL SAFETY AND HEALTH, MONSANTO CO.; PETER BERLE, PRESIDENT, NATIONAL AUDUBON SOCIETY; AND FRED HANSEN, DIRECTOR, OREGON DEPARTMENT OF ENVIRONMENTAL QUALITY

Mr. LASH. Madam Chairwoman, thank you very much.

I am Jonathan Lash. I am chairman of the National Commission on Superfund, and with me are five members of the Commission whom I would like to introduce now.

Far to my right is Bob Burt, the chief executive officer of the FMC Corporation. Next to Bob is Peter Berle, the president of the National Audubon Society. Sitting next to me the Florence Robinson. She is from North Baton Rouge. She lives sandwiched between two Superfund sites. To my immediate left is Mike Pierle, the vice president for health and environment of the Monsanto Corporation, who is sitting in for his boss, Dick Mahoney, who is immobilized by a bad back. And far to my left is Fred Hansen, the commissioner of the Oregon Department of Environmental Quality.

I would like to start by briefly talking about the Commission and some of what we did, and then I will ask the various members who have accompanied me to talk in more detail about the Commission's recommendations. And I will be brief.

The Commission is a group of 25 leaders from industry, environment, citizen and labor organizations, communities of color, State and local government that got together on a private basis to try to develop consensus recommendations for the reform of Superfund.

The members of the Commission represent interests who have, as several people have said this morning, traditionally been adversaries. On Superfund, in particular, the members have represented interests that were at odds over recommendations for the reform of Superfund.

We are here today, however, on behalf of the Commission to tell you that we have reached agreement on Superfund. We certainly cannot speak for all of those who have a stake in the Superfund debate, but at least we agree that Superfund needs significant reform. It needs it soon, this year, by this Congress.

Battles over Superfund historically have often seemed to be a contest between those who cared only about controlling costs and not about the environment and those who thought that all environmental risks should be eliminated, regardless of the cost. This Commission and its consensus recommendations prove that perception is wrong. We spent more than 100 hours in often very contentious, sometimes angry meetings over the course of the year, and we are convinced that the changes that we recommend will make Superfund cleanups better, faster, fairer and cheaper.

We also believe that the President's proposal, as introduced by Chairman Swift and Senator Lautenberg today, takes important steps in that direction. While, as you will hear from my fellow commissioners this morning, there are provisions of the administration's proposal that we hope you will improve, its basic framework is one we support.

Both the administration's proposal and the Commission's recommendations are based on the understanding that it is essential that fewer Superfund decisions be made by lawyers in courtrooms and more be made at the site with the participation of the people, local governments and companies who are directly affected.

Chairman Swift, since you have arrived, I just want to take a moment to particularly thank you. I know something about all you have done over the last 12 months to make it possible to be here today and to try to push this process ahead constructively and fairly, and we are very grateful to you. It made a big difference.

Mr. SWIFT [presiding]. Well, you are very kind.

Let me interrupt to say that we had a very important meeting on a rainy day last year as you people were approaching the end of your deliberations, and I have come to believe that probably—your role was always important. I think it probably turned out to be more important than any of us realized on that day that we met at the office. And if we succeed in this, there will be a lot of credit to spread around, but certainly it will go to the process you had.

Mr. LASH. Well, thank you very much, Mr. Chairman.

Members of the Commission came from a long way apart to agree that there are practical solutions to Superfund's problems, and many of those solutions come into focus at the site. That is where Superfund works or doesn't work. That is where national policies make sense or produce absurd results. That is where the people who are affected, the people whose health should be protected, the people who should have a voice, are located.

Other witnesses will describe our recommendations in detail, but let me give you a brief overview. I will start with the issue that has already been discussed at length this morning: Cleanup goals and remedy selection.

That process, the selection of remedies, more than any other part of the program determines how well Superfund protects human health and the environment, and whether clean-up dollars are efficiently spent or wasted on ineffective remedies.

The Commission recommends that Congress explicitly define the clean-up goal of Superfund as the protection of human health and the environment over the long term. If we can't decide clearly where we are going, we are bound not to get there. At most sites, national health-based standards should be used in conjunction with a limited number of specific variables to define the clean-up goal.

The Commission recommends adoption of a remedy selection process which strengthens the current emergency action and removal program; which has a bias for treatment of the most contaminated areas; which clearly defines the role of cost and public acceptance of the remedy, issues that were discussed at length this morning; which facilitates the use of presumptive remedies; permits interim containment where technology is not practicable; and allows for restricted land use in some circumstances contingent upon approval of the local community.

Those recommendations represent major departures for the participants in the Commission from the positions that they brought in with them and we think can make a real difference in the practicality of the program.

On liability and funding, the Commission recommends that Congress establish an effectively binding cost allocation approach that calls for responsible parties to pay for their fair share of cleanup based on the application of specified factors. The fair-share approach recommended by the Commission has special settlement provisions in it for several types of parties, including small businesses, those who contributed small amounts of waste to a site—the *de minimis* and *de micromis* parties—generators and transporters of municipal solid waste and municipal owners and operators.

We think that those reforms can only work well if the process for public participation in decision-making is reformed.

And I have to add, having listened to the discussion this morning, it is very much the experience of the members of the Commission, all of whom have direct hands-on experience with the program, that public participation doesn't obstruct the process of resolving site remedy disputes and it doesn't lead to expensive solutions. In fact, it can facilitate practical solutions. People want to solve these problems when they are directly involved.

We believe that reforming the decision-making process requires the establishment of an enforceable right to public participation; the creation of community assistance programs such as citizen information access offices and community working groups and the expansion of the technical assistance grant program; and, finally, the expansion of the community right-to-know program.

With respect to environmental justice and site prioritization, it is clear that people of color communities have more than their share of hazardous waste sites and have in the past received less than their share of clean-up dollars. That has to change if this program is to work.

The Commission concludes that the site prioritization process, which makes decisions about which sites get placed on the National Priorities List as well as the priority for cleanup of sites on the list, should be reformed in order to address the environmental justice and other concerns.

On human health—up until now we have done too little and know too little about health consequences. The Commission recommends a three-pronged approach to, first, improve scientific understanding through research; second, improve the ability of health providers to recognize and diagnose effects associated with exposure to hazardous substances; and, third, to create a grant program for community health demonstration projects.

Finally, it is important to improve both the development and the utilization of innovative remedial technologies. We have a series of recommendations for specific steps that EPA could take to improve that process.

As I understand it, Mr. Chairman, Mr. Burt will be the next witness. Thank you very much for this opportunity to appear before you.

Mr. SWIFT. Thank you very much.

I am happy to recognize Mr. Burt.

STATEMENT OF ROBERT BURT

Mr. BURT. Thank you. Mr. Chairman, again, my thanks for all of the work you have put into this.

I think—as a general comment, I think one of the most important things that we need to keep in mind is the progress that we are making. And, sure, we have other obstacles to overcome, but we have come very far.

And I think it is important that everybody realize that their proposal, whether it be the national Superfund proposal, the administration proposal or the Chemical Manufacturers Association proposal, is unlikely to be adopted without change.

I will say that in this process many of my peers in the business community have questioned my judgment in agreeing to the remedy selection proposal, and each of the members of our Keystone foundation I expect could tell the same stories from their constituency. However, none of the constituencies have gone through the process of trying to develop a complete package, similar to what you have. So, as a result, we had to come to our bottom line, or we wouldn't come up with a proposal.

And I think that the two associations that I am associated with, the Chemical Manufacturers Association and the Business Roundtable, recognize that we have made a lot of progress, and they support the progress we have made. They don't like some things that are in the proposal, and—as well, and they will be working to change them, but I think it is from a positive aspect, and that is what I think we need to try to do in the business community and are doing.

In terms of the Commission, the fact that it has a diverse makeup is very important, and it represents the great majority of the stakeholders, although it is difficult for anybody, for example, even six of us, to talk for the business community.

But I think, more important, is that everybody on that Commission had experience with Superfund, whether you were an industrialist who had to pay and was concerned about the drain on our assets or whether you are an environmentalist or whether you are an community activist who had suffered the problems of trying to get involved in the process.

We had three administrators of State programs who were on that Commission. So that this is a proposal and a consensus that was reached by people of practical experience, practical experience outside of the Washington Beltway.

I would like to comment very briefly on the public participation issue. I think that not only is public participation the right thing to do, as I said to this panel when I testified last year, it is good business. It is getting the communities involved in our plants, letting them know what is going on as an integral part of the responsible care program of the Chemical Manufacturers Association. We don't have anything to hide. We act in a responsible manner.

Getting the citizens involved is going to speed cleanups and come up with better solutions. Thus, the combination of citizens' working groups, citizens' information access organizations and TAG grants——

And, incidentally, I think that there is insufficient funding in the administration program for TAG grants, and that is a relatively minor but important difference in our proposal and the administration's proposal. We recommend a cap of up to $60 million for TAG grants per year, and they don't, it is my understanding, although

I haven't seen the bill yet—we haven't seen the bill yet. I think they are silent on funding, at least as far as we can tell.

Those are all meaningful parts of citizen participation, and I think of all of the parts of the Keystone Foundation proposal there is probably little disagreement about that section.

In terms of liability, I actually introduced the fair share proposal of the Chemical Manufacturers Association last August, and we are quite—and Chemical Manufacturers feels quite pleased with the Keystone Foundation report and the fair share portion of it.

I am concerned about the non-binding nature of the administration proposal and would like to see the details of their proposal before taking a final position on it. But our experience with non-binding proposals is that they do not alleviate transaction costs, and people continue to use the courts to get to the ultimate solution, as opposed to going through a binding rough justice type of proposal that was both in the CMA position as well as the Keystone position.

Mr. SWIFT. Thank you very much, Mr. Burt.

[The prepared statement of Mr. Burt follows:]

Statement of Robert N. Burt, Chairman and Chief Executive Officer, FMC Corporation to the House Energy and Commerce Subcommittee on Transportation and Hazardous Materials; February 3, 1994.

Mr. Chairman and members of the subcommittee, I appreciate the opportunity to comment on Superfund Reauthorization. We thank you for your efforts to achieve enactment of major Superfund reform legislation in 1994. This is an important goal which we share. The need to make this law work was what brought us together in a National Commission, and what motivated all of us to work toward the agreement we announced at the end of last year. We believe the work done by you and your subcommittee, the Administration's Interagency Committee, and the Commission, will help to focus this debate.

No one in our Commission was very optimistic a year ago that we could reach an agreement on principle, let alone a detailed blue print for reform. But we did. We are pleased to see Congressional leadership and the President committed to achieving Superfund reform in this year. And those of us on the Commission are eager to support your efforts.

The legislation which you have introduced is the important first step toward that reform. I would like to briefly focus on two aspects of the legislation from the perspective of the Commission's findings; community participation and the allocation of liability.

First, the citizens who testified before our Commission left one clear impression on all of us: they are the ones most directly affected by Superfund sites. Yet too often they have the least to say about how they are cleaned up. As proposed in the legislation you have introduced, citizens deserve an early and meaningful role in the decision making process. Both the Commission report and your legislation recommend the formation of Community Working Group's which are intended to bring all the diverse players at Superfund sites to a common table to openly discuss the issues critical to site cleanup. Penny Newman on our Commission helped organize and make such a group effective at a site near where she lives and which directly affects the lives of her friends and neighbors.

We established two basic principles in the Commission for effective and meaningful citizen participation. First, citizens have to be involved as early in the process as possible in meetings, studies and plans which impact how the site is cleaned up. In order to ensure this happens, the Commission recommended the creation of a legally enforceable right of public participation in the Superfund decision making process.

We believe the bill before you substantially accomplishes these goals. It sets forth a specific set of requirements for citizen participation and allows citizens to bring suit when they believe these requirements are being abused

We also believe it is important that citizens have the appropriate resources to meaningfully participate. For this reason, the Commission recommended the establishment of 50 state Citizen Information and Access Offices, to inform citizens about their rights and responsibilities in the Superfund process. Though we hope the overall effect of this legislation will be to make the program simpler, citizens will still need information which objectively describes the site, the availability of technical resources to the community, the potential for alternative drinking water sources, the legal rights of citizens and the potential for formation of a CWG.

While we are still analyzing this legislation, we want to emphasize, as we did before this subcommittee last year, that reform of the Technical Assistance Grant Program is important if citizen participation is to be meaningful. It is difficult for communities to obtain technical assistance under the current program. If they are fortunate enough to get a TAG grant, the resources provided are seldom adequate to bring in the necessary expertise required to evaluate the complex technical issues at most sites. This leaves citizens feeling disadvantaged and out of the loop. Those of us in the PRP community in the Commission became convinced that the TAG process needs to be reformed, and that more monies from the Fund need to be allocated to it In our report, we list needs for which this money should be allocated, including hiring the necessary technical expertise, assisting in the collection

of data, and for expert review of studies and information relevant to remedy selection decisions. We urge final legislation to address the specific recommendations for TAG funding outlined in our report.

It has been our experience as a PRP that where citizens are kept involved in the decision making process in a meaningful way, the pace and the substance improves. We believe the legislation in front of this subcommittee goes along way toward requiring this sort of participation and we are eager to work with you to conform it even more closely to the recommendations of the Commission.

Let me also comment briefly on the liability section. What we found in our discussions on liability in the Commission was that all parties are looking for certainty from any liability scheme. The environmental community and citizens want the certainty that cleanups will move ahead regardless of liability disputes. And, the business community, both small and large, wants to remove the arbitrary aspects of the current liability system which can cause us to pay far in excess of any common sense judgment about what is our fair share (For example, current law has led my company to pay 100% of the cleanup costs at a site where we were involved for less than five months of its six year life); and then simply to provide some technical advice In addition, many cities and towns, which are having difficulty balancing the

books, also want some greater degree of predictability about what Superfund will cost them as they face other environmental demands.

The bill offered by the Administration makes an effort to correct the current liability system by proposing an allocation system to be administered by a third party neutral allocator. It has many features which are consistent with the Commission report, including provisions for de minimis and de micromis parties. And it recommends a 10% ceiling on a municipal generator and transporter's share of site costs, which is consistent with the Commission's recommendations. It also has an ability to pay test for municipal owners and operators.

However, the proposal could be substantially improved in other respects.. Because the allocation is non-binding on the government to accept as the basis for settlement, it is not a significant departure from the current system. The discretion allowed the Administrator in coming to settlement is open-ended and, therefore, poses the real potential for settlement offers which are not based upon the fair share determination made by a third party neutral. This does not give any party the certainty it needs. It also invites legal challenge and, therefore, could threaten the pace of cleanups just as the current system does.

While we want to make sure any new allocation system is procedurally sound and allows for due process, we believe the binding allocation system we proposed in the Commission report can withstand Constitutional challenge. In fact, one of the strengths of our proposal, in contrast to the one now before us, is that it provides the allocator with the authority to identify and bring to the table all PRP's, to obtain all relevant information from PRP's and to engage in an iterative process which leads to full disclosure. We would urge this subcommittee to consider the liability legislation offered earlier in this Congress by Representative Boucher for ideas on how such an allocation system could be made to work effectively and provide the sort of certainty all parties require.

Mr. Chairman, in our proposal we also attempted to address the government's need for certainty; i.e. that monies can be recovered from parties which refuse to settle. Under the Commission's proposal, settling PRP's would be allowed to recover from those non-settling PRP's under an expedited collection procedure. In other words, we took the government out of the cost recovery role.

Mr. Chairman, I personally was involved in the public introduction of the Chemical Manufacturer's Association Fair Share Liability proposal. I continue to think it is an excellent and workable proposal. However, in the

spirit of honest compromise, I felt that the Commission's proposal captured the basis of this fair allocation approach, and in fact had some other features which made it attractive to all stakeholders. In particular, it provides the certainty all parties desire and need if we are to get on with cleaning up sites faster. Those of us in the Commission stand willing to work to improve this bill within its current framework. But we cannot fully support the liability section unless there is substantial change. We stand willing to work with you to make these necessary changes to bring this section into conformance with what the Commission recommended.

Thank you for your consideration of our comments. We stand willing to work with you and members of the subcommittee in this important effort.

Mr. SWIFT. Florence Robinson, welcome again to the committee.

STATEMENT OF FLORENCE ROBINSON

Ms. ROBINSON. Congressman Swift, thank you very much again for all of the time and the energy that you have put into this Superfund process, and thank you for having us before you once again.

I feel that the overall goal of the entire Superfund process must be the protection of human health and the environment over the long term. This is the clear goal of the clean-up standards and remedy process.

The Commission generally agrees the cleanup standards should be health based. However, there are considerable data gaps in examining questions of risk and health effects. Therefore, the Commission generally agrees that we needed to take a more conservative position, that is we didn't want to wait until we started seeing dead bodies.

Incidentally, in many Superfund communities, the most common social event is a funeral. Therefore, we advocate stringent cleanup standards. They are needed for the welfare of both citizens and of industry. Because as many industrial representatives have commented, as long as the waste is present, they are still on the hook. They are still liable and also the longer the waste is present, the greater is the potential for problems that will develop, such as groundwater contamination and other off-site migration that only increases dangers and costs. In other words, a cheap quick fix isn't always going to do it.

We have heard a lot about the cost of Superfund. Even when you go into so-called inexpensive remedies, you are talking millions of dollars, so nothing in Superfund is cheap.

When you take on a remedy selection that doesn't do the job and you have problems again years later, you have already spent that money and have to come back and spend more money to fix up the situation. So we think we need to have some stringent cleanup standards at the outset.

Let's do the job right the first time. Then we won't have to do it a second time. To prevent unnecessary delays and inconsistencies in cleanup costs by endless debate and litigation in determining site-specific cleanup levels, we think that a formula-based national standard for soil and groundwater levels is needed. This standard should be based on a formula whose two major components are a hazard potency number that will be specific for each chemical, and we are asking EPA to develop these hazard potency numbers.

EPA already has begun developing it for some, not necessarily according to the exact levels we are talking about. The hazard potency number is a specific. It is not going to change from site to site. But the formula gives site-specific flexibility and an exposure number which considers such things as permeability and number of people to be exposed and there are other factors then that will mitigate here.

The overall outcome of this formula should be a risk that is 10 to the minus 6. We have heard talk about equal protection from community to community and this type of approach will indeed

give equal protection to citizens that live in Superfund communities no matter where the community is located.

I might throw this out. I am not so sure I want to be protected in the same level as citizens living in Carver Terrace in Texarkana, Arkansas, or citizens who live around the Reichold Brothers chemical site in Columbia, Mississippi. You are giving me equal protection to be equally dirty. I want to be equally protected as citizens who live in subdivisions such as Broadmore Towers in my town. So we need stringent cleanup standards.

This cleanup standard is a risk-based approach. I think that everyone on the Commission clearly knows my anti-risk position. However, I have sat through this process. I have listened to all the arguments and I can accept the Commission's standards formula approach. But I can't accept any weakening of these standards, and I am just the tip of the iceberg.

A clear delineated process of remedy selection is needed and the Superfund position recommends this sequence of—Ms. Browner also mentioned in her talks some of the steps in this process. It is important you know exactly where you start, what you must do to get to the next step and when you go into containment and whether that will be containment short or long term. It makes it very clear and eliminates confusion.

If no feasible technology is available then we can do interim containment and it defines feasible technology. How do you determine whether or not technology is feasible? Cost is a factor, but cost can't be the primary factor. One must consider cost to the community and ultimately to the entire society, because sick people don't work. Somebody has got to take care of them. Sick children don't learn and children who do not learn don't become viable tax paying citizens in the future.

By making the standards both strict and consistent, establishing a defined and transparent process for remedy selection and providing conditions of containment, the cleanup goal can be uniformly met for all sites. Industry has a clear concept of what must be done and citizens are protected irrespective of their race or ethnicity, socioeconomic level, political clout or participation. This is environmental justice.

Three major emphases on health: First is the replacement of or the reorganization of ATSDR to a health agency that is more efficient and accountable; filling in data gaps on health effects from exposure that will make assessment and setting of standards more accurate; and the meeting of the needs of citizens living near Superfund sites.

The Commission report addresses environmental justice issues. Simply put, if you do the honest and right thing, justice will be served for all. Specific environmental justice issues include stringent formula-based national cleanup standards, a modified liability system that is going to reduce litigation and accelerate cleanups, and enhanced public participation, including the enforceable right to participate in the decision.

I might emphasize the CIAO. If you are not adequately funded, if you do not have a CIAO to work with those citizens so that they are knowledgeable, because we have heard a lot about citizens making decisions on limiting selection, and if it is going to be

meaningful participation, those citizens must be knowledgeable. They need help there.

Also the TAG grants. We need adequate funding for the TAG grants because as long as that site is active, those citizens need to be able to get technical assistance. The hazard ranking system which is revised and considers the total exposure of the communities in the ranking so that many sites, such as Mr. Tauzin is concerned about, which may not get a high ranking number, would under this revised system because you consider total exposure and certain socioeconomic factors which exacerbate exposure for citizens.

We also need site prioritization as to which sites get cleaned up will also use similar factors.

In summary, a Superfund program that truly addresses its mandate honestly and fairly is in the long run cheaper, quicker and better for all concerned.

Thank you.

Mr. SWIFT. Thank you very much, Ms. Robinson.

[The prepared statement of Ms. Robinson follows:]

FLORENCE T. ROBINSON
NORTH BATON ROUGE ENVIRONMENTAL ASSOCIATION

ADMINISTRATION'S BILL ON SUPERFUND REAUTHORIZATION AND RECOMMENDATIONS OF THE NATIONAL COMMISSION ON SUPERFUND

I. CLEAN-UP GOAL AND REMEDY SELECTION PROCESS

The over-arching goal of the entire Superfund process must be the protection of human health and environment over the long term. This is the clear goal of the clean-up and remedy selection process. The Commission generally agrees that clean-up standards should be health-based, but due to the considerable data gaps that exist in risk and health effects, a conservative position was assumed. That is, we felt that we should not "wait for dead bodies." Therefore, stringent clean-up standards are needed for the welfare of both citizens and industry. Indeed, industrial representatives of the Commission have noted, that as long as the waste is present, "industry is still on the hook." Also, the longer the waste is present, the greater is the potential for problems to develop that will exacerbate dangers and costs.

To prevent unnecessary delays and inconsistencies in clean-up caused by endless debate and litigation in determining site-specific clean-up levels, **a formula-based national standard for soil and ground water levels is needed.** This standard should be based on a formula whose two major components are a hazard/potency number, and an exposure number. The hazard/potency number is 10^{-6} for carcinogens, and a hazard index (HI) of one (1) for non-carcinogens. It is important to set such a limit on exposures to chemicals that cause debilitating conditions. This hazard/potency number that is specific to each chemical and should not vary by site. The exposure number gives some site-specific flexibility. It may include site-specific inputs only where they can be objectively measured, have effects that are well understood, and have significant impact on the contaminant cleanup levels. These standards must take into account both chronic and multiple exposures. This is a risk-based approach, and my anti-risk position is very well known. But after extensive discussion and consideration on the issue, I can accept the Commissions Standards/formula approach. However, I **cannot accept any weakening of these standards.**

A clearly delineated process of **REMEDY SELECTION** is needed. This process must include citizens from the superfund community in the decision making process. It should make determinations of when imminent and substantial danger to the public health or welfare exist, and carry out **emergency actions and removals.** Relocation of citizens must be considered a viable and sometimes necessary emergency action. EPA should develop and implement some limited **presumptive remedies** that are consistent with the Superfund's clean-up goals. These remedies must be based on experience with multiple sites with shared characteristics, where the effectiveness of the technology has been demonstrated after rigorous analysis. Highly toxic and highly mobile contaminants (Hot Spots) should be treated.

When presumptive remedies are not available for all or a portion of the site, then an **assessment**

and remedial action plan is conducted. Cleanup targets must be established using the national standards/formula approach, or background or site specific risk assessment where appropriate. The criteria to be used for a feasible treatment technology is based on its ability to do the job, meet the goal, be acceptable to the community, consider future land use for the site and the areas surrounding it, and cost. High cost should be acceptable if treatment technology can successfully address a number of criteria.

If no feasible technology is available, then the site goes into **interim containment**. During interim containment, the risk to the community must be 10^{-6}. Such sites must be monitored at least quarterly for migration and possible exposure opportunity (all routes must be considered). Every five years these sites must be evaluated for the availability of feasible treatment technology. When no feasible technology is likely to become available, the site would become eligible for long-term containment. It still must be protective of human health at the 10^{-6} level. Land that is in interim or long term containment can only be used when the community has been involved in that decision, and community and workers are protected at the 10^{-6} and HI of one.

By making the standards both strict and consistent, establishing a defined and transparent process for remedy selection, and providing conditions of containment, the clean-up goal can be uniformly met for all sites. Industry has a clear concept of what must be done, and citizens are protected, irrespective of their race or ethnicity, socio-economic level, political clout, or participation. This is **ENVIRONMENTAL JUSTICE**.

HEALTH

The major emphasis of the Commission's report that I would place on heath are (1) the establishment of a health agency that is more efficient and accountable, (2) filling in data gaps on health effects from exposure to hazardous substances that will make assessments and the setting of standards more accurate, and (3) on meeting the needs of citizens who live near Superfund sites. **ATSDR** should either be replaced with such an agency, or undergo a major reorganization such that it could become more accountable, efficient, and respond better to communities needs and issues. More funds need to be directed to research assessing the nature and degree of human exposures and the adverse health impacts caused by such exposures (clinical research). Citizens should not merely be "studied," or "diagnosed." Citizens should be provided real health services for their environmental health problems. Therefore, a grant program for community health demonstration projects should be established. These projects, in addition to providing real services to exposed citizens, may also provide important data on the exposure/health effect problem, and provide health care providers with improved training in environmental medicine.

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ENVIRONMENTAL JUSTICE

Environmental Justice issues are addressed throughout the Commission's recommendations. Quite simply put, if you do the honest and right thing, justice will be served for all. Specific environmental justice initiatives are:

1. Stringent formula-based national cleanup standards.
2. A modified liability system that will reduce litigation and accelerate cleanups.
3. Enhanced public participation including the enforceable right to participate in the decision-making process, a Citizens Information and Access Office (CIAO) that is extra-governmental, and is critical to the meaningful participation of citizens in the process, expanded TAG grants that are easier to get, Citizen Work Groups (CWGs) for on-going input in the Superfund process, and an expanded Right To Know.
4. A revised transparent **Hazard Ranking System** that, in addition to the existing factors of the current system, considers the total exposure of the community in the ranking process. This would include such socio-economic\ethnic factors that exacerbate exposures, as use of land and waterways for subsistence or religious/cultural practices, sub-standard housing, inadequate nutrition, and lack of readily available medical care.
5. A site prioritization process that considers the same factors as the HRS.
6. A more accountable health agency, and funds and mechanisms to meet health needs of communities, as well as help fill data gaps.

In summary, a Superfund Program that truly addresses its mandate honestly and fairly, is in the long run, cheaper, quicker, and better for all concerned.

Mr. SWIFT. Mr. Pierle?

STATEMENT OF MIKE PIERLE

Mr. PIERLE. It is always a difficult challenge, I have learned over the last year, to attempt to follow the eloquence of Florence, but I will give it my best shot.

I am here substituting for Dick Mahoney who is chairman of the company and the major participant for Monsanto in the Commission and feels very good about the Commission and its product. He is unable to be here today, but if he was, I think he would say many of the things that I will follow with.

The Commission did produce a very productive product, no question about that. He feels good about that outcome, not only from a general standpoint of outcome, but looking at it specifically through the eyes of a chairman of a major business. This is a good proposal and it is good for business.

Personally, I participated in Superfund three times around. This is the only process that I have ever been associated in Superfund that really was aimed at consensus decisionmaking by decisionmakers of all the affected stakeholders. I think clearly the process was different and very important.

I will talk about remedy selection, health and environmental equity. In remedy selection, you have heard that the process is slow and inefficient and too costly. Why? One of the reasons I would like to highlight—and there is more than one reason—is the unavailability of remediation technologies that have a demonstrated and reasonable cost.

In many cases, we simply don't know how to remediate sites. Current law sets up a requirement of total treatment and preference and therefore you have a loggerhead situation and this has played out in virtually every site in inefficient time and money trying to prove that you cannot through technology available today at many sites do the remedies that one would like to do.

Where we practice certain technologies, such as dig it up and haul it into somebody else's backyard, the community has said, "I don't like the risk associated with digging it up", and not surprisingly, communities that are receiving it are not too overjoyed about receiving the wastes.

Another attempt to practice is incineration. A few years ago it was thought to be the technology to satisfy the problems. We have determined it is not generally applicable. Burning dirt is very expensive, and in addition, the public is not enthused about that type of technology.

So we spent lots of time within the Commission and what we believe we have relative to remedy selection is first a set of recommendations that provides equal protection of health and the environment at all sites. That is the goal. It is simple. It is simply stated and by stating it so it provides real direction to the program.

The Commission report recognizes the technical limitations and even though we eliminate generally the preference for treatment and permanence, especially in the low toxic areas, we do still maintain the bias for treatment for hot spot areas which are where there is basically highly contaminated material.

In doing so, though, in the recommendations, we then broaden the availability of remedies under the statute that are available beyond treatment to also include containment in some areas, both as a permanent remedy and in some cases containment as an interim remedy where there are not cost-effective and available technologies.

In the selection of technologies for hot spot areas for the highly contaminated areas, there are words in the report that speak that these should be done where the costs are reasonable. But there is a clear indication that on hot spots, that there should be more money spent to try and remove the hazard than simply to try and contain that hazard.

In those areas where technologies are not available, basically there is a provision that the containment would meet the health protection goal. In areas on sites though where additional technologies would become available over a 5-year period , there is a 5-year review that could require going back and in the hot spots actually do treatment remediation in addition to then interim containment.

Groundwater is treated specifically in the report as well, but along the same conceptual lines. In some areas, it is recognized in the report that groundwater is already not usable for drinking purposes and never will be and it is not contemplated that there would be treatment of those groundwaters. In other areas though, whether the groundwater is currently used or could be used, it contemplates that the goal again will be to treat those groundwaters.

There are very few technologies available for groundwater treatment, so again where they are not cost-effective, where they are not demonstrated, then one would go to containment of the groundwater again until the technology is available for treatment.

Overall, we think all of these get to a more practical approach. There will be less cost, there will be no diminution or lessening of the level of protection that is afforded at the sites. The process will work because the public is involved. It will become more transparent and by involving all if as stakeholders we think the right decisions will be made at the sites.

Let me briefly speak to health. There were large differences on this subject in the Commission in the extent of problems both to the health and the environment and the Commissioners chose not to debate the differences, but to look for the areas of common ground. It was agreed in principle that there is a need to produce more data to help answer some of the fundamental questions about the extent of health damage and environment damage caused by sites.

There is a need to involve the affected communities in these studies and in the collection of such data. In many cases, those are the people that live there. They understand what the health consequences or environmental consequences must be and they should be listened to and involved in those studies.

In addition, it was agreed that where there are problems in the health communities, and the Commission actually went to the field and held field hearings on this and did hear directly from impacted communities.

The third principle that was agreed to was that those health needs of the communities that are being caused by Superfund sites should be addressed.

The specific recommendation is that the HHS agency should be given priority and responsibility for providing the leadership on all of the health component programs. We should expand data collection efforts, do better studies, have better assessment methodologies and train public health care providers in the communities around providing and understanding the health issues.

Within the recommendation then is also a grants program that actually would put in place and put into the communities the capability to provide some primary medical care to affected individuals, would allow citizens to be referred to other health care providers, and it would provide health information that could be then aggregated up for the benefits of the entire program. That was provided on a pilot basis.

There was a cap both in terms of dollars, time and numbers of sites at which these should be tried out over the next 3 years, I believe.

Last, let me simply say that on environmental equity, the commission has heard from several affected communities. The environmental equity recommendations are included throughout the report.

How will it help? I think remedy selection will provide faster and more effective cleanups and the communities will benefit. There will be consistency of protection, which is a large issue within these communities, that they are getting second class treatments. We believe that this will not happen under our recommendations and we propose changes in the priority ranking system that basically get the right sites into the system on the right priority so that the sites that are causing the worst concerns are addressed firstly; and lastly, because of what is a difficult area to get hard data and information on, we support a study by the GAO to actually look at the discrepancies that exist in the current program and then basically to continue to assess the program so that those discrepancies are indeed being removed.

In summary, many of the commissioners commented that if they sat down individually, they would write a different statute and therefore it is not perfect to your own taste, but it is perfect to the combination of the stakeholders that were represented and again provides a valuable document that we hope will move Superfund reauthorization forward.

Mr. SWIFT. Thank you.

[The prepared statement of Richard J. Mahoney follows:]

STATEMENT OF RICHARD J. MAHONEY, CHAIRMAN, MONSANTO COMPANY

The portions of the Commission's report I will address are the sections on remedy selection, health, and environmental equity.

The existing Superfund program is not only broken because it is ineffective, it is also too expensive and wasteful of scarce resources. Instead of a process which results in efficient and effective remediation, the Superfund program in fact delays remediation. At every site, huge amounts of money are spent by PRP's with no progress toward remediation.

One important reason for this is that the existing program provides for no formal recognition of the fact that we just simply do not have the technological capability for treatment of all hazardous materials in all media commonly found at Superfund

sites. Even where technologies do exist, they are often outrageously expensive compared to the level of human health protection achieved.

In its selection of remedies because the statute provides for preferences for treatment and permanence. There is no process for those circumstances where treatment technology is not available or cost effective.

The result is that PRP's are required to spend huge amounts of money, not cleaning up the site, but demonstrating that there is no effective treatment technology. Then, the decision may be to dig up mountains of contaminated soil, move it to another place and put it there, creating a lot of dust and exposure to the community in the process. Or, we are required to build huge incinerators and burn dirt to reduce the level of hazardous materials. This incineration is not a very sophisticated technology, can be very expensive, sometimes does not achieve the desired result and is often not wanted by the community at the site. The Commission's remedy selection proposal formally recognizes these technological limitations, and provides rational alternatives for addressing them while still providing a high level of protection.

Realistic exposure pathways and actual site conditions which can be measured and are well understood will be used to select the most cost effective remedy for the site which will provide a high level of protection at that site.

Preferences for treatment and permanence are eliminated for high volume, relatively low toxicity materials, and containment is recognized as an appropriate remedy for sites or portions of sites with this kind of waste.

There will be no need to expend time and resources demonstrating there is no effective treatment technology for these sites. Containment will be considered as appropriate as treatment and in those cases where it will provide the same or greater protection at lower cost, containment will be the remedy of choice.

Cost of the remedy is recognized as an important consideration throughout the decision-making process, and the cost of the remedy must bear a reasonable relationship to the level of protection achieved.

Preference for treatment is limited to what we call "hot spots", which are areas of highly toxic or mobil materials and materials which cannot be reliably contained. These areas should be treated, because "hot spots" are meant to be materials of such high toxicity that any damage to a containment remedy which would result in release of these materials would present a serious potential for adverse health or environmental effects.

When technologies do not exist to address these areas of the site, containment is again an acceptable alternative, with a 5 year review process to determine whether new technologies are available which are effective to reduce or eliminate the hazardous material.

Existing and likely future land use of the site is important to the remedy selection decision. With the participation of the community, rational decisions can be made to select the most appropriate and cost effective remedy for the site, given its current and future use. Different remedy decisions can provide the same protection at sites which are used differently because exposures at different sites will be different. For example, clean up levels in a residential area which will provide a high degree of protection are very different from clean up levels which will provide the same level of protection at an industrial site or a site used for a shopping center.

Groundwater remedies will be much more rational and cost effective. When remediation is required, recognition of technological limitations will prevent decisions to require pump and treat remedies for decades (or in some cases even hundreds of years!) which will never be effective in achieving the desired level of remediation. This waste of economic resources will be eliminated.

The Commission proposal provides for incentives to encourage development of new technologies to address the situations where treatment is necessary and technology is not available. PRP's with sites in containment subject to the 5 year review process will pay into a technology fund. The amount of contribution will depend on whether the PRP is engaged in research and development to discover new technologies, the sophistication of the containment remedy used, and other factors. The moneys in this fund will be used to offset costs of implementing new technologies in situations where they are not fully demonstrated and thus may not be effective, and will also be used for research and development.

Members of the Commission held widely divergent views about the relationship between exposure to toxic substances and health effects. Despite the very different views held by individual Commission members, the commissioners were able to agree on two important principles related to health effects from exposure to hazardous substances.

First, the Superfund program must be designed to address the health needs of citizens living near Superfund sites, and that the community around the site can provide valuable information to aid in improved understanding of potential effects.

Second, we don't know enough about effects of chronic exposure to hazardous materials and need to better understand the nature and degree of exposure of citizens around Superfund sites as well as the relationship between exposure and adverse health impacts.

The Commission report contains a number of recommendations to address these needs.

We recommend that the Congress designate a scientifically based health agency in the Department of Health and Human Services, funded separately from EPA, with expertise in health issues. This new agency should provide scientific expertise to State health departments and local communities, particularly the community working groups. This agency should also collect data to identify routes of exposure to hazardous material and exposure measurements and it should have responsive capabilities in cases of public health emergencies caused by exposure to toxic substances at Superfund sites.

The Commission also recommends expansion of efforts to collect exposure and effects data from the local community, which can provide information about the Superfund site as well as other sources of exposure. Research should be undertaken to provide additional scientific knowledge about the relationship between exposure and health effects, including better methods for human exposure assessment and understanding of effects from exposure to multiple sources and hazardous materials. Training of health care providers in environmental medicine is also recommended.

Last, the Commission recommends a grant program for community health demonstration projects to provide health information to members of the community, refer citizens to health care services and, when necessary, to provide primary medical care.

Environmental equity was considered by Commission members throughout the discussion of Superfund reform, and is addressed throughout the report.

Faster and more effective cleanup, which will be achieved as a result of the remedy selection and liability reforms will provide better protection of all communities. The reformed remedy selection process will insure greater consistency in remediation between sites, so that poor communities and communities of color are assured that the communities with the most exposure, from any particular site or from several sources in addition to the Superfund site, will receive priority attention under the Superfund program, changes in site prioritization decisions are recommended.

To provide for continuing recognition of environmental equity issues, the Commission recommends that GAO prepare and release an environmental equity study every 2 years to the Congress, EPA, and communities, to evaluate the program's performance in addressing environmental equity concerns.

Again, I thank you for the opportunity to testify today, and will be pleased to answer your questions.

Mr. SWIFT. Peter Berle?

STATEMENT OF PETER BERLE

Mr. BERLE. Thank you, Mr. Chairman. My name is Peter Berle. I have submitted written comments and will summarize those in the interest of time.

Let me say by way of background, I was the environmental commissioner of the State of New York when we discovered the Love Canal. I have always wondered since then how the battalions of legislators and lawyers and activists and doctors would have kept themselves amused for the last 15 years had we not found that great natural resource which is in my State.

I currently serve as president and CEO of the National Audubon Society, an environmental organization of over half a million members. I speak today on behalf of not only the National Audubon Society, but the Natural Resources Defense Council and the Environmental Defense Fund whose Chief Executive Officers served with me on the commission and therefore speak on behalf of these three significant national organizations.

Like others, we have agreed that we have reached a consensus between us through a process that we were skeptical about in the past and I think have provided guidance which sets clear direction as to where we should go in the future.

I would like to talk about the liability system since this has been of such concern to all. I emphasize that with all the criticism, there are some very important constructive aspects to the system as we have known it. It has provided incentive for cleanup. It has radically changed, I think, the way industry deals with its waste and been a very substantial force in the program to eliminate waste entirely.

At the same time, we are well aware of the fact that it has produced results which have been extremely difficult to deal with, too much litigation, too much time spent in the process, indecision and a situation that has not led to the rapid cleanup that we are after. Therefore, we are recommending as a Commission changes in the liability regime which addresses these concerns.

We believe that all potentially liable parties must participate in an informal process which allocates fair share. You have heard a lot of comment about whether that should be binding or non-binding. The Commission feels strongly that should be a binding process for, among other reasons, to provide certainty to the people who are involved in it, so it has a beginning and an end.

I heard the Administrator talk about difficulties in making that work, the need for hearing officers and others. We think that is doable. We think the value of the process is important to get the speed and efficiency in the operation which we haven't seen before.

The report makes recommendations which address specific needs, the problems of municipalities, small businesses and *de minimis* shareholders. We also believe that funding of the *de minimis* process is one which, as we have approached it, is reasonable. It calls for the government to take care of that cost. We were concerned, however, that as that issue was dealt with, that it might result in less dollars for actual cleanup.

We believe that the funding can be managed out of the savings in enforcement costs that this process will achieve, but the report also recommends a kick-in of an increase in the business income tax if necessary with a limit of $500 million in order to pay those costs. The reason for doing that, again I repeat, is so that the payment of the orphan share situation does not reduce funds that are available for cleanup. I was frankly personally impressed and gratified that our business representatives on the Commission subscribed to that view.

You have heard a lot about cleanup standards. We have articulated the needs for broad standards with flexibility at the local level. I would like to reemphasize our commitment to the notion that with respect to a health standard that at least with respect to carcinogens it should be 10 to the minus 6, that other health standards are recommended and required; so that while remedies may be adjusted dependent upon the local site we are providing for an equal level of protection for all of the citizens of our country.

Therefore, we think that this collection of recommendations that we are making meets the needs that have been specified to have a process that protects our citizens, that provides for the cleanup of waste, that provides the incentives so less waste is produced and can be handled better and that we can move forward on what is a major national concern and need.

Thank you.

[The prepared statement of Mr. Berle follows:]

Statement of Peter A.A. Berle
National Audubon Society

before the

Subcommittee on Transportation and Hazardous Materials
Committee on Energy and Commerce
U.S. House of Representatives

February 3, 1994

Chairman Swift, members of the Subcommittee, I appreciate the opportunity to appear before you today to comment on one of the most important and controversial federal environmental laws, Superfund. My name is Peter A.A. Berle. I serve as President and C.E.O. of the National Audubon Society, a national environmental organization with more than a half-million members. Also, by way of background, I served as New York State's Commissioner of Environmental Conservation at the time that we discovered the Love Canal problem. I have been involved in toxic waste issues for two decades as a state legislator, in government administration as a private attorney and as a leader of a national conservation group. My comments today reflect the views of the National Audubon Society, the Environmental Defense Fund and the Natural Resources Defense Council, all of whom served on the National Commission on Superfund. All three of our organizations strongly support the complete set of recommendations in the Commission's report, but I'd like to focus my remarks on two key areas: liability reform and remedy selection.

Liability Reform

Our three organizations believe that Superfund's current liability system provides important incentives for both cleanup and pollution prevention. Because the foundation for Superfund is based upon the site-specific, polluter pays principle, Superfund liability has prompted industry to take aggressive steps to more carefully manage their wastes and, in many cases, to reduce their wastes altogether. In addition, because the liability regime applies retroactively, many firms have established programs to voluntarily cleanup older sites, before they pose a risk to the public. The Commission recognizes the importance of preserving these incentives and has expressed its support for retaining the basic framework of the current liability regime.

However, our organizations and the other Commission members acknowledge significant shortcomings in the current liability regime that can and should be fixed. The current law has spawned thousands of lawsuits as industry seeks reimbursement for its Superfund costs. These lawsuits have swept in municipalities, small businesses, and others with only tangential connection to Superfund sites. In addition, small contributors -- sometimes called de minimis parties -- have been generally unable to quickly settle their liability under Superfund, resulting in needless uncertainty and costs. Finally, although the current law allows EPA to provide some federal funding to address instances of unfairness that may arise in the application of joint and several liability, such funds have been provided

very infrequently.

The Commission recommendations seek changes in the liability regime to address each of these concerns. First, the Commission recommends stopping the proliferation of lawsuits by requiring all potentially liable companies to participate in an informal allocation process to assign to each liable party a fair share of response costs. This allocation process will largely eliminate the current morass of litigation and compress the existing process into a compact, 18 month allocation determination. Parties involved in Superfund sites will know their responsibilities quickly and be able to settle with the government early in the cleanup process. We also make clear that the government's current authority to compel one or more parties to perform cleanup work, or to pay back the government for its costs, would be retained before, during and after the allocation process to make sure nothing slows down cleanup activities.

The Commission also recommends that the allocation process be binding on the parties, so that companies performing cleanups can more readily recover their cleanup costs from non-settling, recalcitrant parties. By making the process binding, proceedings against recalcitrant parties should be relatively efficient and straightforward. Of course, a binding process requires consideration of certain constitutional due process issues for the parties, and it is our hope that those considerations can be taken into account without requiring a full blown administrative adjudication. In addition, under our recommendations the government would be required to pay for costs attributed to so-called "orphan shares," parties who can't pay or who no longer exist. All parties, including the government would have a limited right to appeal.

This "rough justice" approach to liability does not affect the underlying liability rules, but it provides a more streamlined, efficient and sensible way to apply to those rules.

Second, the Commission recognizes the need to specifically deal with unique circumstances under the current liability system. We have developed recommendations to address the specific needs of municipalities, small businesses and de minimis parties, each of whom has made a persuasive case for special attention. Once again, the liability rules remain intact, but the one-size-fits-all process for applying those rules is changed to address these special concerns.

Finally, the Commission has recommended that the federal government pay for costs attributed to so-called "orphan shares." These costs are currently borne by other responsible parties at Superfund sites and these parties have complained that it is unfair to force them to pay for costs assigned to insolvent companies or firms that no longer exist.

As a starting point, the environmental community expressed considerable reservations about this approach because, although we do not oppose injecting greater fairness into the current system through additional federal assistance, we cannot support such efforts if it

means fewer funds for ongoing cleanup work and other program activities. Industry representatives on the Commission also agreed that orphan funding should not be provided if it meant sacrificing ongoing cleanup efforts.

To overcome these concerns, the Commission specifically identifies the funding source for orphan payments. It provides that such funds may only come from identified savings in the newly reauthorized program and, if those funds are insufficient, the Commission recommends an increase in the Corporate Environmental Income tax to pay up to $500 million per year for orphan shares. Orphan payments could not exceed that amount unless additional tax increases are provided. In our view, this approach ensures that funding for orphan shares will not come at the expense of the current program's cleanup activities.

Notwithstanding the many important issues associated with the liability system, nothing will be more important to our organizations than ensuring that the current strict, joint and several liability system is maintained and that funding for orphan shares not divert resources from ongoing cleanup activities. The Commission recommendations meet both of these tests.

Cleanup Standards and Remedy Selection

One of the major concerns our organizations have had with the current application of cleanup standards and remedy selection in the Superfund program is the widely variant cleanup decisions made from site to site throughout the country. Some communities receive excellent cleanups for their sites, while other communities receive wholly inadequate cleanups. These variations are a product of statutory criteria that afford EPA substantial discretion and flexibility in applying cleanup decisions throughout the nation. It also stems from its application of a "risk range" policy that allows EPA the unfettered discretion to protect one community from cancer risks that may be vastly different from the protection afforded another community, oftentimes without explanation or justification.

Many community groups and environmentalists have advocated that the law be changed to bring greater standardization and transparency in cleanup decisions. Providing greater certainty and clarity to the remedy selection and cleanup process will not only help communities, but will help businesses who have expressed concerns that some cleanup decisions require expenditures that don't appreciably increase human health or environmental protection.

This common concern about uncertainty and variability by environmentalists and industry formed the basis for many of the recommendations in the Commission report. For example, the Commission recommends that land use be taken into account in considering cleanups, but it spells out a detailed process for making land use determinations and sets out important presumptions where land use variations would be inappropriate. Make no mistake, EPA currently considers land use in making its cleanup decisions, but this decisionmaking

process is not guided by any explicit principles or procedures to ensure that these decisions are made protectively and consistently around the country.

Similarly, the Commission recommends the establishment of national cleanup standards based on an approach that affords built-in, site-by-site flexibility. Rather than allowing wide open site-by-site risk assessments, as some in industry had proposed, or establishing fixed, nationally-applicable cleanup levels, as advocated by some environmentalists, the Commission recommended the development of a formula for setting cleanup levels that would treat some factors as "fixed" throughout the country, but would also allow explicit consideration of certain site-specific variables, such as the distance between the site and the groundwater table. This approach fairly accommodates the need for standardization, but also affords site-by-site flexibility.

The Commission took a similarly pragmatic approach to the issue of treatment versus containment. Superfund provides a preference for treatment for all wastes, even if such treatment might make site conditions or health conditions worse than other approaches. Clearly, some highly toxic materials on the site must be treated promptly, and the Commission strongly recommends retaining a substantial bias for treatment in the case of so-called "hot spots." And, where treatment technologies don't exist, EPA should not be allowed to turn its back on the site, but should instead put the site into an interim procedure that would compel reconsideration of treatment in 5 year intervals to prevent EPA from using the lack of adequate technology as a justification for abandoning a site.

At the same time, the Commission rejects the idea that all wastes can simply be contained and that no treatment is ever necessary. By explicitly recognizing that "hot spots" require treatment either immediately or at some future date if technology is not currently available, treatment retains is preference. But, containment can be a co-equal option where wastes do not pose a substantial risk if the containment system fails.

Finally, the Commission recommends the elimination of EPA's cancer risk range, which permits levels of protection that can vary from community to community by a factor of 100. As a group, the Commission believes that all communities should be assured of equal environment protection and that, in the case of cancer risks, that protection level should be set at one cancer risk in a million. In practice, we recognize that, under the Commission's proposal, actual cleanups might vary considerably from site to site, depending on land use, available technologies, site topography and other factors, but we believe strongly that every community deserves the identical guarantee of meaningful health protection for each remedy selected. This guarantee will be a critical cornerstone for the environmental community in evaluating any reauthorization bill.

Thank you again for the opportunity to testify today. I'd be happy to answer any questions.

Mr. SWIFT. Mr. Hansen?

STATEMENT OF FRED HANSEN

Mr. HANSEN. Thank you, Mr. Chairman. I am Fred Hansen, director of Oregon's Department of Environmental Quality. I do not intend to represent the views of all 50 States, although I do believe that a number of States would agree with the views that I have held and that the Commission has come to.

I would like to speak with you about two issues, remedy selection and the non-Federal role in implementation.

First off, I think that it is important to be able to stress several things on remedy selection. From our experiences, every time we have not involved the people that are affected by a site early in the process, we have found nothing but headaches. We have found the process drawn out. We have found that the citizens have demanded really higher levels of cleanup than was what we would have believed to be scientifically defensible, and yet on the other hand, every time we found that we involved them early and that we involved them meaningfully in those decisions that affected their direct community, that we found them not only to be very reasonable in the selection process, but that the process was shortened in time and we found that in the long run, businesses that were operating in those communities had a more effective long-term relationship. That is critical.

Two, from the standpoint of the affected parties, the responsible parties, the issue that I hear over and over again that are the keys to what has to be had that isn't there in the current program is that cleanup levels need to be established with objective and quantifiable standards.

Two, that liability needs to be defined in a way that people know what that liability is, can account for it in long-term financial planning of their companies and be able to take it on in a way that allows them to be able to handle those expenditures.

Three, to be able to handle the scope and timing of the cleanup work in a way that also can be scheduled to be able to meet their needs and the needs of the community. Ultimately, of course, costs are a key element and to be able to have those known and certain are absolutely key.

Spending resources on environmental protection—on litigation rather than on cleanup activity is the message that I hear from the business community in my State, from various citizen groups and others that are involved here is the principal problem in the current Superfund program. We are aware that the Superfund program and liability laws have done substantial things to alter how we as a country manage hazardous substances and that those efforts have moved us further along in pollution prevention and sound management and than probably most other laws.

However, they have come at very high costs in terms of the cumbersome nature of the process, in terms of the heavy transaction costs, and I think that the National Superfund Commission recommendations are key in being able to remove a number of those transaction costs and to be able to move cleanups ahead.

In remedy selection and cleanup goals, there are five key elements. One is the proposal for numerical standards for 100 com-

mon contaminants so that the cleanup goal is certain and can be determined without extensive site specific analysis.

Two, that there is a preference for treatment versus containment, that the preference is retained, but includes objective criteria to move to containment when that is the reasonable option.

Three, that there is emphasis on meaningful, early involvement of citizens in the identification of health problems, of cleanup actions and of the ultimate disposition of the site.

Four, the establishment of presumptive remedies as an alternative to site-specific studies of all potential remedies. We believe that presumptive remedies will assist not only in the actual cleanup of sites on the NPL, but will, in fact, on voluntary sites as well.

Last, we have substantial emphasis that we believe EPA should expand emergency removal authority so that we can provide for better protection of citizens near sites and be able to move cleanups along faster. All of us agree that the speed in which those actions have been taken in emergency removals have often though not always substantially been accepted by communities as positive steps moving the process forward.

Let me turn to the issue of the non-Federal implementation. The States, as you have heard already from Administrator Browner, have had or can play a key role in the implementation and administration of the Superfund program. Currently there is no delegation available to the States. States can play a lead role on certain sites, but we do believe as a Commission that role can be expanded and in the process be able to be more efficient and effectively delivering the Superfund program at the local level.

It is clear that at the Commission level, most of our discussions were on liability, cleanup standards, on citizen participation. We did not spend great amounts of time on delegation, and consequently leave the specifics of how that should take place, but recognize that is important.

As a part of that issue of delegation, we made internal notice of the role that delegation can play on tribal lands. First we recognize that much of the work that States have done to be able to be able to develop their own State Superfund perhaps has been done through assistance from EPA with core grants. Those core grants have not been available to tribal parties and as a result, we believe that kind of capacity development must be had for tribal lands.

Second, we believe that as there is an opportunity, we would recommend for States being able to implement those Superfund programs. If the capacity exists, we believe likewise that should be available for tribal lands.

Thank you for the opportunity to appear.

Mr. SWIFT. Thank you very much.

I am going to ask unanimous consent that all members be able to submit questions in writing to our witnesses, and particularly to Ms. Browner. Without objection, so ordered.

I inadvertently released Ms. Browner before Ms. Lambert had a chance to ask questions, but it will apply for all members of the subcommittee.

Thank you not only for your testimony today, but for all of your work before. In a society that tends to be very skeptical and cynical, there are a lot of stereotypes, and some of those stereotypes are

that academics are too much in an ivory tower to get anything done and bureaucrats are too dull and citizens too uninformed and businessmen too greedy and environmentalists too rigidly ideological to achieve precisely what you people have in fact achieved. You are living proof that none of those stereotypes fit.

I think the NACEPT process was another good example. But I think it is also important—there are a couple of kinds of truisms. One is that when you—when addressed, people stop complaining about a problem and start complaining about the solution. That is not meant to be a cynical observation; it is a perfectly logical, normal, expected part of a process; that once you finally get government to pay attention to your problem, reasonable people are going to have some disagreements about what the solution should be.

We are at that stage. We are over the hump. The problem is that we sometimes forget that doing nothing leaves you with a problem that you yelled so much about in the first place. If you can't keep in mind that doing nothing puts you back where you didn't want to be in the first place, it sometimes gets easy to get on a high horse and not be a flexible as you need to be to get something done.

I say that not so much to you people, but because Swift's Third Law then applies, which is there is nothing easier to criticize than somebody else's compromise. If you weren't at the table—and I know the business community has been hearing it, the environmental community—why did you agree to that? Why did you hold out for this—if you haven't been at the table, you really don't know why those things were made.

However, people who weren't there should have pause about assuming that had they been there, they would have necessarily come up with something particularly different.

Swift's Fifth Law is that it is always easier to edit somebody else's work than it is to write the first draft yourself. We will benefit enormously from that law. You, NACEPT and the administration, have written the first draft for us and we get the easy job of trying to edit it and work out the compromises. I thank you all for that.

If you are dealing with some of your colleagues who are critical of your compromises, Swift's Third Law is in the public domain, you are perfectly welcome to use it.

The Commission's proposal has received criticism in a number of areas, but one in particular, one that interests me—there are people who are concerned about this, and they say your remedy selection is not going to be less expensive. It might even be more expensive.

Can you tell me how you respond when you hear that criticism from colleagues?

Mr. PIERLE. I think we have had opportunity to respond to this on several occasions to date. I think we would all admit that part of the difficulty here has been in producing a work product, does it contain all the clarity that one would like around the product. So people who are reacting to reading the words without understanding how all of them fit together, I think, have come to some premature judgments.

But dealing specifically with the question, it is easy for us to understand, and I will just put it in the context of a site that we have

as perhaps the best way to describe this—the current law requires you basically to treat permanently and remove all waste at a site. That is what the law requires one to do today.

In many cases, as I said, that can't be done. We have a site that we have been working at in Massachusetts for some 13 years; 13 years debating about what should the remedy for this site be when it was very obvious right upfront that the site should partially be developed for use and partially be contained, because there are no remedies for the kinds of problems that were presented.

In reality, we have that remedy today. I think some people are at risk for allowing the decisions through the process for that remedy to go forward with. There are tens of millions of dollars difference at one site looking at what one can treat that is mobile and hazardous and could leave a site and trying to contain and eliminate exposures in other areas. That is just one area where adopting what we have learned into statutory form will continue to help us save money.

We had a second site in Texas under which we were obligated under the statute to try and dig up and burn the entire site. We had an estimate on that site of some $30 million. The initial estimate to cap and cover was maybe about half of that, and the statute said spend it. So you were looking at some $10 million differential, but frankly, at that time it was important for us to say, "Let's get this behind us, off our books for once and for all."

The technology failed. The estimate to try and plow through on that technology at that site rose four or five times. That doesn't make sense, but under current law and the current statute, that is what we are required to do.

What this would suggest in that area is that cost is excessive, that cost is right for containment of those materials. There are hot spots that we ought to still get out and burn and incinerate and treat, but in doing so, we can save ten millions of dollars. This remedy description in the commission proposal, I believe, allows us to do that.

That is just two cases and two sites we are focusing on, the elimination of permanence, the elimination of AROR's. Bringing the treatment requirements down to where there is highly concentrated waste and allowing containment in others on either an interim or permanent basis can save us money.

Mr. SWIFT. The gentleman from Ohio?

Mr. OXLEY. I would like to know where you could get a copy of Swift's laws, the Library of Congress——

Mr. SWIFT. I added these up. I have seven of them, but four and six don't exist.

Mr. OXLEY. Work in progress, Mr. Chairman.

In reading the commission's report defining the problems with remedy selection, I see nothing indicating specifically that cleanups are costing too much. In the report on page 4, you mention that the current approach does not provide clear, well understood goals. It results in excessive time, inefficient and often ineffective roles for communities and PRP's.

The current approach may not be providing a consistent level of health and environmental protection, which is the approach that Ms. Browner took. The current preference for treatment in the

statute may be resulting in some decisions regarding technologies that are sometimes inappropriate and/or ineffective. Adequate treatment technology is not currently implementable for a number of the containments and media at Superfund sites, et cetera.

I think a lot of us feel that the core problem is the massive costs. You discussed that in your answer to the chairman. I am just wondering from a panel standpoint, where do we really get at that core question as to whether we are indeed spending too much? If we are spending too much, how do we become more efficient and spend less of the taxpayer's dollars and the industry dollars that are part of this whole process?

Mr. LASH. If I could respond first. I think one of the first things that brought the Commission together as we began to coalesce around certain ideas was the combined idea that the program was doing too little and costing too much. I think there is some hesitation about generalizing that remedies are too expensive.

There are some remedies, as Mr. Pierle was describing, where a lot of money has been wasted and they have been too expensive. There are other places where the remedies have been inadequate. So it is difficult to simply make an across-the-board generalization that all remedies have been too expensive. Clearly what is most expensive is to spend time fighting over the remedies, litigating over the remedies, fighting at the site over the remedies, extending the period of time over which companies face liabilities, and one of the things that seems very important to us is a series of reforms that enable these decisions to be made quickly, to be made rationally, to be made without litigation and to be made so that all the stakeholders are included and the decision sticks.

Ms. ROBINSON. You might also turn to page 12, Mr. Oxley, under Technology Availability and Feasibility Criteria, No. 5 talks about the cost of the technology. In section G, Determining Feasibility of Treatment, again it refers to costs and it makes a statement that if the technology meets the criteria and if the technology can really do the job, then high cost is more acceptable.

On the other hand, if the technology can only meet one or two of the criteria and it is not going to really do the job to the extent that you want, then cost becomes very important. Don't throw away money to do something that is not going to do the job.

Mr. BERLE. Obviously there is a transactional cost which we think could be reduced. Then the question of what is too much depends on the vantage point from which you look at it. We can agree if you can provide an engineering solution for the same cost and it is a solution that is a savings.

On the other hand, if the question is whether you are spending too much because of the level of protection you are trying to provide, you look at that differently depending on where you are in the spectrum. I would suggest that the kind of community involvement that this proposal requires gives you a better process for reaching some consensus as to where it is appropriate to come out, and for that reason, a greater acceptance or willingness to assume a cost which represents the shared values of all the people that are involved in it.

Mr. BURT. I think there are two things that are going to reduce cost. One is the existing law is written with the idea of getting the

chemicals out of the ground. Our approach is to protect human health and the environment, and you don't have to necessarily get all the chemicals out of the ground to accomplish what I think should be the fundamental purpose of the law, and you can do the second purpose; i.e., protecting health and the environment significantly cheaper at least in the situations where we are involved.

The second thing is that I think that community participation will lead to much more reasonable solutions and it is because of the nature of the bureaucratic process in EPA because, left on their own, bureaucrats don't like to take risks. If we have people in the community that are saying yes, but you know we would rather redevelop this land as an industrial site and not have it cleaned up permanently to a residential site, that is a voice of reason.

As a PRP, we won't have much credibility because they think we just want to spend less money. When informed citizens get involved, I think we will get cheaper and more reasonable solutions.

Mr. OXLEY. The Keystone Commission report recommends a binding allocation system similar to the system the Chemical Manufacturers Association has proposed. On the other hand, the administration bill includes only a non-binding allocation system.

Does the Commission oppose the non-binding system that has been put forward by the administration or is there a difference of opinion on that key issue?

Mr. BURT. I think the answer is probably. It is hard to say because we have not seen the legislative language that is being proposed. I can see where if a non-binding allocation had enough penalties so that if you didn't go along with it, you could effectively make it binding, it might be acceptable. That is unlikely, however.

I think as Peter said very well, without binding allocation, I think the chances of reducing the transaction costs and the time to get to the cleanup is likely not to be reduced as much as it should be.

Mr. PIERLE. I would add—and I concur with Bob—one of the most frustrating aspects of working at any site, and I am speaking from a PRP standpoint, is to step up to your responsibilities and know that the process is not requiring others to do that. So whether it is binding or non-binding, the binding we feel forces people to step up.

Clearly if there is a non-binding process, the force of the government to compel presence in that process is very important so that those that have a role and a responsibility step up to that responsibility and get into the fair share allocation.

Mr. OXLEY. I yield back my time.

Ms. LAMBERT. If you would like to continue.

Mr. HANSEN. We recognize that there have been some questions on the constitutionality issues and we are willing to work with it. I think that it is important that as you have heard already that the Commission considers the issue of binding or something that produces the same result to be an absolutely critical element of being able to reduce transaction costs as opposed to that it is just one of a whole series of recommendations. We would consider that to be absolutely key.

Mr. BERLE. One further comment on that. One of the things from the point of view of the environmental community that is so impor-

tant about this look at the liability issue is that the underlying joint and several process remains if the thing doesn't work. If I were on the other side of the fence, the advantage of the binding commitment is you then know where you are with respect to that situation and using joint and several to push people into the process adds to its efficiency.

So I think it is very important that the binding process provide that clear line that I think the PRP needs to know whether they are out from under joint and several.

Ms. LAMBERT. Two quick questions. If you don't already know, I come from an extremely rural area where most people affected by Superfund believe that "Sara" is their great aunt from Mississippi, however they are not finding this one quite as gracious. They do find that when they have been identified as a PRP, that life is never the same.

They can't secure loans. Their businesses go down the tubes, and it is very difficult. In your proposal, you fiddle with the current *de minimis* liability and establish new categories, *de micromis* PRP's.

I was pleased to see that you went a bit further than the administration proposal on small businesses, but I would like to hear from you what improvements could be made or where you think the administration's proposal could be improved as far as for the small business person.

Mr. LASH. It is difficult for us to comment on the administration proposal. We haven't seen it yet and in particular on the small business issues, we haven't had a complete briefing yet. It was clear to us that there had to be provisions that enabled people to cash out quickly without incurring all the transaction costs during the process, and that it was also going to be necessary for small businesses to have some way to stretch out payments, and both of those provisions are included.

We had quite—I am sorry that neither of our small business representatives are here today because both of them worked very hard to get a series of provisions that they thought would be practical for them to use.

Mr. HANSEN. I think another part of the issue, at least in small business, that I deal with in my State is that, even if they are not a PRP on an NPL site, they still have the liability issues hanging over them. I do believe that a concept that we talked about within the Commission of the voluntary cleanup programs are the types of things that provide a known and clear process by which a number of those small businesses can work through a level of contamination still within their means, but to be able to do it in a timely way so that they can sell property, they can liquidate businesses or they can do other things that we think are an important step toward addressing small concerns on the non-NPL listed sites.

Ms. LAMBERT. There is some type of a structured repayment system for small businesses in your plan, is there not?

Mr. HANSEN. Yes, there is.

Ms. LAMBERT. There is no deadline there in order to reach the *de minimis* or the *de micromis* determination once the allocation process has begun. Most likely, these small businesses will retain lawyers during the process and that takes time, and time is money.

Do you have or have I overlooked a provision to get the small businesses in and out of the process as quickly as possible?

Mr. PIERLE. It seems to me the intent here was to try and fast track the whole allocation process so that it would get done in 12 or 18 months so that could happen very quickly. That should be a fairly simple and low-cost process. At that point in time, *de minimis* people would get out.

I am not sure we describe on the *de micromis*—we did not describe the level of *de micromis* and those that could get out of the process even earlier than that. Again, part of the binding process is we believe that speeds the time that would allow a small business and quite frankly a large business with a *de minimis* responsibility at a site—I would like to not have to allocate resources at those sites as well, and I would like from a big company standpoint to be able to cash out at those sites as well.

Mr. LASH. Madam Chairwoman, I forgot to ask earlier while Mr. Swift was present, there was a letter that Bill Ruckelshaus, one of our members, wrote to Mr. Swift. He was one of our most active members, and he wrote a letter about the commission's report which he had asked me to ask Mr. Swift put in the record.

Ms. LAMBERT. Without objection, so ordered.

[The letter referred to follows:]

BROWNING-FERRIS INDUSTRIES

February 2, 1994.

Hon. AL SWIFT,
Chairman, Subcommittee on Transportation and Hazardous Materials,
House of Representatives, Washington, DC.

DEAR CHAIRMAN SWIFT: This letter is being written in lieu of my ability to appear at your hearings on the reauthorization of Superfund to be held this week. Were it not for the fact that I am halfway around the world in New Zealand, I would be there with you.

Let me say at the outset that I strongly support the administration reauthorization framework for Superfund; it is a bill that comes very close to the consensus position that was reached by the National Commission on Superfund, of which I am a member, and consequently represents an excellent vehicle for Superfund reauthorization.

You are well familiar with the National Commission and its work, but there are a few points that I think are worth making about what it has done in the last year. First and foremost, it is important to understand that the National Commission represents the leadership of a broad spectrum of interests affected by the Superfund statute, ranging from community groups to corporations, labor, and people of color. These are the leaders of these organizations: chairpersons, presidents, chief executive officers. It was these men and women, not their designees, who met regularly over the last 12-month period to express their positions, hammer out compromises, and coalesce behind the report that has been presented to you and other Members of Congress in the last month.

By spending the time together that we did, by honestly airing our concerns and our own special interests, this organization has forged a strong consensus around a comprehensive approach to change in Superfund which we believe is appreciably better than the status quo.

To be sure, what we have arrived at is not perfect; each of us, if true to our own self-interest, would make changes. What the Commission position represents is a consensus document that takes all of those self-interests into account; as such, it is a powerful document.

Anybody can find fault with specific parts of our recommendation; the fact that some have does not surprise me. Those concerns will be expressed and must be dealt with in the upcoming legislative debate. The administration bill, moving forward with the National Commission, represents a strong foundation upon which to build a reauthorized Superfund statute this year. We have a unique opportunity, due to your support, the National Commission's work, and the efforts put in by the admin-

istration, to make significant improvements in a law that virtually everyone, no matter what their bias, agrees is not living up to its promise.

I look forward to working with you and your committee in the weeks and months ahead to forge a responsible reauthorization of the Superfund statute.

With best regards.

Sincerely,

WILLIAM D. RUCKELSHAUS

Ms. LAMBERT. Mr. Schaefer?

Mr. SCHAEFER. Mr. Pierle, in Senate testimony in September, you stated that the Superfund health standard must be based on a range of 10 to the minus 4 to 10 to the minus 6 and this was essential. The Keystone report uses a straight 10 to the minus 6 standard.

In September, you stated that PRP's must have the ability to use site-specific risk assessment to select remedies at Superfund sites. The Keystone Commission report restricts the use of site-specific risk assessment and adopts the national formula.

Also in September, you stated that containment and treatment remedies must be considered on equal footing in the remedy selection process and that the preference for treatment and permanent remedies must be removed in the statute; the Commission report strengthens the preference treatment.

These are inconsistencies I would like to have you comment on, please.

Mr. PIERLE. I will be glad to do that because I think it specifically reflects the difference in the process. At the time that I made those statements, they were reflective of a small group of industry people who were working very hard for constructive Superfund reform and I believe are still working for that today. But it did basically represent the viewpoints of four individual companies, and I think it falls more in the category of a set of recommendations that if we were king for a day, we could sit down and articulate, espouse and promote.

The process that we were in brought us particularly additional viewpoints and judgments about the range of risk, is that a trade off which says because I don't want to spend as much money, someone else has to accept a lesser cleanup? There were those ranges of debates that quite frankly through the process that has brought us to a position that supports the Commission report because we still think that it has a significant remedy reform.

One last comment I would make relative to the site-specific standard, the site-specific risk assessment process versus the formula. There are real concerns in many communities about the power distribution around who sets and who manages the risk process. Part of that is the degrees of freedom that exist across the risk calculation formula.

What I think we have agreed to in the commission is that individual site concentration standards for carcinogens will still be set basically at each site, but there will be a substantially reduced range of variables that can be applied in that risk assessment process.

So I think we have maintained site specific factors to be included, we have maintained as Florence said, a risk-based process for setting standards, and I think as a rationalization of different viewpoints to a common center.

Mr. SCHAEFER. As I understand the report, it restricts the use of site-specific risk assessments. It either does or it doesn't. I just want to know has your opinion changed since your September testimony?

Mr. PIERLE. I would answer that to say yes, my opinion has changed because of the deliberations that we have been in. The report still though, the Commission report still contemplates the use of a more limited number of site specific factors that would go into the calculation of the acceptable cleanup levels.

Ms. ROBINSON. May I respond also, please? As late as October, Mr. Schaefer, I came before you and was quite adamant about background and no risk. Today, I strongly support the commission's recommendations including the 10 to the minus 6 risk.

As Mike indicated, the process there was a strong educational process as you came to understand more and therefore your position, your original position could be modified.

Also we all have to recognize that unless we come up with a law that is going to be helpful for all of us, then it is not going to work. You can't just favor one group as opposed to the other.

Relative to site specific, there are two parts to determining the risk. One is a hazard potency number which does not vary from site to site. It is not site specific. The other is an exposure number which gives you site-specific variability. There are specific factors that will be plugged in that are known to have decided effects.

Mr. SCHAEFER. I understand from your testimony you did support the 10 to the minus 6 and that is what is in the Commission report, so you didn't change at all.

Ms. ROBINSON. No. I am saying that a couple of months ago, I did.

Mr. LASH. The original position Ms. Robinson brought in was background levels.

Ms. ROBINSON. I said just 2 months ago, in October, I was very adamant about background and very adamant about don't expect me to take a risk that you don't take. All of us have changed. All of us came to the Commission with different points of view and as a result of this process, we have become educated, come to understand things much better and we have modified our original positions.

Mr. SCHAEFER. Thank you, Madam Chairwoman.

Ms. LAMBERT. Thank you all for your patience and your involvement today. We certainly have a tremendous challenge ahead of us and not a great deal of time to do it in.

I look forward to working with you all over the next several months. The committee stands adjourned.

[Whereupon, at 2 p.m., the subcommittee was adjourned, to reconvene at the call of the Chair.]

SUPERFUND PROGRAM

Liability Issues

THURSDAY, FEBRUARY 10, 1994

HOUSE OF REPRESENTATIVES,
COMMITTEE ON ENERGY AND COMMERCE,
SUBCOMMITTEE ON TRANSPORTATION
AND HAZARDOUS MATERIALS,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:30 a.m., in room 2359A, Rayburn House Office Building, Hon. Al Swift (chairman) presiding.

Mr. SWIFT. The subcommittee will come to order. Good morning, and welcome. This morning's hearing is going to focus specifically on liability issues raised by H.R. 3800, the administration's Superfund Reform Act of 1994. It will also consider other proposals on liability that have been put forward over the course of the past year. I would like to especially welcome Elliott Laws of the Office of Solid Waste at EPA, who will be spearheading the efforts of the administration to ensure that meaningful and positive reforms of the Superfund programs are enacted in this Congress.

In many ways the liability issue is at the center of the Superfund debate. It is easy to criticize the current liability scheme and the way that it has been administered, and there has certainly been no shortage of people who have been willing to do so. I agree with many of those criticisms. We spend far too much money on litigation and not enough on cleanups.

EPA many times singles out one or two deep pocket PRP's to shoulder the burden of cleanups and leaves it to those parties to search out and sue all of the other responsible parties, a process that results in waves of time consuming and expensive legislation. It's patterned after the big fish eat the middle size fish eat the small fish. In particular, parties who have contributed small amounts of waste and who are supposed to have their liabilities settled early in the process, are far too often being dragged into these court battles.

However, in a search to solve these problems some have proposed to solve Superfund's problems by turning the whole program into another government public works program which would have to be financed with new taxes. This does not make sense to me. We are already struggling to raise the money for other important programs and, indeed, many of those programs face severe cuts in the new budget sent to Congress this week. These proposals would also require a dramatic expansion of the Federal bureaucracy at a time

the President has committed to cut the Federal workforce by 250,000 people, and would increase the potential for contractor waste and abuse. Finally, these proposals would create new sources of litigation and transaction costs and I think we all agree, that would not be a positive development.

There is no question though, that the liability scheme is unfair, litigious and a policy disaster. The administration bill suggests a good alternative approach, a non-binding system of allocation, while others such as the National Commission on Superfund have supported a binding allocation system, to which I am not hostile. Each has benefits and each has problems. It is my hope as we work through this process we can build on the growing center that appears to be forming, and that all the parties will be less concerned about labels and whether all of the specifics of their particular proposal are adopted, and more concerned about trying to find the best parts of each proposal to create a fairer and more effective Superfund.

I would like to add one final note on timing. At the present time the subcommittee is in the process of scheduling two more hearings, one on remedy selection and one on the insurance fund proposal in the administration bill. It is my hope that all hearings can be concluded by early March, and that the markup can begin prior to the Easter recess. Remember, we still have the full committee, all of the work of the Public Works Committee and important sequential referrals. The calendar is our greatest enemy. Finding workable and fair compromises quickly is our greatest friend.

We are pleased to have with us today a distinguished group of witnesses, many of whom have been intimately involved in the issues relating to Superfund liability for many years. I look forward to hearing all of the witnesses' testimony. With that, I am happy to yield for an opening statement to the ranking Republican of the subcommittee, the gentleman from Ohio.

Mr. OXLEY. Thank you, Mr. Chairman. I know that we have quite an ambitious schedule today and a long witness list. It seems that everybody has something to say about Superfund and Superfund liability, in particular.

I want to welcome all of today's witnesses, and especially Mr. Laws from the EPA and Mr. Flint from the Department of Justice. We are looking to both of you to give us our first detailed explanation of the administration's proposed Superfund liability reform. I know we all share the goal of reducing transactions costs, but I hope we can keep in mind the relationship between how liability is assigned and the costs of clean up.

Under current law EPA has little incentive to work to find the lowest cost method of protecting health and the environment. With the right reforms, I believe that the liability scheme can provide much stronger incentives for all parties to seek the least cost solution. That will be good for the economy and good for the environment.

I want to remind the rest of today's witnesses of the chairman's request, to keep within our allotted 5 minutes. I know that each of you has a lot to tell us. Unless we keep to the 5 minute rule someone may not get their chance to be heard at all.

Mr. Chairman, I want to thank you for holding this hearing, and look forward to today's testimony.

Mr. SWIFT. I thank the gentleman. I recognize the gentleman from Colorado for an opening statement.

Mr. SCHAEFER. Thank you, Mr. Chairman. I wanted to ask the committee to give the opening statement of Mr. Gillmor, without objection.

Mr. SWIFT. Without objection, so ordered. I would also ask unanimous consent that any Member be permitted to submit an opening statement for the record.

[The opening statements of Mr. Gillmor, Mr. Visclosky, Mr. Pallone, and Ms. Lambert follow:]

STATEMENT OF HON. PAUL GILLMOR

I want to commend the administration for its good faith efforts to create a consensus Superfund reform bill. We agree on the basic premise that this statute is broke, and it needs fixing.

Yet, now that we have had a week to review the bill, I also want to register my concerns about certain provisions which I believe will not accomplish the goal we share. That goal can roughly be summed up as creating a cleanup program that efficiently and in a timely manner addresses contamination which threatens our health and the environment. Several of us here today have overlapping commitments in another subcommittee, but I hope to be able to ask some questions to clarify some of the provisions about which I have concerns.

I thank Chairman Swift for his efforts to keep Superfund reform moving.

STATEMENT OF HON. PETE VISCLOSKY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF INDIANA

Mr. Chairman, I would like to thank you and the other members of the subcommittee for the opportunity to address the issue of Superfund liability. I am optimistic that the renewed focus on Superfund can bring about workable solutions for communities that are combatting the complex problems that go along with environmental contamination. Currently, liability concerns are a major roadblock in efforts to cleanup and redevelop a whole range of contaminated sites. By failing to confront this issue, we would continue to subject our constituents to the jeopardies of health hazards and stagnant economic development brought about by unaddressed environmental contamination.

One of the most critical issues facing the communities I represent in northwest Indiana as well as the rest of the country, is the difficulty of redeveloping abandoned factories and old industrial sites, known as "brownfields." Due to many years of environmental contamination, the cleanup costs are high, and the liabilities for past contamination deter prospective purchasers, developers, and lenders. The lack of usable sites results in the loss of jobs and economic growth for inner cities. This is an issue that you have helped bring to the forefront, Mr. Chairman, and I commend you on your efforts.

Because I share your support for initiatives to remedy these problems, I have introduced legislation designed to help cleanup and revitalize our Nation's brownfields. This legislation, which I introduced with my colleague from Ohio, Ralph Regula, has bipartisan support and was developed in consultation with the Clinton administration, State agencies, community and environmental organizations, and the northeast-midwest Congressional Coalition. The consensus is clear: the crucial issue of brownfield redevelopment must be addressed within the context of Superfund reauthorization.

Toward that goal, I have introduced two, separate, companion bills to spur brownfield cleanup and redevelopment. The first bill, the Brownfield Cleanup and Redevelopment Act, H.R. 3843, would establish a process whereby States would be authorized to make final decisions on the cleanup of sites with low- or medium-priority contamination. The other bill, the Brownfield Cleanup and Redevelopment Revolving Loan Fund Act, H.R. 3844, would provide loans to eligible sites in severely economically distressed areas that, with a small infusion of capital, would have the potential to attract private investment and create jobs in the communities where the cleanups are taking place.

Both of these bills are designed to encourage privately-funded cleanup and redevelopment of contaminated industrial sites by removing some of the barriers that have driven prospective developers to build on undeveloped "greenfield" sites. State efforts to encourage voluntary cleanup and redevelopment of low- and medium-priority sites are currently hindered by Federal requirements for environmental permits to conduct the cleanups and by the lack of Federal certification for these efforts. Even when these sites are not subject to Federal corrective action, the fear of liability for past contamination often inhibits their cleanup and redevelopment. By giving States the power to create a distinct beginning and end to the voluntary cleanup process, we remove a crucial roadblock to redevelopment.

The status quo seems to be that it is better to bulldoze and ignore abandoned industrial facilities and build on previously untouched land outside the city. However, this shift to outlying "greenfields" has serious adverse environmental and social impacts. Workers, businesses, and communities suffer when lender liability fears thwart investment in brownfield cleanups or modernization. Local and regional economies are stifled when mildly-contaminated industrial sites remain dormant, because existing infrastructure goes unused. Finally, neighborhoods decay from ongoing economic and social distress.

Time and time again, the compelling need to remove the uncertainty from the process of redeveloping brownfield sites has been demonstrated. For example, plans to build a $3 million lumber treatment plant, which would have provided 75 jobs in Hammond, Indiana, were recently abandoned after the discovery of low levels of contamination at the proposed site. The daunting prospect of entering into a project with uncertain consequences resulted in a loss for the City of Hammond of not only one prospective developer, but the potential of any future development on this 20-acre site.

One of the most effective ways to promote the cleanup of our Nation's hundreds of thousands of mildly-contaminated sites is through State voluntary cleanup programs. To date, almost 15 States—including my home State of Indiana—have implemented, or are in the process of implementing, voluntary cleanup programs. By certifying State voluntary cleanup programs at the Federal level, we would eliminate the threat of Federal EPA action on sites already deemed clean by State programs.

I have worked with the Clinton administration to ensure some measure of Federal support for these State voluntary cleanup programs, and am encouraged that the President has acknowledged this growing problem in his Superfund reauthorization proposal. EPA Administrator Carol Browner has noted that the growing trend towards the development of greenfields (rather than brownfields) contributes to suburban sprawl and exacerbates the chronic unemployment often found in inner-city industrial areas.

However, while the Clinton administration's Superfund reauthorization plan acknowledges the benefit of State voluntary cleanup programs, it does not adequately address the major issues blocking the cleanup of brownfield facilities. Specifically, the administration's proposal would not allow the Federal Government to certify State programs to be the final decision-makers on cleanup levels and liabilities for past problems. In addition, the administration's proposal does not address the need to have funding for site assessments of properties in distressed neighborhoods.

The administration's plan does include an offer of technical assistance to State voluntary cleanup programs. However, States and municipalities are unlikely to seek out such assistance because of concern that it would trigger greater EPA involvement and unnecessarily bog down cleanup and redevelopment. By empowering certified State voluntary programs to make the final decisions regarding the cleanup of low- and medium-priority sites, we would remove a crucial roadblock to economic and environmental development. Further, limited capital investment in depressed sites would help to rebuild communities that have been written-off as lost causes.

I urge you, Mr. Chairman, and members of the subcommittee, to focus on efforts to breathe life back into forgotten industrial communities by limiting prospective lenders' fears of liability. Establishing a definite process for the redevelopment of brownfields would achieve the dual purpose of revitalizing economically depressed areas and keeping our greenfields clean for future generations to enjoy.

STATEMENT OF HON. FRANK PALLONE, JR.

Mr. Chairman: Thank you very much for scheduling this hearing on liability issues in the Superfund reauthorization.

Among the many other important issues we will consider, I would like to see us focus some much needed attention on the ways in which some violators have avoided responsibility for cleanup costs by hiding behind a so-called "corporate veil."

That is, I would like to see the subcommittee put the spotlight on how some corporations—and more particularly, how the individuals behind the corporations—use the Bankruptcy Code to escape liability under Superfund, and as a result, pass on to the taxpayers the cost of cleaning up their mess.

In New Jersey, we already have a State statute which the Department of Environmental Protection and Energy (DEPE) has used successfully to pursue individual assets when a corporate entity hides behind bankruptcy. At my request, DEPE confirmed my belief that explicitly granting the Environmental Protection Agency (EPA) similar powers would help a great deal in our efforts to ensure that responsible parties, not taxpayers, foot the bill for hazardous waste cleanups.

According to DEPE, the power to pursue individual assets has been particularly useful in cases involving smaller, undercapitalized companies where the management has been intimately involved in manufacturing and waste disposal activities. These companies are both more prone to seek the protection of the Bankruptcy Code, and because corporate officers are intimately involved in the types of activities that lead to hazardous waste violations, easier to pursue.

As the DEPE stated in a letter to me, "[while] there is no guarantee that the individual's assets would be any more available, or that the individual would not avail themselves of the protection of the Bankruptcy Code, our experience is that cooperation is much more forthcoming when individuals and individual assets are pursued aggressively." I would like to make the entire letter a part of the hearing record, with your permission.

One of our priorities during the reauthorization should be to give EPA this weapon that has been so useful in New Jersey's fight to hold polluters responsible for their actions. We should broaden the liability standard to clarify that individual liability is indeed one of the weapons in EPA's arsenal, and that it is the intent of Congress that EPA use this weapon to vigorously pursue the individuals behind the corporations when these entities veil themselves in the Bankruptcy Code.

Thank you, Mr. Chairman. I look forward to working with you on this issue.

STATEMENT OF HON. BLANCHE M. LAMBERT

Thank you Mr. Chairman for once again putting together a hearing with such distinguished panelists. I look forward to their testimony. Today we will be discussing the administration's approach to address Superfund liability. I must say that I am getting more excited and enthused with the progress reached over the past few weeks. The momentum began with the release of the National Superfund Commission's report on Superfund reform. It continued with Mr. Swift's leadership and aggressive dedication to Superfund's reauthorization, and I believe that with the release of the administration's bill, we have the needed impetus to move forward to pass a Superfund bill.

I also applaud the various parties who have come to the negotiating table. As they say, politics make strange bed-fellows, but in this case, the product is something to be proud of. For example, I admire the commitment demonstrated by small business and environmental representatives. I congratulate NFIB, the printing industry, EDF, NRDC, the Sierra Club and others for working together to produce a workable and responsible solution to address the problems faced by small businesses when pulled into the Superfund process. The formation of this coalition, as well as the formation of the National Commission on Superfund, illustrates the fact that it is not impossible for groups to reach agreement if all parties are willing to come to the table and work out the rough spots.

I am the eternal optimist and I truly believe that we can move Superfund forward if we continue this momentum. The next few months will prove to be extremely hectic, but I am willing to give 150 percent to pass this bill through the House and through conference with the Senate. I am dedicated to the reform of Superfund, and I hope that with the assistance from all of the participating parties, we can draft responsible and responsive legislation.

Thank you Mr. Chairman.

Mr. SCHAEFER. Today's hearing is going to focus specifically on the liability provisions of Clinton's administration on Superfund, and I don't want to take a great deal of time right now. I am concerned about several provisions of the draft, which seem to intend to limit the Federal Government's liability at Superfund sites.

With the passage of the Federal Facility Compliance Act which my former teammate as well as the chairman and Mr. Eckart

worked so long and hard on, I thought that Congress made it very clear to the Executive Branch that this type of treatment for the Federal Government would no longer be tolerated. There are some bureaucrats out there that haven't gotten the message.

Therefore, we would like to correct these problems. I look forward today to discussing some of these issues. I also want to take the opportunity to recognize the presence of a little bit later in the panel, of the attorney general from the State of Colorado, Gale Norton. I have had the pleasure of working with Ms. Norton on many occasions in the past, and she has been tireless and certainly an advocate of the State's role in environmental regulations. I appreciate her being here a little bit later, Mr. Chairman.

With that, I would certainly give back the rest of my time and honor my 3 or 5 minutes, whatever it is.

Mr. SWIFT. I thank the gentleman. I would say that it is certainly true, that it has been made clear, the views that we hold on Federal facilities. The gentleman is quite correct in saying that there were people who didn't get the message, and there are obviously people who still haven't. So, we will probably have to deliver it again.

I recognize the gentleman from Virginia for an opening statement.

Mr. BOUCHER. Thank you very much, Mr. Chairman. I want to begin by commending you for the excellent efforts that you have put forth in bringing the various interests together to discuss the many complex issues that surround the Superfund program, a process that led to the drafting and introduction of the administration's bill.

I also want to commend the representatives of EPA and DOJ for their efforts in preparing the administration's bill. It is a very good starting point, which we can use as a working document as we move toward Superfund reform.

Our focus today is on the liability structure of Superfund, which I would argue is the major source of inequity in the Superfund program. It is a harsh, punitive and unfair system in which resources are spent on lawsuits rather than cleanups, rendering the Superfund program as a whole both wasteful and ineffective.

I suggest that as we look at the liability structure we should seek to achieve three essential objectives. First, to expedite the determination of parties' liabilities at Superfund sites. Second, to require parties to pay only their fair share of the cost of clean up as determined by their overall contribution to the problem, as distinct from the joint and several liability system that characterizes the current law. Third, we should seek to eliminate unnecessary litigation and other transaction costs that are today associated with the determination of liability at Superfund sites.

Last November I introduced, along with our colleague on this subcommittee Mr. Upton from Michigan, H.R. 3624, which is designed to achieve those three essential objectives. It expedites the process by assuring that liability determinations will be made within a period of 18 months. It assures that the liability of each party reflects that party's contribution to the overall problem at the site, utilizing what are known as the Gore factors in order to make that determination.

It creates a binding system of allocation requiring the participation of potentially responsible parties, making them liable for the shares that are assigned to them during the process and then protecting them from contribution suits and other forms of litigation after they have accepted their share of liability through the assignment process.

While the administration's bill seeks to achieve many of these same objectives and in many respects is similar to H.R. 3624, there are important differences. I will take just a moment this morning to identify what I think are the key differences, and suggest that we focus some attention during this hearing on these matters.

First, the administration's approach uses private allocators rather than the Environmental Protection Agency's corps of Administrative Law Judges. I would question how the private allocators could compel discovery and could compel the attendance of witnesses, especially with regard to information that is held by parties who decide not to participate in the allocation process.

We should also question the means by which the private allocators would enforce procedural rules. I think we should question the comparative costs of the use of private allocators as opposed to the cost of utilizing the existing corps of Administrative Law Judges at the EPA.

Second, the administration proposal is for a voluntary and nonbinding allocation system, as compared to the mandatory binding system envisioned in H.R. 3624. The permissive character of the administration's approach would not bring all parties into the process, causing inconsistency and causing delay. It would make it difficult to develop complete information about the site, where cooperation of the non-participating parties is essential in order to develop that base of knowledge.

It presents the likelihood of parties rejecting their allocations and resorting to litigation, delaying resolution of liability questions. It would allow the government to nullify allocations if they are not—and I will quote this language: "fair, reasonable or in the public interest." That is a wide open back door. It would be a door of discretion which would serve as a disincentive for parties to participate in the process at the outset, not knowing what the finality of the result would be.

There are those who have suggested that the opposite approach which is contained in H.R. 3624 of a mandatory process with binding allocations could perhaps be constitutionally suspect, because it might not ensure due process for all of the parties. A party dissatisfied with the result might successfully challenge that process on constitutional grounds.

I would like to suggest that one possible way to resolve that problem—and I would welcome our witnesses' views with regard to this—is to make the process at the outset voluntary, with the parties making the decision as to whether or not to participate. Once they have made the decision to participate, to require that they be bound by the results, so that at the end it would be a mandatory allocation and binding allocation of responsibility for those who voluntarily decided to take part in it.

Mr. Chairman, I have set forth a couple of issues that I hope will be addressed by the witnesses this morning. I will look forward to

their testimony. I will conclude these remarks, once again, by commending you and your staff for the excellent work that you have done in cooperation with other interested parties and in cooperation with the administration in bringing us to this point, where I think we can look forward to reform of the Superfund law during the course of this Congress. Thank you.

Mr. SWIFT. I thank the gentleman very much for his opening statement. The Chair would note that we have 16 witnesses. Multiply that by 5 minutes, and you understand the situation we have. We sent each of you an additional statement, urging that you hold your opening statements to 5 minutes.

Obviously, your written materials will be inserted in the record. I ask unanimous consent at this time that be done. Without objection, so ordered. I am going to give the first panel a bit more leeway, because they are presenting views of the administration. I am going to urge all of you to try and keep your opening remarks under 5 minutes so that we will have time for questions. When I start waving this, know that it's the pen ultimate action before I throw it at you.

With that, I am delighted to welcome as our first panel, the Honorable Elliott Laws of the EPA and Miles Flint, Deputy Assistant Attorney General from the Department of Justice. I will recognize Mr. Laws first, and you may proceed in any fashion you choose.

STATEMENTS OF ELLIOTT LAWS, ASSISTANT ADMINISTRATOR, OFFICE OF SOLID WASTE AND ENERGY RESPONSE, ENVIRONMENTAL PROTECTION AGENCY, ACCOMPANIED BY MYLES E. FLINT, DEPUTY ASSISTANT ATTORNEY GENERAL, DEPARTMENT OF JUSTICE

Mr. LAWS. Good morning, Mr. Chairman. It's a pleasure to be here. I know that you and I have had many discussions as to whether this would actually ever occur this year, and I am pleased to be here to discuss the liability provisions of the administration's bill.

With me today as you have noted is Myles Flint, Deputy Assistant Attorney General at the Environment and Natural Resources Division in the Department of Justice. We are pleased to have this opportunity to speak to the members of the committee.

As Administrator Browner testified last week, we believe this bill makes substantial improvements to virtually all aspects of the current Superfund program, including the liability scheme. Superfund possesses one of the most compelling liability schemes of all environmental statutes, strict, retroactive, joint and several. From its inception, those who were associated with contamination at a site have been responsible for the costs of cleaning the site.

While the severity of this liability is one of the reasons we are here today, few will dispute that it has been instrumental in obtaining a large number of cleanups and that it has fundamentally changed the way America conducts its environmental business.

Still, the system has been the target of much criticism. PRP's complain that the system imposes clean-up costs on parties that can exceed what they view is their share of responsibility. This leads to additional lawsuits, as these PRP's seek to bring others into the case to share clean-up costs. This leads to the second

major criticism of the current law, excessive transaction costs. As the parties sue each other and their insurers transaction costs can skyrocket, with particular burdens placed on small businesses and other parties with limited abilities to pay.

Last, critics state that the scope of the liability scheme allows parties which have contributed only small amounts of hazardous substances to be trapped by the spiral of litigation. While the government normally decides not to pursue these parties, they are nevertheless drawn into the litigation by other PRP's. Likewise, generators and transporters of municipal solid waste, lenders and trustees, often find themselves embroiled in Superfund litigation even when involvement has been minimal.

The administration has heard these criticisms and has addressed them on two fronts, administrative and legislatively. Our administrative improvements announced last year have sought to increase the use of existing allocation tools and discretionary settlement authorities, including *de minimis* settlements in the use of mixed funding. We will continue to implement these administrative improvements as we move through this reauthorization process.

Legislatively, the proposals in the administration's package are much broader in vision in scope. It represents an acknowledgement that some of the criticisms leveled at the program are valid, as well as a commitment to addressing those criticisms.

Our proposal provides exemptions and special treatment to certain categories of parties now suffering through expensive and time consuming contribution actions, and provides a process for allocating each party's fair share of response costs at a site. These reforms maintain the polluter pays principle, which requires that parties responsible for contamination rather than taxpayers, pay for clean up.

Similarly, we believe that it is in the public's best interest that any reforms not diminish the pace of cleanup, either by reducing incentives for private party action or by requiring more government-led cleanups.

Significant reductions in the number of costly and time consuming contribution actions is a major goal of our reform proposals to the allocation process. To achieve this we are proposing an early, expeditious and obligatory allocation process, where each liable party's share of response costs would be allocated by a neutral third party allocator. We believe that a significant package of incentives to parties who choose to settle their liability and disincentives to parties who choose to litigate, will ensure the success of this proposal.

Under the proposal, a moratorium of contribution actions by private parties as well as cost recovery actions by the government would be imposed until the allocation process is complete. At the time of release of the allocator's report parties will generally be able to settle based on their allocated share and upon payment of a premium to account for risks of remedy failure, unknown conditions and incomplete response actions, and will also be able to obtain for the first time a permanent release from all future liability relating to the site.

The government will also provide up to $300 million per year to cover the orphan share at NPL sites, that is, the share specifically

attributable to identified but bankrupt or otherwise non-viable parties, that amount not assumed by generators and transporters of municipal solid wastes and those limited ability to pay parties that have settled with the United States. Any unidentified share of response costs would be distributed among the parties to the allocation.

This approach would have the dual benefit of encouraging both the government and the PRP's to identify as many responsible parties as possible in order to reduce their respective shares of response costs.

The United States is directed to accept any settlement offer based on the allocation, provided that the offer includes the appropriate premium and terms and conditions of settlement, unless it is determined by the administration that the allocation was not fair, reasonable or in the public interest.

We fully expect that we would depart from the allocator's determination only in extraordinary cases, and the proposal contains numerous provisions which limit our discretion, such as recovery of attorney fees by PRP's if any governmental refusal to settle on the basis of the settlement proves unjustified.

As I said before, we believe this system will virtually eliminate pre-settlement litigation. To address post-settlement litigation settling parties have to waive their contribution rights against all parties. In exchange, we will seek contribution protection against non-settling parties.

As the United States alone will pursue non-settlers, any settlement will include a risk premium to account for litigation risks involved in such an undertaking. The parties that will not settle will remain jointly and severely liable for all unrecovered costs including the orphan share, will not be eligible for contribution protection, and will not receive a final release from liability.

We believe that for a number of legal and policy reasons, which Mr. Flint and I will be happy to discuss, this combination of incentives and disincentives provides the best approach to address allocation at these sites.

Additional reforms which will improve the fairness of the Superfund liability scheme revolve around special considerations for certain categories of parties. First, there are the very small contributors of hazardous substances to a site, also known as *de micromis* parties. EPA has usually exercised its enforcement discretion to refrain from pursuing these parties, but they are often brought into these matters by private parties.

Our proposal exempts these truly tiny contributors from all Superfund liability. A complete exemption attaches to any party that generated 500 pounds or less of municipal solid waste or sewage sludge. A presumptive exemption is provided for parties contributing fewer than 10 pounds or 10 liters of hazardous substances. This exemption can be removed if it's determined that these materials contributed significantly to site response costs.

Both the municipal solid waste and hazardous substance levels can be raised or lowered by regulation. *de micromis* parties will not be subject to third party contribution actions.

To encourage economic development of contaminated or "brown field" sites and to discourage the expansion of industry into pris-

tine "green fields", the proposal provides an exemption from liability for bona fide respective purchasers of contaminated property. Conditions to be met are that the purchaser did not cause or worsen the contamination, and that they agree to clean up or cooperate with the government or PRP's who are cleaning the site.

The administration's proposal would also confirm EPA's authority to issue its lender liability rule which protects lenders from liability in certain financial transactions. This proposal takes on greater importance in light of last Friday's decision of the U.S. Court of Appeals for the District of Columbia Circuit in *Kelly* v. *EPA,* which vacated our current lender liability rule. The Court stated that Congress had not granted the Agency the authority to issue rules affecting a party's liability. The government is currently reviewing this decision and has not yet decided to seek a rehearing by the full Court.

In addition to exemptions, our proposal recognizes the need for early settlements for certain parties. These include *de minimis* or small volume contributors, generators and transporters of municipal solid waste, and small business and municipal owners and operators with a demonstrated limited ability to pay.

For *de minimis* parties, the bill removes current impediments to expedited settlements and allows EPA to settle with these parties before the formal allocation process is over or even begins. This in turn will cut down the small party's transaction costs and protect them from contribution actions.

Parties may qualify for a *de minimis* settlement if they have minimal contributions to a site which do not present significantly greater toxic or hazardous effects at the site than other materials, and the proposal sets a presumptive cap of one percent of total volumetric contributions to a site which can be adjusted up or down based on site specific facts.

For generators and transporters of municipal solid waste the proposal provides for expedited settlement for those parties which exceed the 500 pound *de micromis* exemption, and caps the aggregate liability of such parties at 10 percent of total response costs at the site.

Again, while the Agency chooses not to pursue these parties as an exercise of enforcement discretion, some of the most egregious examples of the unfairness of the Superfund liability system are associated with generators and transporters of this type of waste. These parties also will receive contribution protection.

Last, those small business and municipalities with a limited ability to pay response costs are entitled to expedited settlements. While the proposal makes no change in the liability of these parties, it does provide important new provisions which will allow EPA to assess the liability of these parties to pay response costs and in turn substantially reduce the financially burdensome effect of the liability scheme.

For municipalities, we will be required to consider its financial constraints and the potential impact that payment of response costs might have on essential services and debt obligations. This provision will apply as well to municipal owners or operators whose liabilities would otherwise remain.

In conclusion, Mr. Chairman, we believe these reforms to the Superfund liability scheme will be successful in reducing private sector transaction costs and increasing the fairness and efficiency of the program. These proposed reforms were developed with the input of a broad range of parties, interested in successful implementation of this program.

The administration is committed, and I am personally committed, to working with the members and staff of this subcommittee and the rest of Congress to ensure that these and other meaningful reforms are made this year. Again, I thank the chairman and the subcommittee for the opportunity to appear before you today.

Mr. Flint and I will be happy to answer any questions.

[Testimony resumes on p. 297.]

[The prepared statement of Mr. Laws follows:]

STATEMENT OF
ELLIOTT P. LAWS
ASSISTANT ADMINISTRATOR
FOR THE OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE
U.S. ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE
SUBCOMMITTEE ON TRANSPORTATION AND HAZARDOUS MATERIALS
OF THE
COMMITTEE ON ENERGY AND COMMERCE
U. S. HOUSE OF REPRESENTATIVES

FEBRUARY 10, 1994

Introduction

Good morning, Mr. Chairman, and thank you for the opportunity to speak with you this morning about the subject of liability under the Comprehensive Environmental Response, Compensation, and Liability Act, commonly known as CERCLA or "Superfund." My name is Elliott Laws, Assistant Administrator for Solid Waste and Emergency Response at EPA, and I am pleased to have with me Myles E. Flint, Deputy Assistant Attorney General for the Environment and Natural Resources Division of the Department of Justice. As the Subcommittee is aware, EPA and DOJ are partners in the enforcement of CERCLA's liability scheme. Last week, EPA's Administrator Carol Browner presented to you the Administration's proposal to reauthorize and reform the Superfund law. As Administrator Browner testified before you, the Administration's proposal seeks to make substantial improvements to virtually all aspects of the current program, including its liability scheme.

Most of the changes that we propose to the liability scheme are designed to address two of the most common criticisms of Superfund -- namely, that the program is perceived to be unfair and laden with transaction costs, particularly attorneys fees. By overhauling the manner in which we allocate shares of responsibility and by providing for expedited settlements, the

Administration intends to increase fairness and reduce transaction costs -- with the expectation that more parties will settle their liability to the United States and that more money will be spent on cleanups, rather than lawyers.

Today, I would like to speak with you about the past, present, and future of the Superfund liability scheme. First, I would like to begin by briefly describing some of our achievements and shortcomings under the existing liability system. Second, I would like to tell you about some of the administrative improvements to the program that we are making as we await more expansive reforms through reauthorization. And finally, I would like to talk with you about the reforms to the statutory liability scheme that our Administration is proposing, and explain how these reforms will make Superfund a more fairer and more efficient program.

Program Accomplishments and Criticisms Under the Current Liability Scheme

Since its enactment in 1980, the Superfund statute has made those who were associated with contamination at a site responsible for the cost of cleaning up the site. Admittedly, the liability scheme under the statute is a powerful one. Since liability is strict and retroactive, a person can be held responsible even if there was no law specifically prohibiting the actions at the time of disposal. Liability is also joint and several, meaning that each person who was associated with the contamination may be held liable for the entire cost of cleanup at the site if the harm is divisible. Courts have applied common law principles of joint and several liability because in so many cases the agency has been confronted with a "toxic soup" of hazardous substances that have commingled over time. At these sites, the nature of the water and the

records available to us make it impossible to make a precise division of harm according to who contributed what to the site.

While the severity of the Superfund liability scheme has been criticized by many, few dispute that it has been instrumental in obtaining a large number of cleanups conducted or paid for by responsible parties. Superfund's statutory framework, together with EPA's "enforcement-first" policy adopted in 1989, has resulted in private parties paying for 79% of all remedial actions undertaken in the 1993 fiscal year -- more than double the percentage of private party cleanups undertaken six years earlier. Since 1980, EPA has obtained more than $8.3 billion in commitments from responsible parties to undertake cleanups. The Superfund liability scheme has also been instrumental in changing the way that corporate America looks at hazardous waste management. Because of the costly consequences of irresponsible waste management practices, companies are minimizing waste generation and disposing less, and, when disposals are necessary, they are being done in a more responsible manner.

Notwithstanding these successes, the Superfund liability scheme has been the target of much criticism. First, liable parties complain that the joint and several and retroactive aspects of the liability scheme are inherently unfair because they impose cleanup costs on parties that may exceed what they consider to be their share of responsibility. These parties, who often initially bear the cost of cleanup, maintain that they are left with no other recourse but to bring lawsuits against others who may have been partly responsible for the contamination, which in turn lead to protracted disputes and uncertainties about how much response costs each party will ultimately have to bear.

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The excessive transaction costs associated with these disputes is the second common criticism of the Superfund liability scheme. While direct enforcement actions by the United States involve relatively low transaction costs, the transaction costs incurred between responsible parties, and between responsible parties and their insurers, have been quite high. These costs are particularly burdensome to small businesses and other parties with limited resources.

Parties have also protested that the scope of the liability scheme permits parties who have contributed only small amounts of hazardous substances to become embroiled in litigation. Generally, EPA has used its enforcement discretion to not pursue such parties -- particularly generators of extremely small amounts of hazardous substances. However, these parties are frequently drawn into costly litigation by the contribution actions initiated by other liable parties. Similarly, generators and transporters of municipal solid waste, lenders, and trustees, have also been vulnerable to being caught in the net of Superfund litigation -- frequently in situations where their involvement has been negligible or where liability has been asserted on technical grounds rather than on conduct.

Administrative Improvements

While many of these criticisms can be addressed only through statutory changes, EPA last year put in place a series of administrative improvements designed to fix some of the problems associated with the implementation of the Superfund liability scheme. First, EPA began making greater use of its available allocation tools to promote settlements and reduce transaction costs. We have identified more than 20 sites with upcoming negotiations over remedial design and remedial action as demonstration projects for the use of alternative dispute

resolution to facilitate the allocation of liability among responsible parties. Ten of these alternative dispute resolution demonstration projects are already underway. We have already issued a new policy that encourages the sharing of information between and among the public and private sectors.

Our second set of administrative improvements is aimed at fostering more settlements with small volume, or *de minimis*, parties. We have simplified our requirements for determining when a private party is eligible for a *de minimis* settlement, and have streamlined the process in hopes of obtaining early, expedited settlements with eligible parties. We have also issued guidance on dealing with contributors of very small volumes of hazardous substances, also known as "de micromis" parties, and we have instituted negotiations with these parties at sites where other parties have brought contribution actions against them.

In addition, we have undertaken a reevaluation of our policy regarding the use of the Trust Fund to pay for part of the response costs at a site, also known as "mixed funding." We are exploring options for streamlining the mixed-funding decision-making process, and using mixed funding on a pilot basis in several settlements. Finally, in response to a request made by this Subcommittee last year, we have recently completed a major information-gathering effort in preparation for Superfund reauthorization. We compiled information from all 1,249 sites currently on the National Priorities List and analyzed the data. From that information, we have gained valuable insight on liability enforcement, remedy selection, and other critical issues. Using the insight gained from this effort and other administrative changes, we hope to improve the process as much as possible administratively as we prepare for reauthorization of the statute.

The Administration Proposal for Reauthorization

The changes that this Administration is proposing in reauthorization are far more substantial and broad-reaching. They represent a very strong commitment to substantially reducing transaction costs and to enhancing the equities of the Superfund liability scheme. To meet these objectives, our proposal gives exemptions and special treatment to certain types of parties -- currently vulnerable to expensive contribution litigation -- and provides a process for allocating each party's fair share of response costs at a site. These reforms nonetheless preserve the "polluter pays" principle, requiring that parties responsible for the contamination, rather than the taxpayers, pay for the cleanup.

The Allocation Process

While reforms to the Superfund liability scheme are appropriate and necessary, the Administration believes that it is in the public's best interest to maintain certain aspects of the scheme that have led to prompt cleanups and payment or recovery of response costs. We therefore want to ensure that any liability reform preserves the incentives currently provided for environmental compliance and responsible handling of contaminants and private party financed cleanups. Any change in this scheme that diminishes the pace of cleanup, either by reducing incentives for private party action or by requiring more government-led cleanups, is highly undesirable as a matter of public policy. Similarly, any change that increases the transaction costs resulting from public and private litigation is equally unacceptable.

The Administration is, therefore, proposing an early, expeditious and obligatory allocation process, whereby each liable party's share of response costs would be allocated by a

neutral, third-party allocator. This proposed process is intended to reduce, if not virtually eliminate, the expensive and time-consuming process of litigating these issues in Federal district court. The Administration's proposal provides substantial incentives to parties who choose to settle their liability, and disincentives to parties who choose to litigate following the allocation.

First, a moratorium on contribution and cost recovery actions would be imposed until the completion of the allocation. When the allocator's report is released, parties will generally be able to settle based on their allocated share, and, upon payment of a premium to account for risks of remedy failure, unknown conditions, and incomplete responses, will be able to obtain a permanent release from all future liability relating to the site. Perhaps most importantly, the United States will provide up to $300 million per year to cover the "orphan" share, which is the share specifically attributable to an identified bankrupt or non-viable party, or that is not assumed by generators and transporters of municipal solid wastes and limited ability-to-pay parties in settlements with the United States. The shares of response costs that the allocator can not attribute to any identified, known party would be distributed among the parties subject to the allocation. The United States will accept any settlement offer based on the allocation, provided that such offer includes appropriate premium and terms and conditions of settlement, unless it is determined that the allocation was not fair, reasonable, and in the public interest. We expect that we would depart from the allocator's determinations only in extraordinary cases, and the statute contains numerous provisions to limit our discretion. For example, we have provided that defendants may recover their attorneys' fees from the government if any refusal to settle on the basis of the settlement proves unjustified.

To eliminate post-settlement litigation by or against settling parties, those parties will have to waive their contribution rights, in exchange for protection from contribution actions from non-settling parties. The United States will pursue non-settling parties, and settlements will include the payment of a risk premium to account for litigation risks involved in such an undertaking. Parties who wish to litigate rather than settle will remain jointly and severally liable (if the harm is indivisible) for all unrecovered expenditures, including the orphan share, and will not be eligible for either contribution protection or a final release from liability. We believe that this combination of incentives and disincentives provides the best approach to reducing transaction costs and increasing fairness because it preserves the virtues of the current system in promoting settlements and prompt cleanups, while substantially curtailing contribution litigation.

Exemptions from and Limitations on Liability and Early Settlements

To further improve the fairness of the Superfund liability scheme, the Administration proposes special treatment for certain parties otherwise liable under the current statutory scheme. I would like to briefly describe the provisions of the Administration proposal as it relates to some of these parties, particularly:

- very small volume ("de micromis") waste contributors;
- small volume or *de minimis* waste contributors;
- generators and transporters of municipal solid waste;
- parties with a limited ability to pay;

- prospective purchasers of contaminated property, and
- lenders and trustees.

Exemptions for Very Small Volume Waste Contributors ("De Micromis" Parties)

EPA has generally used its enforcement discretion to refrain from pursuing contributors of very small volumes of hazardous substances, or "de micromis" parties. Pursuing such parties under joint and several liability would not only produce inequitable results, it would also be an inefficient use of the government's enforcement resources. While EPA has generally not pursued these parties, other liable parties have. The resulting litigation and associated transaction costs frequently overwhelm these parties, particularly small businesses, and needlessly complicate our settlement negotiations. To solve these problems, the Administration's proposal exempts these "truly tiny" contributors from all Superfund liability. We believe certain parties, including neighborhood pizza parlors or local Girl Scout chapters, should not be caught in the web of Superfund liability. Therefore, a complete exemption from liability is provided for any party that generated 500 pounds or less of municipal solid waste or sewage sludge. Similarly, parties who contributed fewer than 10 pounds or liters of materials containing hazardous substances will also be exempt, unless the Administrator determines that these materials contributed significantly to site response costs. In either case, the "de micromis" party would not be subject to third-party contribution actions.

Prospective Purchasers of Contaminated Property

To reduce the perceived Superfund-related obstacles to the economic redevelopment of contaminated sites, the Administration's proposal provides an exemption from Superfund liability for bona fide prospective purchasers of contaminated property -- so long as they meet certain conditions, including the requirements that they did not cause or worsen the contamination at the site and that they agreed either to clean up the property or to cooperate with the government or responsible parties who conduct the cleanup. Under the current statute, prospective purchasers cannot acquire a site with known or suspected contamination without assuming liability for all disposal that has occurred at the site.

Although the current statute provides for an innocent landowner defense, this provision of the law is narrowly drawn, and some claim that the uncertainties of liability for owners have discouraged prospective purchasers from buying and developing contaminated property. As Administrator Browner testified before you last week, the economic redevelopment of contaminated sites in a safe and environmentally sound manner is one of her personal priorities. Our proposal seeks to stop the flight of industry from contaminated urban "brownfields" to pristine suburban and rural "greenfields," and bring jobs and economic opportunity back to blighted areas, particularly inner cities.

Lenders and Trustees

Additionally, provisions in the Administration's proposal regarding the Agency's authority to issue rules regarding the liability of lenders and trustees has recently assumed a greater level of importance. On Friday, February 4, 1994, a three-judge panel of the

United States Court of Appeals for the District of Columbia Circuit in *Kelley v. EPA* vacated the Agency's Lender Liability Rule, ruling that the Agency had not been granted the authority by Congress to issue rules affecting a party's liability. Although the government has not yet determined whether to seek a rehearing by the full court in this case, the Administration's proposal would confirm EPA's authority to administer the statute in a fair and effective manner. An unnecessary imposition of liability on lenders and trustees -- or even a fear of liability -- would have a chilling effect on the provision of working capital to otherwise credit-worthy borrowers, or to provide funds for the purchase of environmentally distressed property. Clear liability standards for lenders and trustees are necessary elements of the Administration's plan to rehabilitate urban "brownfields" and to bring distressed property back into the stream of commerce.

Early Settlements for "De Minimis" Parties, Generators and Transporters of Municipal Solid Waste, and Parties with an Inability to Pay Their Fair Share

The Administration's proposal also recognizes that certain parties should be able to settle their liability quickly. The parties eligible for such treatment include: (a) small volume waste contributors, or *de minimis* parties; (b) generators and transporters of municipal solid waste; and (c) parties with a demonstrated limited ability to pay their estimated share of response costs, such as certain small businesses and municipal owners and operators of contaminated facilities. If a party falls into one of these three categories, that party is eligible for early settlement with the United States and contribution protection from all other parties.

De Minimis Parties

In enacting special provisions for *de minimis* settlements in the current statute, Congress recognized the impracticability of fully subjecting contributors of small amounts of hazardous substances to CERCLA's joint and several liability scheme, including third-party contribution actions. However, these provisions have historically been under-utilized at least in part because of the substantial procedural and substantive requirements for such settlements. At the same time, *de minimis* parties have been pulled into litigation with other parties, which in turn impedes expeditious settlements with larger waste contributors.

The Administration bill removes current impediments to expedited settlements and make it easier for EPA to enter into early settlements with these parties -- prior to the formal allocation process -- to cut down their transaction and other costs and to insulate them from contribution suits. The Administration's proposal will streamline the statutory requirements for determining *de minimis* status and make it easier for EPA to settle with these parties. In general, parties may qualify for *de minimis* status if their volumetric contribution to the site is minimal. A volumetric contribution is minimal if it contributes no more than one percent or less of the total volumetric contribution to the site, so long as the hazardous substances contributed do not present toxic or other hazardous effects that are significantly greater than those of other hazardous substances at the site. The one percent figure is a presumption which can be adjusted downward or upward based on site-specific circumstances.

Generators and Transporters of Municipal Solid Waste

Our proposal also provides opportunities for early settlement and contribution protection to generators and transporters of municipal solid waste. The current statute does not distinguish parties who contribute municipal solid waste -- in other words, materials generally produced by households, restaurants and offices -- from other potentially liable generators and transporters. As long as a party generated or transported a waste containing even very small amounts of hazardous substances, that party could be potentially liable for cleanup costs under the current joint and several liability scheme.

As with "de micromis" parties, EPA in its enforcement discretion has generally not pursued such parties, but others have. Municipal and private generators and transporters of municipal solid waste have been sued or threatened with third-party litigation by private parties who maintain that such wastes, while perhaps low in concentrations of hazardous substances, contribute greatly to the cost of cleanup at a site due to the large volumes of municipal solid waste mixed in with the hazardous substances.

The Administration proposal strikes a fair compromise between the concerns of municipal solid waste generators and transporters on one hand, and the other liable parties who are concerned with the increased cleanup costs on the other. First, our proposal exempts any party who contributes fewer than 500 pounds of municipal solid waste as a "de micromis" contributor to the site. Second, for parties who generated or transported 500 or more pounds of municipal solid waste, our proposal provides an opportunity for early settlement with the United States, and caps the aggregate liability of all such parties in the

aggregate at ten percent (10%) of total response costs for each site. Settling parties also receive protection from third party contribution claims.

Parties with a Limited Ability to Pay

The third category of parties that are eligible for an expedited early settlement are those small businesses and municipalities with a limited ability to pay response costs. While the Administration bill makes no change in the liability status of these parties, it does provide important new provisions which should substantially reduce the financially burdensome effects of the liability scheme. In the case of municipalities, our proposal also requires consideration of a municipality's financial constraints and the potential impact that payment of response costs might have on the municipality's essential services and debt obligations. We would be required to make similar special inquiries in the case of small businesses as well.

Conclusion

In conclusion, the Administration's reforms to Superfund liability, both administratively and in the proposed "Superfund Reform Act of 1994," will be successful in reducing private sector transaction costs and increasing the fairness of the program. These reforms were developed with the cooperation and input of a broad range of parties interested in bringing the Superfund program to its fullest potential. The Administration is committed, and I am personally committed, to working with this Subcommittee and other members of Congress to ensure that these meaningful reforms are made this year.

Mr. Chairman, I thank you for this opportunity to address this Subcommittee, and I will be glad to answer any questions that you might have.

Mr. SWIFT. Mr. Flint, do you have an opening statement?

Mr. FLINT. No, I do not, Mr. Chairman. We believe that perhaps it would be most useful for the committee if we were just available to respond to the inquiries that you undoubtedly have with respect to the proposal.

Mr. SWIFT. Thank you, very much. My colleagues suggest that we give you a gold star, and I concur. You are hereby awarded the gold star.

Mr. FLINT. I never heard of a lawyer getting that before.

Mr. SWIFT. Last May when Carol Browner testified here, she emphasized the importance of preserving the principle of site specific polluter pays liability. The debate over that has raged on for some time, with some groups actively and strongly opposing that.

Could you discuss the administration's position on the elimination of retroactive liability, particularly what the reasons were, the rationale the administration has for choosing not to endorse the elimination of retroactive liability as a means of reforming the abuses or the parts of the law that didn't work.

Mr. LAWS. Certainly. As I said before, the liability scheme of the Superfund system has fundamentally changed the way America conducts its environmental business. The fear of Superfund liability has drastically changed the way American industry treats its hazardous waste.

As a result of this and the current liability system, we are seeing approximately 70 percent of all cleanups being conducted by private parties. Our estimation was that if we did away with the retroactive portion of the liability structure that we would see a shift of that 70 percent that is being conducted by private parties to the Federal Government.

The abolition of retroactive liability could result in the loss of somewhere between $870 million and $1.17 billion private sector clean-up dollars annually.

Second, we found that the abolition of retroactive liability would disrupt the existing liability scheme, and then generate a new round of Superfund litigation. As you all recall, it took a few years at the beginning of the Superfund bill back in 1980, to settle the joint and several retroactive nature of Superfund's liability structure.

If we did away with retroactive liability from a date certain we would certainly just create a new wave of litigation, as lawyers try to find loopholes in whatever system was created, as well as a new wave of litigation that addressed exactly when wastes were deposited at the site as parties to get either in or out of the cut-off date.

We think that the deterrent effect that the current liability structure provides would also disappear with the elimination of retroactive liability. As that fear factor which I discussed earlier would disappear there would be no incentives for industry to continue the progress it has made in how it manages its waste and the progress that it has made in waste minimization and pollution prevention as well.

Last, we felt that elimination of retroactive liability would result in increased transaction costs, less fairness, and impose a burden on the trust fund that would quite honestly so reduce the number

of cleanups and actions that the Agency was able to address, that the program would come virtually to a halt.

As the chairman knows, the administration went through a very long and very intense debate as to whether we would maintain the retroactive liability scheme. For these reasons, the administration decided that maintaining that provision of the liability structure was best.

Mr. SWIFT. Let me turn the question around then. As my staff will tell you, probably nobody has fulminated against the old system more than I have.

The impression should not be left that, because you did not agree to eliminate retroactivity and joint and several, that you did nothing about the problems that were there. I would just like you to tick off again—and it was in your testimony—I would like you to re-emphasize what it is in the administration's proposal that in fact does address the parts of that system that were egregious.

Mr. LAWS. Clearly, the introduction of exemptions for *de micromis* contributors of both municipal and hazardous wastes the direction to pursue expedited settlements for *de minimis* parties and municipal owners and operators, the ability to address lender liability, the authority to issue a rule to address trustees and other fiduciaries, the allocation system, we think all of these in their own way address criticisms of the liability structure. When viewed as a whole, they will make drastic changes to the way the program currently operates.

Mr. SWIFT. Let me turn now to the whole question of the allocation system. The National Commission proposed a binding system of allocation, as opposed to the non-binding system endorsed by the administration. Some persons have expressed concerns about the constitutionality of the binding system.

I think Mr. Flint may want to first of all address the question of the Justice Department's views on that legal question, the constitutionality of a binding system.

Mr. FLINT. Yes, Mr. Chairman. I don't believe we have addressed the constitutional issue directly as such. There may be some problems. I think that our sense has been that if there is a carefully constructed system, that perhaps it would avoid any constitutional pitfalls.

The difficulty that we saw with that kind of solution, however, was that in order to make it binding you would have to create a system that was essentially a mirror image to some extent anyway of the current litigation system which would provide parties due process, giving them an opportunity to present evidence to be examined or cross examined. In order to enable the allocator to get into a position where he could reasonably determine liability and then reasonably determine the allocation appropriate for each PRP in a manner that would survive judicial scrutiny and process we thought would be as cumbersome essentially as the current litigation system. You would not be achieving two of the objectives that we thought people were seeking here.

Mr. SWIFT. Just jump from the soup to the stew.

Mr. FLINT. Get something quickly. The other was to reduce the transaction costs that are related with the very difficult question

of trying to divide up the responsibility in a very legalistic way for the soup that we have at most of these Superfund sites.

Mr. SWIFT. On the other side they say that if the government doesn't have to accept what's done finally, are you really ahead of where you are now. You can argue that either way, that it's going to be too much like the current system that we seek to change.

There are arguments that the non-binding leaves you with pretty much the same mess you have on your hands now. What's the response to that?

Mr. FLINT. We think there are several points to be made about that. The first is that as Elliot Laws has stated, the *de micromis* and opportunity to remove the *de micromis* is explicit in the statute. The ability to settle early, preferably before the allocation process with the *de minimis* parties eliminates one of the major concerns and one of the major criticisms of the current scheme.

The second aspect of it is that if you accept the allocation, that is, the result of the non-binding system, there is an opportunity early on with the acceptance of the allocation percentages and a premium as discussed by Mr. Laws, that you would be able to obtain contribution protection and in fact be able to walk away from the facility with one payment.

It gives you an opportunity to do that early on in the process. The incentives to do a PRP are that they do have that ability to get out quickly and clearly. The disincentives are that if they fail to do that, that they are exposed to the current liability scheme, joint and several liability, and they don't get the contribution protection that is provided for a settler.

The Federal Government's obligations are substantial here. One, before that settlement can be rejected it has to be explained. The Federal Government, Department of Justice and EPA must concur in the judgment not to accept the allocation that has been presented by the allocator. There is a relatively short timeframe in which that is done.

If the Federal Government declines to settle on the basis of the allocation that has come from this process and it is subsequently determined on the basis of a comparison of settlement offers with the result that the PRP makes, that they have achieved something better than what the government was willing to give them, then the government is responsible to that party for its costs.

There is a real incentive to the Federal Government not to make exceptions. I think that beyond that, there's also the obligation of the Federal Government to report to the Congress as to the manner in which the allocation system is working and the results of that on a regular basis.

Mr. SWIFT. Let me explore one more area of this topic, and then we will move on. The administration proposal suggests the use of neutral private parties to conduct its allocations. Others, such as the proposal that the gentleman from Virginia has introduced, use Administrative Law Judges to do the allocation process.

Could you discuss the reasons that the administration decided to use private parties. Also, address the question of why the current system of Administrative Law Judges wouldn't be able to handle the allocation responsibilities.

Mr. LAWS. I will address the Agency's current ALJ situation. Our office of Administrative Law Judges currently has an annual budget of $1.7 million, which covers the expenses of seven Administrative Law Judges, two law clerks, one professional member, manager and support staff. Our Environmental Appeals Board consists of three Judges, law clerks, and supporting staff.

Our estimates have been that an ALJ system to handle Superfund allocations would require the hiring and training of an additional 40 to 60 Administrative Law Judges, with the fulltime staff and support that it also would require. Staff, we have estimates up to an additional 125 people.

Administrative Law Judges are generally generalists in terms of law. What we are anticipating in our system is that we will tap into the huge reservoir of folks out in the private sector who have vast amounts of experience in Superfund, and use those parties with their experience to serve as allocators.

The other issue that we think is, the delays attendant within an ALJ system. Our allocation system will take generally up to 6 months, with the possible request of an additional 3 months by the allocator. ALJ proceedings even in simple cases normally take 14 to 18 months. Our current ALJ's at the Agency have an average docket of 150 cases. Even then, they only render decisions in 10 to 12 cases a year. There is currently a 1 to 2 year backlog in scheduling ALJ hearings at the Agency.

For those more resource related reasons, that was the major factor in the Agency's decision that the ALJ system would not be a viable alternative.

Mr. SWIFT. What is the average pay of an ALJ?

Mr. LAWS. I don't know.

Mr. SWIFT. Could you provide that to us?

Mr. LAWS. Certainly.

Mr. SWIFT. Thank you. I recognize the gentleman from Ohio. Excuse me, Mr. Flint.

Mr. FLINT. I guess I was going to add one other element to this last response of Mr. Laws. That is, the idea of using an outside allocator also has the benefit of one which the parties are participants in the selection. It gives that person the appearance of lack of bias, not being an interested party. As we all know, the Federal Government is frequently a PRP along with private parties in the majority of the sites.

Mr. SWIFT. Thank you. I recognize the gentleman from Ohio.

Mr. OXLEY. Thank you, Mr. Chairman. Mr. Laws, I would like to ask you a couple of questions on the orphan share section. New section 122(h) authorizes the party performing clean-up work to be reimbursed for the orphan share and the share of the other parties. When would this reimbursement take place. If I am cleaning up a site where the allocation process says I'm only partially responsible, when can I expect to receive reimbursement. Is the EPA going to deduct all of its overhead costs before I get reimbursed?

Mr. LAWS. A lot of those details have not been worked out. The provision allows for a reimbursement schedule, and the specifics of the reimbursement approach will be determined solely at the discretion of the President. I think our intention would be that as the claims come in we would pay them as they come.

There have recently been questions to what happens if the $300 million set aside for orphan shares is not enough.

Mr. OXLEY. That was my next question.

Mr. LAWS. OK, let me get into that. I think that as an initial matter we have done an awful lot of investigation, and believe that the current estimate of $300 million is more than enough. There has been a lot of debate as to whether in fact that is a sufficient amount. The administration is committed to two things. One is to fully fund the orphan share and to do so in a way that is not going to decrease the amount of money available for cleanups.

We will be working with all of the interested parties and the Congress to ensure that the amount that we have placed in the legislation is sufficient to cover the orphan share. If, however, we do get to a point where for any number of unanticipated reasons the orphan fund is insufficient for any particular year, we are looking to see what sort of mechanisms could be put in place to address that contingency.

Mr. OXLEY. The administration proposal would provide that EPA could recover without limit, all oversight and indirect costs. This would overrule the decision by the Third Circuit, *United States* v. *Rohm & Haas,* which held that such costs are not recoverable and would legitimize EPA costs expended under a program that Congress has already repeated criticized.

Wouldn't this amendment remove any incentive for EPA to control its spending on things unrelated to any response activities. Indeed, doesn't it create an incentive to spend money on such activities because EPA knows it can recover it?

Mr. LAWS. I guess the short answer is no, I don't think so. The Agency is currently in the process of reviewing its oversight recovery policy. Our end result response to criticisms by this body as well as the General Accounting Office have been tightening the controls for indirect and oversight costs that we have.

I cannot see how the simple fact that we are able to collect oversight costs is going to somehow transform the Agency to just cavalierly spend moneys that the Agency is committed to see that these sites are cleaned up as quickly and as efficiently as possible. I honestly don't believe how clarifying our authority to collect oversight and indirect costs would somehow cause us to stray from that mission.

Mr. OXLEY. What protects a truly innocent PRP from abuse. Should EPA not accept the allocators decision. Or, if the PRP disagrees with the allocation because the PRP would risk being saddled with all the orphan costs, won't innocent PRP's have to settle under the administration's non-binding proposal?

Mr. LAWS. There is a provision that allows the Agency to settle with PRP's at any time, either based on the allocation or not based on the allocation. If a party felt that its allocated share was unfair they could certainly enter into negotiations with the Agency to try and convince the Agency of that fact, what facts the allocator did not accept, assuming that the Agency did not make that determination itself.

Again, there are ample opportunities before, during and after the allocation process for EPA to settle with other parties.

Mr. OXLEY. I would like to get back to the question of the funding of the orphan share. How would you propose if indeed the $300 million is inadequate, to make certain that was fully funded.

Mr. LAWS. As I said, we are still looking at options. One of the ones that has been suggested and we are seriously looking at is simply passing on whatever shortfall arises in one year to the next year. That way, we wouldn't have a situation of having to reduce the amount of money by paying cents on a dollar to a party simply because the money was unavailable in a certain year. That party would retain its claim, and it would simply be paid out in a different fiscal year.

There are certainly other options to address that, and we would certainly consider any of them.

Mr. OXLEY. To date, how much money from the Superfund Trust Fund has been kept from EPA and used to offset the Federal deficit?

Mr. LAWS. Is that a cumulative amount?

Mr. OXLEY. Yes.

Mr. LAWS. It varies from year to year. We can provide that for you.

Mr. OXLEY. How much has accumulated all together?

Mr. LAWS. That varies as well, based on the tax receipts.

Mr. OXLEY. My numbers tell me about a billion and one-half. Would that be about right?

Mr. LAWS. It usually runs between a billion, four to a billion, seven, the total receipts.

Mr. OXLEY. Does your proposal before us assure us that all taxes and fees collected under your proposal will be made available for Superfund?

Mr. LAWS. It anticipates I believe with the orphan share, that more money will be available. The ultimate amount of course that will become available, is subject to appropriation committees and what is ultimately provided. I think that our anticipation is that a larger amount than is currently provided to the program will be provided in the future.

Mr. OXLEY. I mean, what do you base that on?

Mr. LAWS. One of the things is the fact that we don't want to reduce the amount of money available for cleanups. We are providing money from the orphan share from the unappropriated dollars. So, taking those two facts into account, we are assuming that a greater portion of the Fund would be made available to the program.

Mr. OXLEY. With the limits on municipal liability and the 10 percent cap, have your economists run models so that there is something to base that belief on?

Mr. LAWS. Yes. I think the amount attributable to the difference between the 10 percent cap and what an allocator might find would be the true municipal share, is estimated to be $40 million a year. The Office of Management and Budget and EPA have worked very closely in doing a budget impact analysis.

Mr. OXLEY. Thank you. Thank you, Mr. Chairman.

Mr. SWIFT. In order of appearance we shall now go to the gentleman from Colorado.

Mr. SCHAEFER. Thank you, Mr. Chairman. Mr. Laws, are you familiar with the Federal Facility Compliance Act?

Mr. LAWS. Yes, sir, I am.

Mr. SCHAEFER. How do you interpret that?

Mr. LAWS. That's a wide ranging question.

Mr. SCHAEFER. It's actually a very simple question. The Federal Government will now be subject to fines and penalties by the States if they violate environmental laws per RCRA.

Mr. LAWS. That's correct.

Mr. SCHAEFER. Is that correct?

Mr. LAWS. Yes, sir.

Mr. SCHAEFER. I am looking at the bill on page 48, 49 and 50, and it seems to me that what we are saying in here is that we are going to now exempt the Federal Government in cases particularly prior to 1976, from any of these individual hazardous waste problems that possibly could have occurred by either DOD, DOE or et cetera. Do you interpret it that way?

Mr. LAWS. No. I think it's a much narrower exemption. What we are dealing with there are certain land manager agencies who, by statute, were required to basically turn over tracts of Federal land, usually for mining purposes. The Federal agencies maintained up until approximately 1976, absolutely no authority whatsoever to regulate what was done at those sites. Those provisions are attempted to address Federal liability in those instances.

I don't think it is as broad a read as you pose it.

Mr. SCHAEFER. Mr. Flint.

Mr. FLINT. It's clearly our understanding, Congressman Schaefer, that where the Federal Government is the owner and operator of a facility, that it is responsible for complying with all of the environmental statutes. In the CERCLA context that we are talking about here, that it assumes its responsibilities a PRP to clean up its activity, its share of the cost. That is not intended to be changed.

My understanding is that this provision is designed for the circumstance where the actor on the Federal property was not the Federal Government, but where the actor on the Federal property, a mining company for example, could go on and conduct exploration and activities without control from the Federal Government under the mining laws of the United States.

Mr. SCHAEFER. Why do you come up with that date?

Mr. FLINT. That was the passage of FLPMA, the Federal Land Management whatever act. It was at that point that the Federal agencies obtained authority to regulate, clearly regulate, certain kinds of surface activities even on mining claims on Federal property.

Mr. SCHAEFER. Do you feel that the Federal Government should be liable for the same claims as private companies, to violations of environmental law?

Mr. FLINT. I think that certainly the Federal Government should be liable in the same claims that a private company would have. But I can't imagine a circumstance where a private company wouldn't have the ability to control the activities of a third party on its property.

In this situation, under the mining laws, individuals were authorized to prospect, to stake claims, to conduct exploration and mining activities on the Federal property. They were not required

to patent that property and take title to it. Quite frankly, frequently they did not. As a result they mined the property, they left the results of the mine on the Federal property, where the Federal Government had no ability to manage or oversee the mining operation. They left the property without ever requiring a patent.

This was designed simply to deal with that kind of circumstance.

Mr. SCHAEFER. In looking through the legislation, it seems to me that we are trying to give breaks to the Federal Government, where they have indeed been a party to the various violations of environmental law in the past. The purpose of the Federal Facility Compliance Act was to make sure that the Federal Government had to comply with laws as well as private parties.

Now, in reading through this legislation it seems to me that we are now saying to the Federal Government you are going to be exempt again, and what it's going to do is break apart the Federal Facility Compliance Act. I don't know for what purpose. Maybe it's because of the cost involved.

But we are going to have some people coming in on the third panel that—particularly our Attorney General from the State of Colorado and all of NAAG—who has supported the Federal Facility Compliance Act. It was signed into law by President Bush in 1992. I feel that we have some real problems in this bill, where the Federal Government is trying to get away and sneak out of some of the liabilities that it has been involved with, in violation of RCRA.

Mr. FLINT. May I respond, Congressman?

Mr. SCHAEFER. Please.

Mr. FLINT. First, let me say categorically, it is not our intent in this bill to absolve the Federal Government for its responsibilities as an owner or operator of an activity. If it has a facility such as Rocky Flats in your State, Rocky Mountain Arsenal in your State——

Mr. SCHAEFER. I am glad that you mentioned those two.

Mr. FLINT. I remember them well. If it has an activity like that, there is no question that under current environmental law including the Federal Facilities Act, that the government is responsible for complying with the environmental statutes. It is not the intent that any provision here absolve it of that responsibility.

There is a provision here—perhaps I may be jumping ahead from where you are, but it may be what you are concerned about—there is a provision here that deals with what we in the Justice Department and I suspect EPA as well, refer to as the FMC situation. That is a situation where the government, during the Second World War, by virtue of issuing national rules concerning price controls and national regulations of similar nature concerning management of the economy for the purposes of assuring war production, but not when it was operating as an owner or an operator of such facility.

We have a court case, the FMC case, in which the Court suggested that by virtue of that regulation during that wartime circumstance the government could be found liable even though the United States was not the owner or operator of the facility. This provision of the statute does provide a specific and very limited exception for making it clear, that the United States is not liable for that kind of broad regulatory authority, not an authority that any private individual could have.

In the FMC situation—perhaps I could use it as an illustration to make a point that I think is responsive to your question. The FMC is a facility in Front Royal, Virginia, where there was a rayon manufacturing facility. A portion of the equipment that was used by that facility was owned by the Federal Government. It is a Superfund site. The Federal Government clearly acknowledges its responsibility as a PRP for the portion of the facility which it owned, and the activities pertaining to it.

The rest of the facility was not owned or managed by the Federal Government. The only responsive role that the Federal Government had was as a regulator of the general economy of the United States under wartime conditions. The court in the FMC case suggested that by virtue of that responsibility the Federal Government should be held responsible for all of the clean up at the facility or substantially all of the clean up at the facility.

That is the only exemption that is suggested or intended to be suggested here.

Mr. SCHAEFER. My time is up, Mr. Chairman, and I apologize. One last quick question. In reading this legislation and all of a sudden we are going to exempt the Federal Government in many, many cases here, who is going to pay for these cleanups. It is all private, when the Federal Government is actually involved?

Mr. FLINT. I think I have tried to say, Congressmen Schaefer, when the government is the owner or operator of a facility, whether it's pre-Superfund or post-Superfund past 1980, it is obligated to pay its share of the costs of the clean up. This bill does not exempt it from that responsibility.

Mr. SCHAEFER. Is this true in the mining context as well? I mean, here we have mining companies that are involved in bringing out these materials.

Mr. FLINT. Where the government is in the same position as the mining company, it is conducting the mining operations, the mining company under Superfund is responsible for the clean up. If the government is mining and conducting the operation, the government is responsible for clean up.

Mr. SCHAEFER. Thank you, Mr. Chairman. My time has expired, I am sorry.

Mr. SWIFT. If I might, I would like to pursue the same thing. It is my understanding, and I am not intimately familiar with the case at all, it is my understanding in the FMC case that the court in fact did find that the United States was an operator. In fact, they also found that the United States had "arranged for the disposal of the waste." Is that not your understanding of the case?

Mr. FLINT. It was by virtue—suggesting that it was by virtue of its ability to regulate in the issuance and its ability to control through the regulations of the issuance of nationwide regulations, that it became an owner/operator. It's our view that is not what was intended by the concept of an owner/operator.

If we were in fact manufacturing the facility or manufacturing the materials or the materials were being manufactured in a government facility which is frequently the case, or a portion of the facility is owned by the Federal Government, the government, we believe, is clearly responsible.

Mr. SWIFT. All right. You can see why, as a non-lawyer, I sit here and say that sounds kind of slippery to me. I am willing to have you dismiss that as being ignorant.

Mr. FLINT. I don't mean to dismiss your question. It's a serious one.

Mr. SWIFT. You can see the concern that we have.

Mr. FLINT. Yes, I do.

Mr. SWIFT. What my observation has been on this issue is, people in the previous administration and in this administration have some overreaching policy concerns that they have raised, that we probably need to listen to with care and try to address. What you need to understand is that we have all had experience with respective agencies, often below the political level, where they have frankly been—and I choose this word very carefully—dishonest, and where they basically have got a don't bother me boy, we are going to take care of you kind of attitude. They don't want to have to live by the same rules as anybody else.

Addressing the policy concerns that you have had and the previous administration have had, I think the gentleman from Colorado and I are very happy to do that, but we don't want the bastards down below getting away with the crap that they got away with before. If we have to, in order to achieve the second purpose maybe not reach an agreement that you would think perfectly reasonable in the first instance, then that's what we are going to do.

Mr. FLINT. I can assure you, Mr. Chairman, that it is our view that those kinds of activities are entirely inappropriate. There should be no mechanism under this legislation which would exempt them from responsibilities.

Mr. SWIFT. I believe that people in the previous administration felt that way as well. We have a practical problem we are trying to resolve, and the degree to which you can help us solve your problem and solve ours, we will be cooperative. But if we have to err, we are going to put those people in the cage.

I recognize the gentleman from Virginia.

Mr. BOUCHER. Thank you very much, Mr. Chairman. I want to join with you and the other members in thanking both Mr. Laws and Mr. Flint for their appearance here this morning and their very informative opening statements, and helpful answers to our questions.

My basic question to both of you is this. The principal task that we are about in reforming the liability section of Superfund is to expedite determination of the party's liabilities, make sure that each party bears a liability that is proportionate to the contribution that it made to the problem at the site overall, and to eliminate unnecessary litigation and other transaction costs, to cheapen the process, to make it more reliable, to make it fairer and make it quicker.

Now, you are proposing to do that in the administration's bill through a voluntary process in which the parties can choose to participate or not, and for those parties that do choose to participate at the end of it all you would have a non-binding allocation of responsibility. In essence, they could walk away from whatever decision the outside allocators make and resort to other remedies that may be available.

By contrast, the legislation that I have introduced along with Mr. Upton is a mandatory process, in which all of the potentially responsible parties would be required to participate, and at the end of the allocation process the parties would be bound. That is probably the major difference between the proposal that you have put forth and that we have put forth. I might add that subsequent to our introducing our bill, the National Commission made recommendations that are entirely consistent with those contained in H.R. 3624.

You already have in place as I understand it, a non-binding allocation system authorized under the current Superfund law. My questions to you are these, how often have you used the current non-binding and voluntary allocation system that you already have as part of the current law? If it has not been very often, then why has it not been more often? What do you think you would receive through changing the law to provide yet another voluntary and non-binding allocation system that you don't already have in the current law?

What, in your proposal, would assure a greater level of party participation than is available in the statute as it currently exists? Mr. Laws.

Mr. LAWS. Let me explain one thing. I assume the voluntary nature of our program is that it is voluntary as to whether the PRP's will actively participate in it. It is obligatory on the government to conduct an allocation system in any case where there are two or more PRP's. That is one of the most fundamental differences between that and the current process, which is a totally discretionary process.

Probably the biggest handle that is going to get PRP's to participate in this process is that, for the first time there is the opportunity for a complete release from Superfund liability. In order to get that they must participate in the allocation process. That finality which heretofore has not been available, is probably the strongest incentive to get PRP's to participate.

Mr. BOUCHER. But can't a party simply walk away from the decision once it's rendered by the outside allocators?

Mr. LAWS. That party could do that. That party would then not be eligible for such a release. In fact, if it did not settle with the United State, it would be subject to joint and several liability, which could include funding of the orphan share. There are significant disincentives for a party not to participate and make an offer to the government based on the allocator's determination.

Mr. BOUCHER. Isn't it logical to think that a party that does participate and receives an allocation which it believes to be grossly in excess of its reasonable responsibility for what happened at the site would simply walk away, taking its chances with the regular joint and several process? Isn't it logical to think it would happen in a great number of cases?

Doesn't your system sort of offer an invitation for that?

Mr. LAWS. It's difficult to generalize, as to what would happen. The uncertainty that is incumbent in rejecting the allocation and taking your chances in joint and several with the attendant uncertainties and the huge costs including orphan share, reimburse-

ments to the government is something someone would have to balance against the certainty that is provided.

Also, as I said before, there is an opportunity if a party feels that the allocator came up with a result that is grossly unfair, that they would then have the opportunity to make that argument to the administration and possibly convince them.

Mr. BOUCHER. I think we have identified an area of difference which deserves additional focus, perhaps informally, as we structure the provision that will move forward for liability fund reform. Since I do have a couple of other questions, I would like to move to those.

Mr. Flint, did you want to comment?

Mr. FLINT. I just wanted to comment that my understanding is that a person may decide, as a matter of his own business considerations, not to actively participate in the allocation process. However, it is our responsibility—the government responsibility—to provide that allocator with all of the information we have with respect to all of the PRP's and for the allocator, in coming up with the allocations, to assign shares even to those people who are not active participants in the allocation scheme.

Mr. BOUCHER. Mr. Flint, let me ask you this question. You had raised in your opening remarks and DOJ has continually raised the issue, of whether or not a process that involves binding allocations but does not involve the regular procedural guarantees that due process normally requires, could withstand constitutional muster.

Let's presume that we take an approach that is voluntary at the outset, meaning that the parties can elect to participate or not, but for those who decide to participate the decisions of the allocators would be final and binding. Would that process, in your view, be subject to the same constitutional infirmities?

Mr. FLINT. I have not looked at that specific scheme, Congressman.

Mr. BOUCHER. Would you agree, that's one potential way to address the problem?

Mr. FLINT. It's one possible way to look at it. I think that there are some potential difficulties with that proposal. If I might comment about it, it seems to me that if a party believes that it is in fact going to be bound both as to liability and amount in a binding allocation process, that the party is going to look at that process and demand some degree of certainty that there will be a rather rigorous process to assure that they have a fair hearing.

Mr. BOUCHER. So, the focus becomes somewhat on the process itself, and the opportunity to present evidence and cross examine witnesses, et cetera.

Mr. FLINT. If the process doesn't provide—if the binding process doesn't provide sufficient due process activities or actions, then they would decide not to participate.

Mr. BOUCHER. Mr. Flint, we could examine that question in greater detail and we will, but let me move to one other question. If we in fact shortened the litigation process we may, assuming that we utilized the EPA's corps of Administrative Law Judges for that purpose, impose some greater staff obligations upon the EPA which obviously we in Congress would have to address. Do we not correspondingly save staff resources at the Department of Justice?

Would you not be devoting less of your personnel to the litigation process in the event that we adopt a less formal administrative process at EPA?

Is it not potentially possible that the government overall would have a staff saving because of the reduction in resources needed at DOJ as compared to what you currently have?

Mr. FLINT. I am not sure how they would parse out. I think that at the present time at DOJ, we have probably somewhere close to 200—I could get the number but I just don't have the exact figure—employees.

Mr. BOUCHER. You would agree, that there would be some reduction in your staff requirements at DOJ, would you not, assuming that a process either such as the one that Mr. Laws recommends or the one that I am recommending would be adopted. There would be some reduction in your staff resources.

Mr. FLINT. It's possible. I just don't know.

Mr. BOUCHER. I think it would help us in our deliberations if you could examine that question somewhat more carefully, and give us an estimate of what your staff resource reduction would be in the event that the administration's approach is adopted and in the event that H.R. 3624 is adopted.

Mr. Chairman, I apologize for the length of these questions, and yield back any time that I have remaining.

Mr. SWIFT. No apology is necessary. The gentleman has worked very hard on this provision, and has been very constructive. The Chair's view is that the arguments on both sides of this issue have such merit, that I think we need to find the best in both approaches and blend them, and move on.

I pledge to work with you, as a central player on this issue and with the administration and others, to try and achieve that goal. I recognize the gentleman from Idaho.

Mr. CRAPO. Thank you, Mr. Chairman. Mr. Flint and Mr. Laws, I would like to go back for just a moment to the questions that Congressman Schaefer and the chairman were talking with you about with regard to the exemption for the Federal Government.

As I understand your discussion of that exemption, the justification for it was that—correct me if I am wrong here—the justification was that in the private sector an owner would always be able to have control over what the person who the owner allowed to have control of the property was doing, through a lease arrangement or in some way. The owner could never argue that he or she or it did not have control over what happened on that property.

But in some circumstances I understand you to be saying that the Federal Government, land management agencies or whatever, would not have that ability with those they allowed on the property under requirement of law for purposes of handling the law. Am I correct to this point?

Mr. FLINT. Not at the present time. We are talking about a historical point in time, prior to FLMPA, in 1970.

Mr. CRAPO. Correct, and that's what this exemption applies to.

Mr. FLINT. Right.

Mr. CRAPO. I guess the question that I have is, I guess I don't buy that distinction. It seems to me that the United States Government has a hard time making the argument that it doesn't control

what happens on land under its management. The Bureau of Land Management might say that Congress made us manage it this way. But I don't know that it gets the government out of saying that it is managing the land or that it is a participant in what is happening to the land in the same way that an owner in the private sector who might allow someone on the land through a lease that does not allow the owner to exert influence over that land, that it would be able to make the same argument.

I guess my question is back to the same point, again, why does the Federal Government deserve to have that kind of treatment?

Mr. FLINT. I think that Congressman, I agree with you, that this was mandated by Congress. It's by virtue of the mining laws that the managing agencies had no ability to go and control that activity. The only point that I can make in response to that is, it was in the situation of the private party, they had the ability to decide whether or not the person was coming on the property or not and what activities it could be conducting on the property. The land managing agency did not have that responsibility.

Mr. CRAPO. Although the Federal Government did have that ability.

Mr. FLINT. By virtue of the ability of Congress to act.

Mr. CRAPO. It's the Federal Government, in essence, that is getting this exemption.

Mr. FLINT. It's the taxpayer.

Mr. CRAPO. Let me just say there, I think that you understand the difficulty that we are having with the justification being put forward for why this law should not apply to everyone, including the Federal Government.

Let me go on to another wrinkle that I found, that I think applies more specifically out in the West, from where I come. In section 107 of the Act where it talks about the 10 percent cap for liability for municipal generators and transporters, that relief to the municipalities is justifiable and needed. But the relief is only allowed where the disposal did not occur on lands owned by the United States.

We are getting back, again, into the question of why it is that there is some special treatment with regard to Federal property. My question there relates to this, in the West there are going to be facilities that are perhaps on BLM property or whatever, that municipalities are involved with. I am not sure I understand why a municipality who has been involved in the West on public lands should be treated any differently than a municipality somewhere else that is not involved on public lands.

Could you tell me the justification for that distinction.

Mr. FLINT. It's my understanding in that situation, the land managing agency—again, I would assume that this would primarily be the BLM or Forest Service.

Mr. CRAPO. I think you are correct.

Mr. FLINT. Have been in the position where the municipalities have conducted or maintained hazardous waste facilities on Federal property, that the agencies are of the view that they were not the operators of those facilities, that they were there for the convenience of the local communities, and that they believe they should not be responsible under the terms of Superfund.

Mr. CRAPO. The net result of this, if it were enacted in its current form is, that the ones who would be responsible would be the municipalities.

Mr. FLINT. The municipalities, with the provisions about taking into account still other sections of the statute which deal with the issue of ability to pay.

Mr. CRAPO. Again, the ability to pay protects everyone, including municipalities that aren't subject to the statute.

Mr. FLINT. You are exactly right.

Mr. CRAPO. What we are saying here is that municipalities that happen to be in areas of the country where they are surrounded by BLM ground or for whatever has been the past practice, their activities related to Federal land are not going to be given the kind of protection that municipalities in other areas will receive.

Mr. FLINT. That is my understanding.

Mr. CRAPO. The reason is that the Federal Government, again, does not want to have to be a part of the liability scheme here.

Mr. FLINT. The view of the land managing agencies is that it was not their activity, and, it therefore should not be their responsibility.

Mr. CRAPO. Is that a standard in the rest of the Act, however? In other words if it was not your activity you are not liable? As I understand it, if you are an owner or somehow involved with it, you get hit with it. But we are saying that because the Federal land management agencies were not managing or participating then they would like to be exempted, and everyone would like to be exempted if they were not participating in the actual management.

Mr. FLINT. You are right, Congressman.

Mr. CRAPO. I guess you can see, I guess there's a double standard there, in that area of the statute as well. Let me ask one final question. You raised what was called the FMC situation. If I understand that situation correctly, the argument being made is that where the Federal Government's responsibility is not because of being an owner or an operator but because of Federal regulations.

Again, the Federal Government should not be responsible for liability if its involvement is through regulatory or legal mandates. Is that the line of argument there?

Mr. FLINT. No, it's not quite that, Congressman. If the government is an owner/operator of the facility, and it doesn't make any difference whether the Federal Government is an owner/operator by virtue of a statute or regulation or by virtue of some sort of a contractual arrangement that has been entered into, the government should and the government is, responsible for its activity.

The exemption that I have mentioned is on page 52 of the bill, and it deals with the situation where the government acting under its authority to regulate the economy, and for preparation during or otherwise in connection with the law—I am reading the express language here—through the use and implementation of national priority rating system, national wage, profit, price incentive for controls.

Issuing those kinds of regulations, not actively directly working on a particular property in a particular plant. In that situation those kinds of activities shouldn't make it responsible for the activi-

ties of those who were actually operating the plants, running the manufacturing equipment, deciding how they were going to dispose of the waste, where they were going to dispose of the waste.

It's where the Federal Government, as a part of its regulation, was directing where they were to dispose of their waste or what waste they were going to come out of that plant, it would be moving into the area as an operator and it should assume responsibility.

Mr. CRAPO. Let me try to understand this a little better though. If the Federal Government, through one of the areas that you just described, required someone in the private sector to undertake an activity that ultimately caused that person to be subject to potential liability, the government would be exempted; is that correct, from liability?

Mr. FLINT. I am not quite sure that I can—I am trying to figure an example of what you are talking about, Congressman. I am not sure.

Mr. CRAPO. Let me be a little more specific. It says here an action taken pursuant to Federal authority to regulate the economy. Let's assume that through some exercise of the Federal Government's authority to regulate the economy they required an action of someone in the private sector which ultimately caused that person in the private sector to be potentially liable under this Act, would the government also share in that liability?

Mr. FLINT. If it were specifically directed. This concerns national policy. As a result of a national policy the Federal Government went to a particular person and directed a person to take a particular action that resulted in pollution, it seems to me that you are coming very close to the government becoming an operator and becoming responsible.

It's where the government issues and has the ability to issue broad national policy and set general national schemes for setting priorities about what materials can be produced, not requiring them to be produced, that this provision is intended to address.

Mr. CRAPO. I think I understand what you are saying. Again, I am going to take exception to it, if I understand it that way. It seems to me that even though the Federal Government acting in a broad regulatory manner as opposed to a specific regulatory manner, can become involved and can become a participant in a decision making process that in fact that it mandates or drives that could result in pollution.

If the Federal Government, through rule or regulation or statute drives an activity, even if it's in a broad regulatory arena that results in pollution, then the Federal Government ought to step up to the bar and share in responsibility for that liability.

Again, this is one more area where it seems to me that if we are going to clean up as we should under this Act, all participants should be a part of it. Without specific reference to this specific statute, I have had many people in my community talking about other Federal policies telling me how, particularly in cities and counties, where they have been required to take a certain action to take something out of their water system because it was considered to be a pollutant. Then, through another Federal regulation or

whatever, it was determined that the water wasn't proper so they had to put stuff back into it.

They are going forward and backward and forward and backward, because of Federal regulations. Easily, a county or private sector will be required to take an action by a broad regulatory policy of the Federal Government that could ultimately subject them to liability. It seems to me that that's an ultimate catch 22, if the Federal Government then says yes, we are the ones that made you do it but we are not going to share in the responsibility for paying for this pollution.

Could that happen. It seems to me that from our discussion, that could easily occur.

Mr. FLINT. As I say, I haven't thought of the example that meets that obligation. It was not our intention to remove and it was not our intention in the drafting of this provision to remove the government's responsibility where the government, like a private individual or private corporation is on the ground making decisions concerning the management of a piece of property which results in pollution of that property, that the government would somehow escape that responsibility for the cleaning up of that site.

Mr. CRAPO. Thank you.

Mr. SWIFT. I thank the gentleman. I would inform the committee that we are informed that there will be a vote in 10 minutes, which gives us about 20 minutes before we really have to go. If it is possible to complete the questioning of this panel in that time it would be a courtesy to them, certainly, so that they can go.

With that, I am happy to recognize the gentlewoman from Arkansas for questions.

Ms. LAMBERT. Thank you, Mr. Chairman. I have several questions. Because of my district, I am obviously concerned about protecting rights and interests for small business. They are predominantly what are in my district, especially when they have been identified as the PRP's.

I do think that the administration has taken some first steps and very good first steps to assist the *de minimis* PRP's, but I do think that we can do better. I have been pleased and excited about the willingness of some of the small business groups and environmental groups—FIB, EDF, NRDC, and some of the other groups—to come together, to try to find some common ground to recognize how we can accomplish that.

On page 79 and 80 of H.R. 3800, the administration is proposing expedited final settlement procedure for *de minimis* PRP's. It states that wherever practicable and in the public interest, the President will, as promptly as possible, offer to reach a final administrative or judicial settlement. That concerns me. It seems a bit loose, and I think it does give a tremendous amount of discretion to EPA and DOJ.

I, personally, believe that we have to have a harder hammer to come down to get the small guys out of the loop as quickly as possible. There is some consensus and some ideas that have come up with the discussions that have been going on with the small business groups, especially the need for some sort of a time schedule, time line, to get these small businesses out of the loop, to get their portion allocated, and to give them an idea of what they can expect.

Again, with the willingness of all of these different groups who have come together and worked hard to come up with their proposals, I think you will hear later on in the testimony today that they propose a prompt determination of the responsibility to get the small business *de minimis* parties out within 180 days after the commencement of the allocation process. If that can't be accomplished by EPA or they cannot act within that timeframe, they may lose the premium or potentially the whole clean up cost.

They have also recommended structured settlements for small businesses so that they can structure their payments to get themselves out, as well as a small business assistance program to provide technical assistance to give small businesses the capability when they have been declared a PRP at a Superfund site, to be able to work through the process of what they are going to be responsible for.

Many of these proposals are based on the National Commission on Superfund's report. I would simply like to know if you have comments on some of those proposals, and how you would get the small businessmen out of the loop. Sometimes the process is so lengthy, with the attorney fees, you end up putting those small businesses out of business. That does very much concern me.

Mr. LAWS. Congressman, clearly, one of the main goals of the administration's proposal is to address the burdens that have been placed on small business. We have some very, very rough estimates that the administration's proposal as it affects *de micromis* parties, could reach as much as 40 percent of the PRP's that are currently at sites. We think that we have gone a long way in addressing that, and adding the *de minimis* and ability to pay aspects of it will go even further in addressing small business concerns.

We have not had a chance yet to review the NFIB and EDF compromise that was worked out. As I said, we are very interested in addressing small business issues. We will certainly be looking at those to see if it's something that is appropriate for inclusion in the legislation.

Ms. LAMBERT. We would encourage any comments that you do have on that proposal later on, for the record.

Mr. LAWS. Certainly.

Ms. LAMBERT. You also mentioned or have talked about the orphan share. I notice that there's only $300 million that has been allocated. Do you really feel like that's adequate. Is that enough, and what happens if that is not enough? Has there been thought put to what determination would be used on how the additional remediation cost would be split up if the orphan share is not enough and doesn't meet the needs.

If in fact there's an additional 20 percent that still requires clean up, are you going to go about some specific schedule or formula in order to divvy up the remaining cost among PRP's or other liable parties?

Mr. LAWS. Based on the best information that we currently have, we believe that the $300 million annually will be more than enough. That calculation, however is, even as we speak being reviewed, to make sure that the assumptions that we have made and the figures that we have are appropriate. The administration, as I said before, is committed to fully funding the orphan share.

We encourage any parties out there who might have information to indicate that our estimate is too low, to provide that to us so that we can consider it.

As to the second point, even with the best of estimates for some reason, we may hit a brick wall in any given fiscal year. The administration is currently looking at options to determine what procedure or process should kick in at that point.

The current drafting of the orphan share provision, I think, provides the President with the flexibility to implement a pay out process or however, to address that consideration. There clearly has been evidence and strong desire that something more specific perhaps be in the statute. One of the options that we are looking at that I mentioned earlier is a proposal that would allow PRP's entitled to reimbursement from the orphan share pot to maintain their full claim, and that the claim would just be pushed off into the following fiscal year.

As I said, that is just one of the areas that the administration is looking at, to make a determination as to what would be the most appropriate vehicle to address that.

Ms. LAMBERT. Along those same lines, if you have 25 sites that are currently under clean up, is there any way that you have discussed or thought about allocating from that $300 million. I mean, do you look at severity of problems and things like that.

Mr. LAWS. Again, I think that we entered into this with——

Ms. LAMBERT. Equal share to each 25?

Mr. LAWS. Our assumption was that with the number of sites that would be eligible for orphan share we would be able to fully fund it. Again, that is our main goal. We don't have to get into a situation of perhaps holding back to a mega-payout date towards the end of the year or something like that.

Again, if it looks as if there is not going to be as much leeway in the funding versus what the payout required is, then we certainly are going to examine whether we need to put it into the statute again. I stress that the current language of the statute provides the President with a lot of flexibility to determine this, but we will make a determination as to whether we need to put into the statute a specific mechanism to both address the possibility of not having enough money in the orphan share fund or whether we need to structure payouts the rest of the year. We are examining that.

Ms. LAMBERT. You also stated that under the administration's proposal, the States would have the delegated authority to administer and enforce the Superfund program. In light of some of the articles we saw last week in the Washington Post about abuses by States in the Medicaid program and other areas, how do you all propose to keep a handle on that, to eliminate abuse or the duplicative problems that you may run into with the States administering the Superfund program.

Mr. LAWS. One of the major changes in a State authorization or State referral would be that the States would have access to the fund for the first time. Also, in terms of our capacity building grants and cooperative agreements that we are currently providing to the States, that would continue as well.

The whole purpose of the state authorization program is to try and address the repeatedly directed criticism of having two masters

at a site. The States, if they have a lead, still have to satisfy EPA. If EPA has the lead we still have to satisfy the States. We have been working very closely with them to try and minimize the instances where we step on each other's toes and minimize the instances where we have to look over each other's shoulders.

The caution I always raise, however when we discuss this is, EPA and the government do have an obligation and a fiduciary responsibility to the Fund. We certainly have an obligation to satisfy the legitimate oversight of the Congress. To some extent we are going to have to balance that need, to be able to provide the Congress with information regarding how the Fund is being spent and what the States are doing at administering a Federal program, with the desire not to waste resources by having two sovereigns doing basically the same thing.

Ms. LAMBERT. Statutorily there are really no safeguards in there to make sure that there are no abuses or that the funds that are being allocated to the States are actually going to clean up.

Mr. LAWS. There are several. There are annual reviews. There is currently in the proposal a provision that would require EPA to look at all of the remedy selections that a State makes, either for a referral or for an authorized program. There are particular things that are listed in the statute which would provide, I believe, a sufficient level of comfort, that abuses will not occur at the State.

Ms. LAMBERT. Thank you, Mr. Chairman.

Mr. SWIFT. I thank the gentlelady. I recognize the gentleman from Michigan. I would also state that I don't want to limit your time artificially. If you can't do it in the amount of time we have we will just hold the group until after the recess.

Mr. UPTON. Thank you, Mr. Chairman. We all have lots of folks coming by our office as well, so I will probably not be able to come back for a little while after the vote. I may just make a couple of remarks here, and we will see if it leads to a question.

I want to thank the chairman for his swift action here.

Mr. UPTON. It was only last week that the administration's bill finally made it to the hill. Though I have not thoroughly had the chance to examine it, I appreciate the timeliness that you are taking to move this legislation, as it is an issue we cannot really wait for as a country to last into the next Congress. I want to applaud your leadership. Certainly, I pledge my willingness to try and work in a very constructive manner to fix the many problem.

Mr. Laws, as you know, I have been very concerned with a host of problems that the Superfund legislation has borne upon us the last 13 or 14 years. I look forward to Mr. Chavis' testimony who will follow you, as we look at problems particularly in the Northeast and Midwest with sites that folks are not willing to come in and redevelop, whether they be because of bankruptcy or expansion.

The fear of liability, particularly with innocent parties, bears real problems. I know that the Northeast and Midwest Institute has found literally thousands of such sites and hundreds in Michigan, that's for sure. I have introduced legislation on the liability end. I know that you and I are going to be getting together in the next couple of weeks to discuss the legislation that I have introduced.

In maybe a minute or two, I would just comment briefly on some of the steps that the administration has taken in its bill to look at the fear of liability in terms of development of these sites. I represent southwestern Michigan, 80 or 100 different communities, ranging from communities with not even a four way stop that have problems with problems like the City of Kalamazoo, which we have seen growth move into rural areas rather than have the fear of liability.

I would be just interested just very briefly in your comments.

Mr. LAWS. There are two major provisions in the administration proposal that would address that concern. The first is the prospective purchaser exemption where we are for the first time providing prospective purchasers with exemptions from liability, specifically so that they can go into the urban "brown fields" as they have been lately referred to, to purchase these properties and redevelop them.

The basic requirements for the prospective purchaser are that they are not attempting to basically avoid liability through a sham purchase, and that they did not contribute to the contamination, and that they agree to either clean it up or cooperate with the government or PRP's who are cleaning it up.

Hopefully, that will have a major effect in both relieving some of the lender's concerns about providing money for these types of activities as well as prospective purchasers who do want to go in.

The other thing that we are doing is the encouragement of the voluntary clean up programs within the States. A lot of times the States have told us that they have lots of developers who would be willing to come in and clean up a site if they had some level of confidence that the clean up level that they conducted at the site was going to satisfy both the States and EPA.

Mr. UPTON. Your bill does not include tax credits, does it?

Mr. LAWS. No, it does not.

Mr. UPTON. I might be interested to hear why or why not at a subsequent meeting.

Mr. LAWS. OK.

Mr. UPTON. I need to run, to get to the Floor. Thank you very much.

Mr. LAWS. I would be happy to answer any other questions that you might have.

Mr. UPTON. Thank you, Mr. Chairman.

Mr. SWIFT. I thank you. The subcommittee will stand in recess until we vote. I would urge members to return promptly, at which time the Chair intends to enforce the 5 minute rule on witnesses and on member questions.

I want to thank both you, Elliott and Mr. Flint, for your assistance. I think it has been very helpful as we get started on working out the problems in passing legislation this year.

Mr. LAWS. Thank you, Mr. Chairman.

[Brief recess.]

Mr. SWIFT. The subcommittee will come to order. We are happy to welcome our second panel. They can all take their positions at the table. There is William Roberts of the Environmental Defense Fund, Dr. Chavis, of the Alliance for a Superfund Action Partnership, Deeohn Ferris with the Environmental Justice Project, Harriet James, with the NFIB, Bernard Reilly, with the Dupont Com-

pany, Dennis Minano, with General Motors, and Kate Probst, with Resources for the Future.

We welcome all of you. I will remind you of two things. One, we are going to enforce the 5 minute rule, not only you but exercise some discipline on this side of the dais as well. Also, however, that we already have permission for your full written statements to be made a part of the record.

Also, I will indicate that Dr. Chavis has a 1 p.m. plane. There will be time for him to testify, as he is scheduled as the second witness. I have told him that when he feels that he needs to go, particularly given the weather outside to catch the plane, he should feel free to leave and he will be then replaced at the table by Larry Wallace, who will participate for the remainder of this panel.

With that, welcome to you all. I am happy to recognize William Roberts.

STATEMENTS OF WILLIAM ROBERTS, LEGISLATIVE DIRECTOR, ENVIRONMENTAL DEFENSE FUND; BENJAMIN F. CHAVIS, JR., CHAIRMAN, ALLIANCE FOR A SUPERFUND ACTION PARTNERSHIP, ACCOMPANIED BY W. LARRY WALLACE, EXECUTIVE DIRECTOR; DEEOHN FERRIS, DIRECTOR, ENVIRONMENTAL JUSTICE PROJECT, LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW; HARRIET JAMES, LEGISLATIVE DIRECTOR, NATIONAL FEDERATION OF INDEPENDENT BUSINESS; BERNARD REILLY, ON BEHALF OF CHEMICAL MANUFACTURERS ASSOCIATION; DENNIS MINANO, ON BEHALF OF AMERICAN AUTOMOBILE MANUFACTURERS ASSOCIATION; AND KATHERINE N. PROBST, FELLOW, RESOURCES FOR THE FUTURE

Mr. ROBERTS. Thank you, Mr. Chairman. On behalf of the Environmental Defense Fund and its 200,000 members I want to thank you, Chairman Swift and other members of the subcommittee, for this opportunity to discuss the liability regime under Superfund. EDF has been actively involved in the Superfund reauthorization process, serving on EPA's NACEPT Committee on Superfund and on the National Commission on Superfund.

EDF believes that Superfund's liability system is the cornerstone of this Nation's hazardous waste and pollution prevention policies. Alterations in the system should be undertaken cautiously, without weakening the important incentives created by this regime.

Although there are a wide array of liability issues raised by H.R. 3800, EDF and many others in the environmental community will be focused on two main issues during reauthorization. First, reauthorization must ensure that Superfund retains the powerful incentives in the current law for pollution prevention and voluntary clean up. Second, as Congress considers the allocation approach in H.R. 3800 we will seek assurances that funding for so-called orphan shares is precisely identified in the statute, and does not in any way lessen the ability of the Federal Government to finance ongoing or future clean up activities.

In our view it is simply indefensible for the Federal Government to slow or stop clean up work in some communities solely to defray the orphan share clean up costs of an identified polluter. If it is Congress' judgment that the Federal Government should pay for

orphan shares Congress should find the additional resources to do so, and not place the burden on the backs of local communities who have already been denied adequate cleanups for too long.

Given the myriad of issues associated with liability reform, I would like to confine my remarks to four key issues: incentives, orphan funding, the binding, non-binding question, and small business concerns.

The liability standard under Superfund has given industry powerful incentives to do three things: more carefully manage hazardous wastes, reduce the generation of waste through pollution prevention, and clean up old contaminated properties before they pose a serious risk to human health and the environment.

The liability rules have accomplished these important objectives without burdensome new regulations, without thousands of new Federal bureaucrats, and without prescriptive and costly technology requirements. H.R. 3800 retains the strict retroactive joint and several standard provided in current law, and thus retains the incentives outlined above. Firms will continue to face potential responsibility for poor waste practices and for unaddressed abandoned waste sites.

The innovation provided in H.R. 3800 which is similar to recommendations made by the NACEPT Committee and the National Commission on Superfund is to use an informal allocation process to dramatically streamline the determination of liability under the existing liability rules. H.R. 3800 recognizes the importance of Superfund's liability scheme but recommends a faster and more cost effective way to implement it.

Regarding orphan funding, although H.R. 3800 retains the liability rules in the current law it makes one important change that could, if implemented improperly, seriously weaken current clean up efforts. The allocation procedure in H.R. 3800 is not budget neutral. In the exercise of rough justice the allocator may assign a share of responsibility to parties who are not viable, who no longer exist or who, for some other reason, have a limit on their liability.

Although current law places the cost for these shares on the other parties at the site, H.R. 3800 proposes that the Superfund trust fund pay for these shares. The Federal Government would in effect write a check to a polluter for costs that the polluter now pays. Clearly, there is a very real risk that the size of orphan shares and hence the cost to the government, could be extreme.

The key question for us is maintaining the assurance that the funds that we currently provide for Superfund clean up work are not diverted to pay for the costs of what polluters now pay. This is going to be litmus test for many of us in the environmental community.

On the question of binding, non-binding. With some reservations concerning constitutional concerns, the National Commission on Superfund, of which EDF is a member, advocated a mandatory binding allocation process to determine shares. Everyone involved, including the Federal Government, could appeal an adverse allocation decision, but provisions were included to discourage appeals and encourage settlement.

In particular, the Commission agreed that strict joint and several liability should apply to any party who fails to settle or pursue a

timely appeal of an allocation determination. The Commission believes that the binding process serves two important purposes.

First, for parties conducting clean-up work, a binding allocation enables them to more readily recover from non-settling parties. Lawsuits brought against those parties to recover a portion of clean up costs will resemble a judgment of enforcement action rather than the extensive liability determinations required under current law.

Second, the binding process would obligate the Federal Government to play by the same rules as everyone else, particularly as it relates to orphan shares. Clearly, EDF support for this obligation was directly linked to the absolute cap on orphan funding. EDF would not support forcing the Federal Government to accept an allocation in a binding process without a funding cap.

H.R. 3800 does not solve an important problem within its non-binding system, obligating the United States to play by the same rules as everyone else. Under H.R. 3800 an allocation determination can be rejected by the Federal Government if the determination would not be fair, reasonable and in the public interest. This provision gives the government wide latitude to reject allocation determinations, latitude that is not available to the other allocation participants.

The administration and the National Commission agree that joint and several liability must be applicable to non-settling parties. However, the administration has expressed concern that an obligation on the Federal Government to settle based on the allocator's determination, may inadvertently undermine joint and several liability by allowing a recalcitrant party to argue that his or her liability is not subject to joint and several liability at all, but in fact is divisible based on the allocator's methodology.

EDF and the National Commission on Superfund favor retaining joint and several liability for recalcitrant parties and, therefore, take the administration's concerns seriously. We are seeking ways to resolve this problem in a manner that increases the obligation of the Federal Government to settle based on an allocator's determination without undermining joint and several liability.

Finally, regarding small business concerns. The Environmental Defense Fund and many of us in the environmental community have concerns about dealing with issues that have been raised by the small business community. Today, we are sending a letter to the President as well as to Members of Congress outlining jointly with the National Federation of Independent Business, a set of recommendations that we think can solve the issues and concerns of small business with the current liability scheme. Harriet James will talk much more about that.

[Testimony resumes on p. 332.]

[The prepared statement of Mr. Roberts follows:]

Statement of William J. Roberts
Legislative Director, Environmental Defense Fund

before the

Subcommittee on Transportation and Hazardous Materials
Committee on Energy and Commerce
U.S. House of Representatives

February 10, 1994

Introduction

On behalf of the Environmental Defense Fund and its 200,000 members, I want to thank Chairman Swift, Representative Oxley, and the other members of the subcommittee for this opportunity to discuss the liability regime under Superfund. EDF has been actively involved in the Superfund reauthorization process, serving on EPA's NACEPT Committee on Superfund and on the National Commission on Superfund.

EDF believes that Superfund's liability system is the cornerstone of this nation's hazardous waste and pollution prevention policies. Alterations in this system should be undertaken cautiously, without weakening the important incentives created by this regime.

Although there are a wide array of liability issues raised by H.R. 3800, EDF and many others in the environmental community will be focused on two main issues during reauthorization. First, reauthorization must ensure that Superfund retains the powerful incentives in the current law for pollution prevention and voluntary cleanup. Clearly, Superfund's main purpose is to remediate identified sites that pose a risk to human health and the environment. But, Superfund -- and its liability system in particular -- serves a much larger purpose in giving businesses a compelling incentive to address the risks associated with hazardous waste generation and disposal. In our view, H.R. 3800 retains these important incentives, but we wish to make clear

that our continued support hinges on preserving these incentives. We will vigorously oppose efforts to eliminate or substantially weaken these incentives.

Second, as Congress considers the allocation approach in H.R. 3800, we will seek assurances that funding for so-called "orphan" shares is precisely identified in the statute and does not in any way lessen the ability of the federal government to finance ongoing or future cleanup activities. In our view, it is simply indefensible for the federal government to slow or stop cleanup work in some communities solely to defray the "orphan" share cleanup costs of an identified polluter. If it is Congress' judgment that the federal government should pay for "orphan" shares, Congress should find the additional resources to do so and not place the burden on the backs of local communities who have already been denied adequate cleanups for too long.

Given the myriad of issues associated with liability reform, we will confine our comments to what we consider to be the major issues raised by H.R. 3800. Obviously, we would be willing to assist the subcommittee on other issues, as appropriate. In our view, the key issues are: (1) incentives; (2) orphan funding; (3) binding/non-binding; and (4) small business concerns.

Incentives

The liability standard under Superfund has given industry powerful incentives to do three things: more carefully manage hazardous wastes, reduce the generation of waste through pollution prevention, and cleanup old contaminated properties before they pose a serious risk to human health and the environment. The liability rules have accomplished these important objectives without burdensome new regulations, without thousands of new federal bureaucrats, and without prescriptive and costly technology requirements.

Under Superfund, each business uses its own best judgment to avoid liability. One company may choose an aggressive program of pollution prevention. Another firm might carefully scrutinize its waste disposal contractor. A third company may conduct an environmental audit and cleanup its old, abandoned waste sites before they create a hazard to the local community.

In addition, new technologies and cost-effective methods are employed when they make economic sense, not before. Firms are given a compelling reason to avoid creating a risk to human health and the environment. But, they are free to use new technologies when they become available, to apply rigorous cost-benefit analysis, and to consider the unique aspects of their circumstance.

No federal environmental regulatory program can come close to making these claims. Superfund sets a rigorously enforced performance requirement -- protect human health and the environment -- and then allows the ingenuity of the marketplace to decide how best to achieve it at the lowest possible cost. As the subcommittee evaluates proposals to replace the liability system, it is imperative that you ask what will take its place. Will it require substantially more federal intrusion? Will it be more or less cost-effective? And, most importantly, will it lead to the same level of environmental protection?

H.R. 3800 retains the strict, retroactive, joint and several standard provided in current law and thus retains the incentives outlined above. Firms will continue to face potential responsibility for poor waste practices and for unaddressed, abandoned waste sites.

The innovation provided in H.R. 3800, which is similar to recommendations made by EPA's NACEPT Committee on Superfund and the National Commission on Superfund, is to use an informal

allocation process to dramatically streamline the determination of liability *under the existing liability rules*. Under current law, the federal government sues one or more firms to perform a Superfund cleanup who, in turn, sue others to help defray cleanup costs. Ultimately, either through settlement, negotiation, or court order, the private parties resolve their liability with the government and with each other. But, reliance on the courts for this purpose has led to costly and unjustified delays.

Instead, H.R. 3800 uses an allocation process to roughly determine shares among responsible parties. These determinations are expected to allow parties to easily and expeditiously determine their responsibilities with the government and with each other. H.R. 3800 recognizes the importance of the incentives in Superfund's liability scheme, but recommends a faster and more cost-effective way to implement it.

Orphan Funding

Although H.R. 3800 retains the liability rules in current law, it makes one important change that could, if implemented improperly, seriously weaken current cleanup efforts. Under current law, the application of joint and several liability means that a liable party, not the federal government, is financially responsible for the acts of other liable parties. This makes sense in many Superfund cases because the harm caused by the polluters -- contaminated soil or groundwater -- is not readily or causally linked to the activities of any one party. As a result, Superfund considers all polluters to be equally responsible for cleanup costs.

Much has been said about allocating liability among responsible parties. Given the very real difficulties of linking conduct with harm at Superfund sites, such an allocation can only be a rough exercise in equity. It would be a mistake to assume

that any court, allocator, or administrative law judge can accurately calculate the precise percentage of responsibility for every party at a site, as though it were a mathematical equation. It is rough justice, plain and simple.

Generally, EDF supports efforts to use allocation procedures or other alternative dispute resolution procedures to resolve Superfund cases. In cases where all parties are financially viable, it can reduce transaction costs, speed resolution of liability and give all parties greater certainty about their responsibilities.

However, the allocation procedure in H.R. 3800 is not "budget neutral." In the exercise of rough justice, the allocator may assign a share of responsibility to parties who are not viable, who no longer exist, or who, for some other reason, have a limit on their liability. Although current law places the costs for these shares on the other parties at the site, H.R. 3800 proposes that the Superfund trust fund pay for these shares. The federal government would, in effect, write a check to a polluter for costs that the polluter now pays. And, the size of that check would be determined by a rough, unscientific allocation exercise.

Clearly, there is a very real risk that the size of the orphan shares, and hence the cost to the government, could be extreme. Other than some general equitable factors, nothing restrains the allocator from assigning very large shares to the orphan/federal government. Recognizing this risk, the National Commission on Superfund agreed that a firm, annual cap needed to be placed on orphan spending. We recommended that cap be $500 million per year. With an annual, national cap in place, the allocation process would face a built in check to prevent runaway federal obligations.

The key question for EDF and other environmentalists in evaluating the Administration bill is whether their proposal will place an appropriate limit on federal spending. Annual Superfund appropriations are already well below annual receipts. To divert existing scarce resources from cleanup activities to defray polluter costs would be a gross injustice to the communities needing help. In our view, there is simply no justification for taking funds dedicated to protecting innocent communities and redirecting them to help liable polluters.

H.R. 3800 does not explicitly redirect funds in this manner. The bill proposes, in section 122a(e), that Congress authorize mandatory spending for orphan shares up to $300 million per fiscal year. Because these funds would be spent from existing, unobligated trust fund surpluses, no additional revenues are required and no decreases are needed in appropriation levels for Superfund's existing discretionary spending. While H.R. 3800 is silent on the question of redirected funds, it could be easily read to allow such a diversion of funds.

EDF strongly believes that additional, explicit legislative safeguards are required to prevent a redirection of funds. First, EDF believes that the provision must explicitly allow use of these funds only if discretionary appropriations for Superfund in the preceding fiscal year equals or exceeds spending in fiscal year 1994, as adjusted for inflation. This restriction means that orphan funding will be in addition to, rather than in lieu of, existing Superfund spending.

Second, EDF believes that explicit provisions must be included to ensure that, in the event $300 million is insufficient to cover all orphan expenses, discretionary spending would remain unavailable to cover the excess expenses. The subcommittee should recognize that H.R. 3800 makes orphan payments an entitlement, much like Social Security or Medicaid.

It would not be subject to annual appropriation and would place an entitlement obligation on the Superfund trust fund, whether or not $300 million was sufficient to cover all orphan expenses. Unlike the National Commission on Superfund, H.R. 3800 does not cap orphan spending. We believe explicit provisions must be added to H.R. 3800 to ensure that these obligations do not require cleanup work funded by discretionary accounts to slow down or stop simply to pay polluters their orphan share.

Third, EDF is concerned that the Administration has failed to identify an alternative means to finance orphan spending if Congress refuses to create another entitlement spending obligation. Given discretionary spending caps, we are very concerned that the commitment to fund orphan shares not be used to cannibalize Superfund or other environmental programs that fall under the spending caps.

Understandably, the funding and budget questions are complex. But, orphan funding is a litmus test issue for the environmental community in this reauthorization.

Binding/Non-Binding Allocation

With some reservations, the National Commission on Superfund advocated a mandatory, binding allocation process to determine shares. Everyone involved, including the federal government, could appeal an adverse allocation decision, but provisions were included to discourage appeals and encourage settlement. In particular, the Commission agreed that strict, joint and several liability should apply to any party who fails to settle or pursue a timely appeal of an allocation determination.

The Commission believes that a binding process serves two important purposes. First, for parties conducting cleanup work, a binding allocation enables them to more readily recover from

non-settling parties. Lawsuits brought against those parties to recover a portion of cleanup costs would resemble a judgment enforcement action, rather than the extensive liability determinations required under current law. Although we expect that the allocation process will convince most parties to settle, the binding process helps parties to recover from the few recalcitrant non-settlers.

Second, a binding process would also obligate the federal government to play by the same rules as everyone else, particularly as it relates to orphan shares. Clearly, EDF's support for this obligation was directly linked to the absolute cap on orphan funding. EDF would not support forcing the federal government to accept an allocation in a binding process without a funding cap.

H.R. 3800 is a mandatory, non-binding allocation process. Neither the PRPs nor the federal government are required to accept the allocator's determination of shares. However, H.R. 3800 provides considerable incentives for PRPs to settle. Under subsection 122a(i)(1), a non-settling party is "liable for all unrecovered response costs, including any federally-funded orphan share." In addition to this stick, the bill provides several carrots, covenants not to sue (provided appropriate premia are paid) and contribution protection among them.

H.R. 3800 also addresses one of the two concerns addressed by the binding process: recovery of costs from recalcitrants. Under 122a(g)(3)(E), settling parties who are performing some or all of the cleanup work "shall receive reimbursement from the Fund for any response cost incurred . . . in excess of" their allocated share. This new right of reimbursement for PRPs represents a major change by shifting the onus of collecting from recalcitrant parties from PRPs (as recommended by the National Commission on Superfund) to the federal government.

Clearly, there are risks with this approach. Looked at optimistically, this provision will be invoked rarely because most parties will settle. Moreover, giving the federal government this authority creates the potential that orphan expenses can, to some degree, be offset. On the other hand, handing out a right of reimbursement to PRPs without a commensurate commitment to sue recalcitrants could represent a tremendous drain on the trust fund. EDF urges the subcommittee to request the Administration to estimate the cost of this provision to the trust fund. Assuming that trust fund impact is not an issue, providing a right of reimbursement to settling parties appears to solve one half of the binding allocation equation by resolving the recalcitrant PRP issue.

H.R. 3800 does not solve the second problem: obligating the United States to play by the same rules as everyone else. Under H.R. 3800, an allocation determination can be rejected by the federal government if the determination "would not be fair, reasonable, and in the public interest." Section 122a(g)(1). This provision gives the government wide latitude to reject allocation determinations, latitude that is not available to other allocation participants.

The Administration and the National Commission on Superfund agree that joint and several liability must be applicable to non-settling parties. However, the Administration has expressed concern that an obligation on the federal government to settle based on the allocator's determination may inadvertently undermine joint and several liability by allowing a recalcitrant party to argue that his or her liability is not subject to joint and several liability at all, but is in fact divisible based on the allocator's methodology.

Whether or not the government agreed with the allocator's methodology, the obligation to settle would lend credence to the

recalcitrant's claim that the federal government viewed the allocation as a valid way to divide liability, obviating the need for joint and several liability. Such an argument, if successful, could have the effect of replacing joint and several liability with proportional liability in all cases where an allocation has occurred.

EDF and the National Commission on Superfund favor retaining joint and several liability for recalcitrant parties, and therefore take the Administration's concerns seriously. We are seeking ways to resolve this problem in a manner that increases the obligation of the federal government to settle based on the allocator's determination, without undermining joint and several liability.

Small Business Concerns

The liability system, in its current form, is a one-size-fits-all system. Whether a business is a sole proprietorship or a Fortune 500 conglomerate, the liability process and rules are the same. EDF believes that Congress can and should provide meaningful assistance to small businesses, without changing the structure and underlying incentives of the current liability system.

Given that the liability system is implemented through the court system, small businesses are frequently at a disadvantage in defending themselves in contribution cases brought by larger firms. Even if they only contributed a minimal amount to a Superfund site, the resolution of their liability may take years.

EDF believes that an allocation process, like the one recommended by the National Commission on Superfund and by the Administration in H.R. 3800, can provide much needed assistance for small businesses. In general, we believe that all pending

and prospective litigation should be stayed or barred until the allocation process is complete. Settling small businesses should also receive third party lawsuit protection. The allocation process should run on tight timelines, with real incentives to make sure that decisions are made in a timely fashion. As recommended in H.R. 3800, expedited determinations should be made for de minimis and de micromis parties. Small businesses should also receive an "ability to pay" determination and structured settlements to allow such firms to spread out their payments over time.

These recommendations will not allow small businesses to escape their cleanup responsibilities, but they will ease the burden of those obligations.

Conclusion

The Environmental Defense Fund is committed to making Superfund work. That is why we have taken part in the NACEPT process, the National Commission on Superfund, and other efforts to bring about meaningful reform to this program. However, we do not favor overhauling Superfund simply for the sake of doing something different.

In many ways, the National Commission on Superfund and the Administration's bill strike the correct balance. Both recommend retaining the current liability rules because they provide powerful incentives for prudent conduct, but both favor much needed procedural and fairness improvements to reduce transaction costs. EDF believes that this balanced, centrist approach makes sense.

Although more work must be done to ensure that orphan funding is confined, that concerns over binding and non-binding allocation systems are resolved, and that the concerns of small businesses are adequately addressed, we are encouraged by the initial approach set forth in H.R. 3800. EDF looks forward to working with the subcommittee as it moves ahead with this important legislation.

Mr. SWIFT. Thank you, very much. I recognize now, Dr. Benjamin Chavis.

STATEMENT OF BENJAMIN CHAVIS

Mr. CHAVIS. Thank you, Mr. Chairman. Good morning. I am Benjamin F. Chavis, Jr. I am the executive director and chief executive officer of the NAACP, and also chairman of the Alliance for a Superfund Action Partnership, ASAP.

My personal involvement in toxic waste issues goes back many years. People of color have been disproportionately impacted by hazardous waste facilities for a long time. Back in my home State of North Carolina in Warren County, there was a community that was the site of a PCP landfill. Out of that site grew national recognition that minorities in the United States were being disproportionately impacted by this problem.

Over the last few months a disparate group of advocates, local governments, companies and associations realized that the debate on Superfund offered us a chance to find common ground on an issue which has historically been very divisive. After some discussions that shared belief evolved into the Alliance for Superfund Action partnership.

Today, ASAP represents a very broad and large diverse constituency of Superfund stakeholders. The NAACP, Local Governments for Superfund Reform, the American Furniture Manufacturers Association, the International Fabricator Institute, the City of Atlanta, the Society of Independent Gas Marketers of America, the National Food Processors Association, Johnson Controls, Continental Corporation, the American International Group, Texaco, Phillips and several others in a variety of fields.

Our group did not start out constrained by past ideology or commitments to old slogans and principles. To be sure, we did start off in a very different prospectus. We shared a common purpose, to make Superfund work.

In reference to H.R. 3800, Mr. Chairman, we believe that what the administration has proposed is a step in the right direction, but it does not go far enough. It does not present fundamental reform of Superfund. I would just summarize my testimony, and you have the written document.

The issue for us is expedited clean up. The issue for us is getting the health studies and health assessments that are needed, particularly in people of color communities, that are disproportionately exposed to these hazards. Also, the way you get on the NPL list and their hazardous ranking system, we believe needs to be changed. As I have mentioned to you before, in many urban areas you can't get on the NPL site because they don't drink groundwater. This is a problem that needs to be looked at.

We have presented an eight point program. I differ somewhat with my colleague that just testified, in terms of the liability question. We want Superfund reauthorized in a way that would limit the lean toward prolonged litigation, that would limit billions of dollars being spent in court battles while our communities don't get cleaned up.

It's interesting, that the proponents of the current way H.R. 3800 is written seem to suggest that what has happened over the last

12 or 13 years has been a situation where Superfund has worked. It has not worked. It has not provided an expedited clean up of communities. It has not provided that health care assessments be done in communities that are affected. It has not provided an opportunity for communities where these exposures exist, to be involved in determining the fate of those communities.

Also, the way the current legislation is proposed, we don't believe it's going to serve as an economic incentive to the communities where Superfund sites are located. In many of these communities, Mr. Chairman, the presence of these sites have served as an economic disincentive. So, not only are communities exposed and the health degradation risks are increased, but it's also a double whammy, that they cannot get any incentives for economic development.

We want our communities to be involved in the clean up in a way that serves also as an economic incentive. We think that the liability system ought to be changed, it ought to be reformed. We believe that polluters should pay, but polluters should pay for clean up, should pay for health care, should pay for community involvement.

We do not believe that the billions of dollars that have already been spent on litigation have done anything to improve the quality of life in communities that are exposed to these sites. Therefore, Mr. Chairman, we submit once again, the eight point program as a way of placing our stake in this debate early on. We know that this is going to be a long debate about Superfund. It's going to be the major environmental debate of this year. As this debate goes forward, we want to make sure that the interests of people of color communities and interests of persons that live in these communities are adequately addressed, and that the debate does not just revolve around liability as if that's an extraneous issue in terms of whether or not the funding and financing mechanism really pays for clean up in an expedited way.

That's where we come down, Mr. Chairman. I would just like to say that this is a new area for the NAACP. We believe our communities should have laws enforced in a way that improves the quality of life. There's a lot of documentation already on the public record about the failure of past administrations to equally enforce environmental laws when it comes to our communities.

We believe that this is a real opportunity when Superfund is up for reauthorization, to alleviate what has been done in the past but to make sure that we don't repeat in the future the failures of the past. We think that the way Superfund was implemented over the last 12 years has failed, and we do not want to see it reauthorized in a way that would continue this failure.

Mr. SWIFT. Neither do we.

Mr. CHAVIS. Mr. Chairman, I have three other statements that we would like to offer into the record that are also members of the ASAP coalition. One is a statement from Carolyn Bell, from the Community Health Resources of Memphis, Tennessee. This is dealing primarily with the health care issue. One from Local Governments for Superfund Reform, and one from the Industrial Compliance.

[Testimony resumes on p. 388.]

[The prepared statement and attachments of Mr. Chavis follow:]

ASAP

ALLIANCE FOR A SUPERFUND ACTION PARTNERSHIP

Dr. Benjamin F. Chavis, Jr., Chairman

W. Larry Wallace, Executive Director

Good morning. I am Dr. Benjamin F. Chavis, Jr., Executive Director and Chief Executive Officer of the National Association for the Advancement of Colored People (NAACP). I am also Chairman of the Alliance for a Superfund Action Partnership (ASAP). I appreciate your inviting me here today to share with you the views of the NAACP and ASAP on Superfund reauthorization issues.

My personal involvement in toxic waste issues goes back many years. I helped found what is known as the environmental justice movement to assist in drawing attention to a long ignored reality: people of color were being disproportionately victimized by hazardous waste facilities, past, present and future. I spoke out against siting a dump in a North Carolina minority community. My interest in Superfund reform stems directly from years of grassroots experience with toxic waste issues. I believe that this law has directly contributed to the environmental racism afflicting people of color. And despite fine words, no bill presently before you changes this much at all.

Over the last few months, a disparate group of advocates, local governments, companies and associations realized that the debate on Superfund offered us a chance to find common ground on an issue which has historically been very divisive. After some discussions, that shared belief evolved into the Alliance for a Superfund Action Partnership (ASAP).

Today, ASAP represents the broadest and largest diverse constituency of Superfund stakeholders you can find: the NAACP, Local Governments for Superfund Reform, the American Furniture Manufacturers Association, International Fabricare Institute, the City of Atlanta, the Society of Independent Gas Marketers of America, the National Food Processors Association, Johnson Controls, Inc., Continental Corporation, the American International Group, Texaco, Phillips, and several others in a variety of fields.
Our group did not start out constrained by past ideology or commitments to old slogans and principles. To be sure, we did start out from very different perspectives, but we shared a common purpose -- to make Superfund work. Unlike others, we did not take any options off the table.

In a moment, I will discuss the Eight Point Plan we developed in detail. But before I do, I ask that you consider this:

At one time or another, everyone here has said that there's too much litigation in Superfund, too much mistrust, too little cleanup. And many have also agreed that a major cause of all these problems is the retroactive, site-by-site system used to raise cleanup funds.

Yet, you are here today seriously considering a bill drafted by the Administration -- and another plan presented by the National Commission on Superfund -- which will keep this failed system in place.

Some have -- and others will -- come before you to say that things aren't so bad, that Superfund is basically working, that with a nip here and a tuck there, all will be well. Or their rhetoric will be bold, but their reform plans will be modest. Our message to you is this: They are wrong.

Theirs is a view glimpsed from Washington's corridors, not from toxic ground zero -- the communities and people living with Superfund risk every day.

In Washington, the talk is of making "polluters" pay and of "fair share" allocation.

At toxic ground zero, the talk is of one thing: Clean up our neighborhood, do it fast and do it right. Communities want to see cleanup crews and doctors, not lawyers, allocators and allocation committees.

Mr. Chairman and members of this Subcommittee, if your house is swept into the ocean after a hurricane, you don't rebuild it as before; if it is uprooted by an earthquake, you build to new standards. The same should be true for Superfund. But what you have before you seeks to achieve reform by building on the very same foundation with the very same materials which have been crumbling around you for 13 years -- retroactive, site-specific liability. I implore you to think more boldly.

I deeply respect and appreciate the efforts of the Administration and the National Commission on Superfund, not only to address Superfund's problems but to address additional environmental justice concerns. A number of the specific suggestions raised in the Eight Point Plan have been incorporated in the Administration's bill.

But I feel absolutely certain in saying today that if you enact their proposals, especially those which maintain the current financing system, you will come back here in a few years, long after the congratulations and smiles at the bill signing, explaining to citizens, but probably not very persuasively, what went wrong. In other words, you may be able to pass a bill which does not fundamentally reform Superfund, but, if you do, you most assuredly will not solve the problem.

We say it's time to make a core change in Superfund. And change -- and boldness -- is what ASAP's Eight Point Plan is all about.

II. DETAILS OF THE EIGHT POINT PLAN

The ASAP Eight Point Plan is designed to achieve several critical goals -- the same ones shared by the Administration and members of this Subcommittee: a new focus on public health; significant community involvement in the process; accelerated cleanup; better site prioritization to ensure the most effective allocation of resources; reduced transaction costs; more rational remedies; greater fairness; and stronger public and private support for the program.

But the difference between the Eight Point Plan and other options is that its reforms are integrated. Each point of the plan relies on the others to work. We recognize, where other plans do not, the inextricable interrelationships of various parts of the current program -- and of our proposed solutions. And we especially recognize that virtually every one of the problems identified by everyone is either connected to or grows out of the retroactive, site-specific liability system. As long as it is in place, trying to reform other parts of the program will simply not succeed.

Let me stress that the Eight Point Plan is not set in stone, and we are improving it all the time. We are actively reaching out to environmental justice and community activists, to state and local leaders, to environmentalists and public health experts, and to other businesses for new ideas and refinements.

And we reach out to you and your staffs to assist us in perfecting our plan.

1. THE RIGHT PURPOSE: Public Health.

A. Problem

Nearly 14 years after enactment of Superfund, the nation still awaits cleanup of more than 1200 of our worst toxic waste sites, much less the many which have thus far been ignored. Full-scale health investigations are being conducted at an annual rate of only 15 percent of the eligible sites. Despite the national Trust Fund created to clean up toxic waste sites and pay for health evaluations, whole communities have had no relief from the imminent threat of disease, and citizens face shortened life spans due to exposures to toxic chemicals.

Although toxic exposure is harmful for any community, it should be noted that I led a 1987 study by the United Church of Christ Commission on Racial Justice, which showed that hazardous waste sites and NPL sites are located disproportionately in minority communities.

To protect public health and to overcome years of minimal effectiveness, Superfund must have stronger and more practical provisions for (1) greater utilization of public health professionals; (2) availability and allocation of resources for evaluation of health effects, i.e. health assessments, health investigations and health monitoring; (3) availability and allocation of resources for public health information, education, training and technical assistance; (4) accountability and quality assurance; and (5) ongoing community policy and leadership development.

The existing Superfund law is focussed on fundraising, not on these goals.

Currently, the public health focus of Superfund legislative intent has been severely compromised. Public health professionals are barely visible in the process, overshadowed by lawyers, financial planners, transactions and negotiations. Rarely does an epidemiologist, medical doctor or biostatistician get involved in the process until after tens or hundreds of thousands of dollars have been expended on legal fees and other non-cleanup or health preservation-related activity. Site cleanup and related health activity are literally put on hold for years.

Agency for Toxic Substance and Disease Registry (ATSDR) is hopelessly backlogged in its conduct of health investigations of National Priorities List (NPL) sites. Such investigations can provide valuable insight into long-term and aggregate health effects of communities exposed to chemical releases from hazardous waste sites. Toxicological profiles have been generated for only 176 of 275 Superfund "Priority Chemicals."

Current staff levels cannot possibly keep up with the present demand for health assessments and other mandated responsibilities (e.g. applied research, emergency response, health education and surveillance, and registries). Clearly, ATSDR, at its present level of appropriations and operations, is overwhelmed.

It also is not clear that ATSDR was ever charged with the responsibility to respond to health effects once identified. Most local medical providers may not -- and in fact usually are not -- abreast of information needed to diagnose or treat symptoms that are associated with exposures to toxic chemicals via toxic waste sites. In short, responsibility for health response activity continues to remain an enigma for many affected residents.

By ATSDR's own admission, serious gaps exist in scientific knowledge about the toxicity, bioavailability, exposure and human health effects of individual hazardous substances -- and mixtures of these substances -- released from hazardous Superfund sites, especially during emergency releases. Additionally, physicians and other health care providers near Superfund sites express the need for training and technical assistance on hazardous substances and related health effects.

The Administration is to be commended for its sensitivity to -- and inclusion of -- specific provisions which seek to address the problems of highly impacted communities, particularly those of people of color. But these are essentially add-ons to the current system, rather than basic reform.

B. ASAP Solution

With a change of focus from battles over who will pay to a new focus on public health, Superfund could be an effective ally in our nation's ongoing effort to prevent disease and contain health care costs. ASAP proposes a Superfund program run on public health grounds by public health officials -- not run on fundraising grounds by lawyers. This public health process would begin at the time a site is first proposed for the NPL and would not end until the site is delisted.

Our proposal is designed to attack five specific problem areas:

1. Professional Visibility

Presently, except in the instance of ATSDR health assessments and related activities, public health professionals and other scientists are seldom engaged in Superfund cleanup activity. The government should expand the use of health experts and give them leadership roles in cleanup decisions. EPA also should engage Superfund "Public Health Oversight Teams" to monitor and assist site cleanup and health assessment activity. The teams should be activated upon identification of each NPL site or other sites that request assistance.

This team should be composed of a broad representation of health and environment professionals at the local, state and federal levels. Team members should include experts who don't work for EPA and ATSDR, as well as representation from these agencies. This team should operate in concert with proposed Citizen Working Groups (CWGs). It should be empowered to make recommendations to EPA or state site representatives.

2. Health Assessments and Investigations

Based on years of observation by Superfund evaluation experts and community representatives, it is very clear that ATSDR cannot, at its current operating level and budget, meet the high volume demand for health assessments and health investigations that need to be conducted for sites and persons potentially exposed to toxic substances at those sites. ASAP recommends that the budget for ATSDR be increased to accommodate the number of pending and projected health assessments and investigations.

ASAP further recommends that ATSDR strengthen its contracting priorities to engage the needed assistance from outside contractors, particularly local and state public health organizations.

ATSDR should prioritize its follow-up investigations for sites, since many communities may need attention more quickly than others.

3. Health Effect Studies and Applied Research

ASAP agrees with proposed language in the Administration's bill to engage research assistance via cooperative agreements and grants to public and non-profit institutions. Health research initiatives are presently suffering -- particularly applied-research -- and without this valuable information, surveillance and disease registry information is severely handicapped.

But caution must be exercised not to rely on studies that are inherently long term, and which require exposure models and study designs that may take years to construct.

In all appropriate circumstances, ASAP proposes scientifically sound toxic substance chemical screening within affected populations to rapidly determine actual exposures to known toxins at the site and in the area. This is a much more immediately usable tool than "health effect studies," which if done right, take 20 years and require statistically stable study populations.

The value of screening, along with other tests, is that it allows addressing site assessment, NPL inclusion, prioritization and population impact all at once. ASAP proposes that these comprehensive "fingerprint screenings" (with appropriate control groups) be a principal criterion in listing a site, prioritizing it and protecting public health.

4. Non-Emergency Health Response and Guidance

ASAP strongly supports the need for local health care providers to be engaged in the health response process. Historically, there has been a separation of environmental health from primary health care. Persons affected by toxic substances can seek health remedies from local doctors literally for years, but often times those doctors do not recognize the ailment. A formal mechanism to provide local clinicians with Superfund information needs to be instituted.

ASAP recommends that whenever a site is designated by ATSDR for health investigation or whenever a site health assessment warrants further consideration, an Environmental Health Response Briefing should be routinely issued to the medical establishment in affected communities. Similarly, there should be consultation by government health experts with primary care providers close to the site in the early stages of site assessment.

5. Health Education and Training

Bridging the gap between environmental health effects and primary health care has been discussed for years among environmental scientists, with little progress. This must occur.

Environmental surveillance efforts could be significantly enhanced if the health care provider community were trained to recognize environmentally related health effects. To improve the health status of persons living near hazardous waste sites, the scientific and medical communities must have an understanding of the issues impacting residents of affected communities. This can be achieved by (a) improving scientific understanding of the relationship between exposure and health impacts by involving the expertise of groups like NIH, NSF, and the American Academy of Sciences; (b) improving the ability of local health departments to recognize and diagnose health effects associated with exposure to hazardous substances; and (c) improving the ability of health care providers to diagnose environmentally related disease.

2. THE RIGHT SIZE: Adequate Funding

A. Problem

Since Superfund's inception, public and private financial resources have been improperly allocated and diverted to wasteful litigation. The results have been stalled cleanup and a concentration of cleanup efforts at sites with viable PRPs.

In order to properly refocus the Superfund program on human health, environmental protection and other important priorities, ASAP members believe that adequate funding must be raised in a reliable and efficient way. It is not enough to propose new programs and pay homage to new priorities. Money to fund them must be spelled out and integrated into any reform plan that truly seeks to improve the program.

B. ASAP Solution

The Eight Point Plan does just that. Through the elimination of site-specific fundraising and implementation of a broad-based business taxing mechanism, our plan raises more money for cleanup and related priorities while reducing the overall costs to business and assuring greater certainty.

Consider what would happen if we stopped fundraising site-by-site at old multi-party NPL sites and raised the money mostly from business taxes:

- This expanded fund would be able to pay for cleanups immediately because legal warfare would no longer hinder and delay cleanup work.

- In the absence of site-by-site fundraising, public health and the environment -- not fundraising imperatives -- would drive the Superfund program and set its priorities.

- Freed from fundraising and the need to allocate liability based upon an incomplete and inadequate information base, EPA could devote far more time and resources to addressing health threats, putting health professionals on the scene first rather than last.

- Business and other PRPs (cities, states and the federal government) would benefit greatly. Enormous contingent liabilities would be lifted and transaction costs would drop drastically. Costs to business would actually go down, but money for cleanup would go way up.

Point two of the Eight Point Plan calls for creation of an overall NPL program of $3.6-4.6 billion per year. This represents an annual increase of $500 million to $1.5 billion -- money that would go directly into cleanup and support activities, such as public health and job training, environmental restoration, community participation and empowerment, assistance for Indian tribes, and coordination of federal programs to help communities recover from the economic and social harm of toxic contamination.

Monies dedicated to actual cleanup of orphan and multi-party sites would expand by 45-75 percent over current remediation spending. This includes attacking the backlog of thousands of CERCLIS sites which have yet to be analyzed, and setting cleanup priorities based on a new environmental impact ranking system.

Business will still pay the vast majority of Superfund costs, but in a much more efficient manner than the adversarial, litigation-based, site-specific model used today.

The private-sector financing would be provided by current oil and chemical feedstock taxes, an increased broad-based tax on larger businesses (we have recommended a doubling of the current Environmental Income Tax), a new tax on insurers, and a small business tax levied on small business large and small quantity generators, which do not pay the EIT. This would be relatively simple to implement because the Resource Conservation and Recovery Act (RCRA) requires that every facility which produces more than 100 kilograms (220 pounds) of hazardous waste per month be registered with EPA and observe numerous record-keeping requirements. (RCRA classifies a small quantity generator as a facility which produces between 100-1000 kilograms of hazardous waste per month. A large quantity generator produces more than 1000 kilograms per month.)

Thousands of large, medium and small businesses have written to the President offering to pay these kinds of taxes. Last week, the Business Roundtable voted to support a Superfund financing package of increased taxes, and in the words of its announcement of February 4, called for "if necessary, an increase in the Environmental Income Tax (up to a doubling)." They and other businesses rightly maintain that this is not an issue of new taxes -- this is merely a more efficient way to raise money they already are spending.

Indeed, the taxes we propose will actually reduce business costs because of the elimination of most of the site-specific litigation and other transaction costs. We are open to other ways of raising the necessary funds from the business community, but we are confident that the system we have proposed will work well, and has the broad support of business.

In addition to business, there are two other major groups that would benefit significantly from the revision of site-specific PRP liability and therefore should contribute to the fund. These are state governments and the federal government. Both have very large liabilities at non-federal facility NPL sites. States also have various shares of Superfund costs above and beyond their PRP liability. Our plan therefore assumes a 10 percent state share. In exchange, state and local government PRP liability would be reduced substantially. In addition, we are exploring delegation of program management to states with demonstrated competence in this area.

Attached to this testimony are spending and income charts that detail our financing proposal, and an acceptable financing option (Attachments A, B and C).

3. THE RIGHT PLACES: Environmental Impact Prioritization.

A. Problem

Cleanup decisions and progress today depend much more on whether a site has cleanup funds (i.e. successful negotiations or litigation with large solvent PRPs), than on whether that site is a public health risk.

B. ASAP Solution

We propose amendments to the hazard ranking system. The new system will:

- Move those sites that most threaten citizens to the top of the priority list.
- Require greater reliance on real risk and real exposure pathways (including history of exposure) in contrast to the current system which makes groundwater contamination the heaviest factor in a site's ranking. There are sites, especially in urban areas, where groundwater contamination is not relevant, but where residents face serious threats nonetheless from soil and other contamination. The emphasis on groundwater contamination, though, raises the "bar" for these sites to be included on the NPL.
- Take into consideration not only the risks presented by the toxic waste site in question, but also the health effects it may have in conjunction with other environmental risks in the area (such as other dump sites, industrial facilities and abandoned plants). Sites that affect the same population could be

ranked together, similar to the Clean Air "bubble" concept. In ranking sites, the history and extent of exposure is important (taking into account the socio-economic conditions of the community which may exacerbate the effects of exposure). These issues should also inform action under Point 8.

- Require that all subsequent cleanup decisions and actions should be based on these same priorities. Once sites are scored, prioritization for financing and remedial action should be based on the severity of the public health risk, not which sites offer the potential for funding. (One of the major defects of the site-specific system is that cleanup priorities "follow the money.") In other words, sites exhibiting the highest public health risk should have first claim on the fund's resources until they are cleaned up, before resources are devoted to lesser priority sites.

- Require that sites in disadvantaged communities receive priority for cleanup over other sites of equivalent public health risk located elsewhere in order to spur economic redevelopment.

- Require that the public be afforded the opportunity to comment on these priorities.

We agree with much of the work of the National Commission in this area, although it is limited to listing of sites, as opposed to including prioritization of resources and effort as our plan does.

ASAP proposes a major focus and emphasis on human exposure pathways as a principal prioritization criteria. Specifically, sites with little or no human exposure or assimilation pathways, or sites where those substances are safely managed and contained as part of ongoing operations, would rank way down the list.

ASAP strongly feels that site-specific risk assessments using actual census, cultural, meteorological, geological, land-use and comparative natural exposure data should be required.

4. THE RIGHT WAY: Effective Remedies.

A. Problem

The current process for selecting remedies is in need of major change. ASAP believes that remedy selection must be conducted on a site-specific basis with full community participation in the context of a global Superfund budget. Remedy selection must put health concerns first, but also take into account such issues as future land use and available technology.

The belief that we have unending dollars to be extracted on a site-by-site basis from companies with "deep pockets," whether they acted illegally or not, has worked against intelligent remedy selection. Instead of achieving the best remedy for each community, the current system has simply created a bias toward the most expensive remedy. The two are not necessarily the same, since what is best for the community as a whole may be the most cost-effective approach.

Unfortunately, however, after years of exclusion from the process at their sites, communities sometimes pressure EPA for expensive remedies because that may be perceived as the "safest" approach. PRPs in turn resist, which creates distrust in PRP motives and even greater pressure to ignore cost. Citizens also mistrust the current process where private interests with a financial stake are involved in making health decisions. PRPs argue that they should have a say because they are funding the remedy.

This is another example of how liability concerns are intertwined with other aspects of the program.

B. ASAP Solution

Once sites have been ranked based on a revised HRS (see Point 3), the remedy for the site must be chosen on a site-specific basis in a process involving environmental health professionals, environmental engineering professionals, the affected community, relevant governmental authorities, and entities which have knowledge of disposal at the site.

- It is critical that affected community and citizen leaders be fundamentally involved in these decisions.
- Effective protection of public health must be the overall standard.
- Factors such as land use and available technology must be taken into account.
- Based on current or currently planned future use, a decision should be made to either:

  (a) Execute a removal or stabilization action and re-evaluate the site;

  (b) Select a remedial action based on the current actual or likely future risk; or,

  (c) Defer the site for re-evaluation at a time certain, not to exceed five years. Deferral would have to be based on a determination either that existing technology acceptable to the local community cannot effectively reduce the site risk; that emerging technology may provide

a more cost-effective remedy; or that action at other sites presents a greater need for protection of health and the environment. Deferral would not be permitted if the delay would result in any appreciable increase in risk to public health.

Since the plan would include all the key stakeholders in the decision-making process, there is no need to impose external and arbitrary statutory preferences for any specific decision among the options above, nor would there need to be arbitrary preferences for remedial actions such as ARARs or treatment and permanence (although remedies will have to make permanent reductions of risk).

- Remedies and associated efforts (see Points 6 and 8) should encourage sustainable development, including encouraging the creation of permanent new jobs, and increased local knowledge and skill base.

- The same remedial standards and goals should apply to all NPL sites, whether single or multi-party.

5. THE RIGHT FINANCING SYSTEM: Business Assessments On Those Parties Which Benefit.

A. Problem.

The current financing system has failed the test of 13 years of real world experience, and it also creates a whole series of other secondary problems beyond its impact on the speed and efficiency of cleanup.

Except for most of the government and private-sector lawyers who make their living off of it, everyone now recognizes that the retroactive liability financing system is a huge problem. The question is whether we tinker with it, or whether we fundamentally reform it.

The issue is <u>not</u> only cost allocation, or share allocation, among PRPs for cleanup and natural resources expenses. With cleanup progress dependent on private checkbooks at each site; as a practical matter, cleanup priorities and decisions are clearly affected by factors other than public health and environmental priorities.

Progress occurs based on the presence and willingness to settle of PRPs, and -- whatever the law says -- their financial concerns play a role in public health decisions.

As long as PRPs are pursued for financing on a site-by-site basis, this cannot be avoided.

B. ASAP Plan

Expanded business taxes and other contributions would generally replace the present site-by-site financing system for legal disposal before a cut-off date in the past. This would remove most transaction costs and remove a series of enormous negative economic effects of the current system.

Liability Reforms

- Retroactive joint and several liability generally would be eliminated at multi-party sites. At these sites, the expanded fund would pay to clean up hazardous waste disposed of before a particular cutoff date in the past, and to restore damaged natural resources.

- In general, entities which legally disposed of waste before that date at these sites would no longer pay for cleanup on a site-by-site basis, but instead contribute through the expanded tax and contribution system.

- Entities which illegally disposed of waste will remain liable for cleanup costs and penalties, regardless of when the disposal occurred (the cutoff date will not apply to them).

- Entities which disposed of waste after the cutoff date will remain liable for cleanup costs and penalties associated with the post-cutoff date activities.

- Rights of citizens to pursue personal injury claims ("toxic torts") will be preserved.

- The cutoff date will be selected based on several criteria: (1) the impact on speed and efficiency of cleanup (i.e. the date which considers practicality, costs and benefits of pursuing the current system); (2) the number of current NPL sites and PRPs affected by each possible cutoff date; (3) the practical availability of records at most sites to reasonably and quickly allocate liability; (4) the date following implementation of RCRA and other disposal permitting requirements which made the rules of behavior clear for most PRPs such that they should pay for cleanup even if they did not violate the law of the time; and (5) the date which most effectively reduces transaction costs and other expenses related to litigation. We believe a decision based on those criteria will lead to a conclusion that the end of 1986 is the best cutoff date. However, we recognize that other dates have been suggested and we are open to discussing this matter.

Transitional Protections

- We propose creation of a transitional credit system, whereby funds spent on remediation-related activities after January 1, 1990, would be credited against future Superfund tax payments, perhaps on a phased-in basis. Thus, any incentive to delay settlements in anticipation of liability relief is eliminated. This recognizes that some have expressed concerns over whether the proposed liability change would create transition problems, especially in cases where PRPs are on the verge of settlements with EPA, or have already reached settlements and are carrying out particular cleanup tasks.

- PRPs working pursuant to a consent decree or order when the law passes would be required to continue to manage remediation through completion, with the expanded Fund providing reimbursement for all remediation costs (upon appropriate documentation).

Remediation Management

- It is hard to imagine a more inefficient remediation system than the one used today. We suggest allowing three alternatives for the actual management of remediation:

  (a) Maintain Section 106 authority so that EPA (or delegated states) could continue to name a PRP to manage the site cleanup, ensuring that the private sector controls remediation management, and for cases where PRPs desire to manage cleanup. Such PRPs would be reimbursed for remediation expenses;

  (b) Have the federal government directly contract for cleanup with private parties or new public/private organizations (this could mean agencies which have more contracting expertise than EPA handling the implementation of cleanup);

  (c) Delegate the program to competent states with the same authority and funding regime.

- Lien to Prevent Unjust Enrichment: Whenever Fund monies are used to pay response costs for any non-publicly owned site or facility, EPA should be authorized to place a lien upon that private property to prevent unjust enrichment of the property's owner. The amount of the lien shall be for the amount of money paid by the Fund for response costs for the property less any amount paid by the property owner (i) pursuant to a settlement or judgement in any cost recovery action under CERCLA for that property, or (ii) to any other potentially responsible party pursuant to a settlement or judgement in any third-party suit for contribution for response costs for that property.

Areas We Are Exploring

We recognize that a perfect NPL system will only address a part of the problem. There are thousands of other toxic waste sites left to the states and private parties to address. We are exploring expansion of some of our ideas beyond the NPL in order to address the combination of public health and economic development issues created by CERCLA and equivalent state liability regimes at non-NPL sites. These include:

- An expansion of the trust fund to be available to qualified states if they elect to use it to replace current liability approaches at (a) higher priority state sites; or (b) non-NPL municipal co-disposal sites.

- Encouraging states to establish voluntary cleanup programs for lower priority sites; this would include a special focus on creating incentives for cleanup and development of sites in economically depressed areas.

- Part of this includes special approaches for small businesses with on-site contamination (i.e. single small business party, non-NPL sites), perhaps including a program similar to the effective LUST program.

- Where equitable and in the public interest of efficient cleanup, considering eliminating or ameliorating retroactive liability at single-party sites. This could include a special insurance trust fund to settle claims at such sites.

6. THE RIGHT PEOPLE: Public Participation and Empowerment.

A. Problem

Citizens living near hazardous waste sites tell a consistent and discouraging story of exclusion from the cleanup process. They are angry and disillusioned with government and the Superfund program. Excluded from the process, they are forced to watch from the sidelines as PRP and government lawyers decide their fate.

Citizen input is an invaluable tool in arriving at the right remedy for each community. Citizens can offer site-specific information about public health, cleanup needs and economic factors. But Superfund rarely taps this important resource.

B. ASAP Solution

ASAP believes community leaders and concerned citizens should be involved at the beginning and throughout the Superfund process.

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Under our proposal, as the program's focus shifts from financing concerns to concerns of public health, citizens would be involved from the initial stages of the process until the end. Moreover, we would provide both programs and financing to make participation effective and for training and business opportunities in remediation for minority businesses.

- The public should be able to provide comment on the overall site prioritization and priorities in use of funds. A national and statewide citizen involvement process must be established for this and other purposes.

- Public meetings and consultation with community leaders would be required before each major decision in the process.

- As a means of establishing better communication with affected communities, ASAP believes site-specific community working groups (CWGs) should be instituted. CWGs would serve as clearinghouses of information for affected citizens.

- A CWG would be formed for each site as soon as it is listed on the NPL, given access to all validated data collected by EPA, and encouraged to participate in the process from inception to completion. CWGs would be required to fairly represent the affected community, including affected citizens and the TAG recipient.

- Major reforms to the TAG program need to be enacted, including simplifying the grant application and accounting process, removing time restrictions on grants, making TAG grants available earlier in the process, eliminating the current cap on grants, providing advance funding (to be accounted for), and allowing flexibility in the use of TAG funds.

- Both TAG recipients and affected citizens' representatives on the community committees would be given the resources to participate fully.

- EPA (and each state if the program is delegated) would form a citizens advisory committee to assist it in evaluating the quality of community outreach and involvement in the Superfund process.

- The Eight Point Plan would provide funding for grants for underprivileged and minority communities. These grants would fund groups willing to develop site inventories and site characterizations through academic research and outreach with members of the affected community.

- The Superfund program would make grants to local educational institutions serving underprivileged and minority communities, especially in high toxic waste impact areas, for the training of minorities in environmental remediation skills.

- EPA and states would have an affirmative responsibility to provide opportunities and incentives for the involvement of minorities and minority businesses in environmental cleanup contracts.

7. THE RIGHT SAFEGUARD: Prospective Liability.

Those knowledgeable about Superfund today will agree that the current laws governing hazardous waste disposal offer powerful incentives for care in hazardous waste disposal.

Retroactive liability for historic waste disposal practices is irrelevant to proper current behavior. Then what is its purpose? It can only be to punish past actions even though they were legal at the time. The question is whether punishment helps or hinders cleanup of the old sites where it is applied. All evidence indicates that it is a powerful hindrance to cleanup.

The Eight Point Plan currently calls for prospective strict joint and several liability. With respect to prospective liability, ASAP's overriding concern is that incentives for proper waste management be powerful, predictable and clear.

8. THE RIGHT APPROACH: Coordination of Other Programs.

A. Problem

A disproportionate number of sites are located in or near poor and minority communities, whose infrastructures are disintegrating. Businesses have fled the area, taking jobs and tax dollars with them. The schools may have taken a sharp downturn, and health problems may have begun to surface. A declining tax base hinders the ability of these communities to respond to the serious problems facing the residents. Superfund's failure to clean up old toxic waste sites is certainly not the only cause, but it exacerbates the problems of these communities.

B. ASAP Solution

Superfund alone cannot resolve the interrelated problems of communities affected by hazardous waste contamination. However, the Eight Point Plan sets aside a modest amount of Superfund money to coordinate other government programs and services and focus them on helping affected communities recover, both economically and socially.

Rapid, efficient cleanup and the elimination of retroactive liability are the first steps to help reverse this trend. Yet more than cleanup of the particular sites needs to be done. The resources of other federal programs need to be focussed on areas of high negative environmental impact. A collaborative effort on the part of appropriate federal, state and local agencies, and the private sector to address the problems affecting these areas needs to occur throughout the process, as well as after a site has been adequately cleaned up so that these communities can recover.

ASAP recommends that a lead federal agency, such as the Department of Housing and Urban Development, be designated to coordinate efforts of the federal government, and that it chair an interagency committee including at least the following agencies/departments: Health and Human Services, HUD, Commerce, EPA, Education, Labor, and Agriculture.

This committee would identify those federal programs which can be effective in this effort and changes that need to be made to other programs so they can be used as well. It should establish working relationships with state and local governments, as well as the citizen working groups.

The lead agency and the committee would establish action plans for revitalizing priority communities, working closely with community leaders, state and local governments, and the private sector. These plans shall include coordination with the Economic Empowerment Zones, as designated under the Omnibus Budget Reconciliation Act of 1994 (P.L. 103-66). Multi-media environmental source reduction programs led by EPA and DOJ should be focused on such areas.

Planning grants would be made available to municipalities and local communities to develop innovative solutions for high toxic impact communities. HUD and the Department of Commerce also may provide grants for economic redevelopment, such as returning formerly contaminated real estate to productive use.

Government contracts at Superfund sites should be designed to the greatest extent possible to allow for minority businesses and small businesses to qualify for participation. EPA should institute a Small Disadvantaged Business program similar to the one instituted by DOD.

Government contractors at Superfund sites should be given incentives to create joint ventures with small and minority businesses, allowing the small business to perform the work for which they qualify, with the intent of helping the small business to expand it's capabilities and qualify for more meaningful cleanup remediation jobs.

There are resources now devoted to the types of activities discussed here. It is in the public's interest to focus them on the areas most in need of assistance -- particularly those with high negative environmental impact. Current HUD development programs, SBA incentives for small businesses (8a small business requirements), and tax credits/reductions for empowerment zones all serve to boost the local economy in many of the neighborhoods faced with serious health risks. We do not need to raise significant additional funding to support this activity, but instead need to concentrate on using the resources we have more efficiently.

The Eight Point Plan is the only Superfund reform proposal that looks beyond the problems of the contaminants and considers the rippling effect that a hazardous waste site imposes on a community. Even if the health risks posed by Superfund sites are removed completely, minority and poor neighborhoods in particular often cannot rebound on their own. An assessment of the other economic and social impediments facing these communities and a targeted method of addressing these problems will expedite a community's ability to bounce back from these hardships.

We cannot afford to ignore the devastating rippling effect that impacts communities with hazardous waste sites located near them. We see them everywhere -- from the South side of Chicago to the inner-city of Houston to the rural areas of Warren County, North Carolina. These communities need a Superfund that works -- one that recognizes that the problems do not start and end with the contamination, they extend and affect an entire community. These problems warrant a coordinated response.

III. COMMENTS ON THE ADMINISTRATION PLAN

We just received copies of the bill you have introduced for the Administration, so our comments on it are necessarily incomplete. We hope we will be able to supplement our comments here when we have the time to understand all of the bill's details.

Point One: Public Health

The Administration is to be commended for its inclusion of specific provisions which seek to address the problems of highly impacted communities, particularly those of people of color. But it does not go nearly far enough, and it can't, because it does not provide the necessary financing reform.

The Administration proposes to conduct "Multiple Sources of Site [Pollution] Demonstrations"; engage research assistance via cooperative agreements and grants to "appropriate" public and non-profit institutions; conduct selective health effect studies to ascertain the need for broader health studies; and engage peer review of the ATSDR's assessment of relevant toxicological testing. These are good ideas. They are pieces of what we are talking about in Point One of our Plan.

The bill authorizes a five-year study/demonstration project at several sites to provide additional public health benefits to citizens (e.g. health screening, medical care) "in an effort to increase community acceptance and satisfaction with actions taken at these sites." This sounds like the National Commission's "$50 million-a-year for 10 projects" proposal, which is a good idea. But it suffers from the same fatal flaw: there is no new money provided. It is just another one of those ideas which will have to struggle for funding with other Superfund priorities like cleanup. Mr. Chairman, after years of ignoring the problem, unfunded demonstration projects are just not good enough.

In sum, ASAP believes these amendments to the current legislation are positive, and start to address the concerns we have raised, but they are far too narrow in focus as they are mostly demonstration projects, and they do not have proper new funding.

Point Two: Adequate Funding

ASAP is in the process of carefully analyzing the Administration's financing provisions. We do have some initial thoughts to share with you.

The Administration proposal would maintain the current inefficient site-by-site liability fundraising system. Thus, the exorbitant legal fees and other non-cleanup costs incurred today would continue largely undiminished. (See comments on Point 5.)

In crafting its bill, the Administration ignored offers by large and small businesses to pay higher taxes to support fundamental reform of Superfund. In letters to the President, 4500 businesses of all sizes and a variety of trade associations across the country offered to pay higher taxes in exchange for elimination of retroactive liability.

But the Administration rejected these offers to support higher taxes for a better Superfund. It accepted one offer, though. Insurers had indicated that they would support a new tax on their industry to finance an expanded Superfund and an elimination of pre-1987 liability. Instead, the Administration took this offer and used it to establish an Environmental Insurance Resolution Fund set up only to reduce the liability of solvent PRPs.

The Administration also proposes a specialized "orphan share" program to reduce the liability of solvent PRPs.

But neither the insurer fund nor the orphan share fund direct new money to cleanup; both simply move money from one group to another. It's the legislative equivalent of rearranging the deck chairs on the Titanic.

It is true that the Administration bill authorizes more money for Superfund. But look closer -- these funds are all earmarked for the proposed orphan share program; again, not new money, just redirecting the flow of funds already in play.

The best evidence that the "emperor has no clothes" can be found in the Administration's call for a number of new initiatives, programs for which it proposes no new funding. Over the next five years, the new and expanded programs with stated costs will require hundreds of millions of dollars in additional resources over and above the additional authorization, and that does not include several programs for which a cost has not been stated.

So one of two possibilities exist: these programs won't get funded, making their creation a bit of a sham, or the funding will come out of current resources. If these programs were fully funded, Trust Fund cleanup spending could be reduced by 20-30 percent.

Let me be clear that ASAP fully supports increased spending in many of the areas identified by the Administration. And we appreciate its leadership. But the difference between the Administration and us is that we pay for our proposals; they don't. And the only way you can pay for them, short of increasing general revenues, is to increase the size of the Trust Fund with broad based taxes as we propose.

Attached to my testimony is a list of the unfunded new and expanded programs which would draw money from cleanup.

Point Three: Environmental Impact Prioritization

The Administration has adopted most of the Eight Point Plan's suggestions for NPL site listing changes.

The bill adds to the factors to be considered in an NPL listing decision: "the presence of multiple sources of risk" and "cumulative risk to minority and low-income populations." It changes the bias in the HRS regarding groundwater. All three of these are called for in the Eight Point Plan.

This is a very positive development. Unfortunately, the Administration has not extended this concept to the critical area of cleanup and resource prioritization (nor can it overall until the current financing system is replaced).

Point Four: Effective Remedies

To the extent we understand it, the Administration's bill would provide for site-specific cleanup standards as the exception, not the rule. While local input would be accepted on some of the issues which relate to the choice of remedy, particularly land use, it is not at all clear that local views would have a powerful voice overall, or that the remedy choice would be the product of all of those with a legitimate interest in it -- government, community and business. Instead, it appears that rational decisions would be paramount. ASAP believes the Administration's bill demonstrates all too clearly that the discipline which can be imposed on the system through a global budget cannot be duplicated through a series of standards and exemptions which only complicate the decision-making process.

Many argue over whether there should be national standards. We believe exposure standards for a given route of exposure to a given hazardous substance must be uniform. The issue in remedy selection should be how to most economically and securely prevent unhealthy exposures in a way that is favored by the affected community.

On a positive note, the Administration does authorize a five-year demonstration project in communities which are also empowerment zones to study multiple source and cumulative risk. EPA is to coordinate with HUD and other departments. ASAP would provide the funding for such efforts at a much larger number of sites.

Point Five: Financing

In contrast to ASAP's comprehensive and integrated reform of the retroactive liability and funding issues, the Administration's proposal is woefully inadequate and virtually guarantees continuation of the same history of delay, inaction, litigation and waste of enormous resources that has marked the first 13 years of Superfund.

Rather than directly confront and reform the liability and funding problems, the Administration makes minor liability changes to favor certain parties and otherwise relies upon an unfair, time-consuming and non-binding cost allocation process which only serves to add further delay, litigation and inequity to Superfund.

Although 56 percent of the length of the Administration bill (79 of 141 pages) is devoted to liability provisions, when all is said and done, much of what's there today remains the same. Fundamentally, all the bill does is (a) give special treatment to certain parties, (b) add a complicated, non-binding allocation process from which all aggrieved parties will return to the current system, and (c) raise and allocate $800 million to $1 billion in new funding solely to reduce the current liability of solvent PRPs.

And that, members of the Subcommittee, should not only give you great pause, it should alone be enough to convince you to set it aside and look at alternatives that yield fundamental reform. If you believe, as many of you have said, that retroactive site-specific liability is the Superfund problem, the Administration bill is still the same old failed story.

Listen to what Local Governments for Superfund Reform has to say about this. In a statement released February 3, LGSR Chairman Joe Palacioz, City Manager of Hutchinson, Kansas, said: "The Administration's plan fails to help local governments fulfill our primary responsibilities at Superfund sites -- First, eliminating risk in a timely manner; Second, protecting the local economy and tax base; Third, returning polluted non-productive land to productive, taxable status; and Fourth, controlling costs at these sites. For all local governments, the Administration's ability-to-pay proposal is nothing more than another unfunded mandate, which will ultimately lead to rationing of services and increased taxes on our citizenry to pay for an inefficient federal program."

The Allocation Plan

Trumpeted as a "fair share" plan to eliminate the unfairness of the current liability system, the proposal does nothing of the sort.

- The "fair share" allocation plan lets EPA remove the potential benefits of that process for settling parties which want to cash out by charging "premia" (set by EPA) for every possible future event, including and especially the risk that EPA will not collect the fair shares of non-settling parties. In other cases, you may get a share, but you won't know of what.

- EPA is given enormous discretion over all critical issues and in most cases its judgement is not reviewable. Imagine the howls of protest you will soon receive if you put that into law?

For evidence of the continued, unacceptable injustice in this so-called "fair" process, how about the fact that even if a third-party allocator finds that a PRP has no liability, EPA can still order that PRP to clean up a site!

Transaction Costs

The Administration argues its plan will reduce transaction costs 50 percent. Pure fiction.

- It will increase government transaction costs. The government will be required to conduct PRP searches now carried out largely by the private sector at its own expense. And EPA has agreed to pursue all non-settling parties, rather than forcing this job on a few selected PRPs. This is fairer, but not cheaper.

- On top of this, EPA will conduct separate and "expedited" cost allocation and cash out processes on its own for favored parties: all municipalities, all generators and transporters of MSW, and de minimis and de micromis PRPs. EPA staff have said in the past that this is an enormously expensive and time-consuming process, precisely why the agency has done so few de minimis settlements and NBARs since 1986.

- Insurance transaction costs will go up due to the heavy incentives to draw in as many parties as possible as early as possible in the process; PRPs will initiate actions against their insurers and/or claim duty to defend contributions. This will not apply to parties which settle with the EIRF.

Effect on Settlements

- While the Administration argues that PRPs will have heavy incentives to settle, in fact the reverse may be true.

- Assuming the neutral allocator does a fair job of cost allocation, EPA has the unrestricted, and unchallengeable power to impose "premia" on settling parties which want to cash out for all future risks: failure of a remedy, new site conditions, etc. Most important, it can charge a premium for its "litigation risk" in collecting the balance of amounts due from non-settling parties. These "premia" are not subject to any challenge -- they are entirely up to EPA's discretion. Yet, settling parties would have no ability to recover these extra costs from non-settling PRPs.

- A similar incentive against settlement exists for parties which are less inclined to settle. Faced with the threat of joint and several liability for all costs of cleanup, PRPs have not hesitated to fight for the past decade. The new system will reduce this potential liability for non-settling parties to the

costs left after settling parties have paid their fair share. The threat that they will have to pay the orphan share paid by the Fund is no different that today's reality.

- The provisions protecting settlers against contribution suits and reimbursing them for payments for cleanup in excess of their settled share could prove attractive to some PRPs. However, if the latter reimbursement is carried out, it would drain Fund resources from cleanup.

Effect on Small- and Medium-Sized Businesses

The vast majority of PRPs are small- and medium-sized businesses and non-profits, including municipalities -- not Fortune 500 companies. The Administration explanations recognize their concerns, but the bill does not address their problems.

- For those which cannot prove they are de minimis contributors (most of them), a fast-track allocation process using the Gore Factors means that they will be disadvantaged relative to large, sophisticated PRPs which can produce disposal records and studies of "mobility" and similar issues. Small businesses (and most other PRPs) simply do not have the records to prove their status or amount of contribution, much less the toxicity, mobility, control and negligence factors called for with use of the Gore Factors. Thus, this process will result in cost shifting from such large PRPs to smaller ones.

- Far more small businesses will be brought into the Superfund process far earlier than in the past due to the incentives of this bill to draw in every possible PRP in the beginning. This will exacerbate the business harm caused to smaller PRPs by longstanding contingent Superfund liability.

- For those who are de minimis contributors, it is not very credible to hear one more promise in a long string since 1986 that the Administration will provide expedited de minimis settlements "wherever practicable" and "as promptly as possible."

- The de micromis exemption allows parties which sent 10 pounds or 10 liters or less of hazardous wastes to a site to certify that they qualify for full exemption from liability. This certification process makes sense (as opposed to requiring proof). However, EPA can raise or lower the amount, or determine that such parties should be liable if "such material contributed significantly or could contribute to the costs of response." Almost by definition such disposal "contribute[s] to the cost of response."

- Let's be clear what you're doing if you enact the Administration bill: you are providing relief to some big businesses and imposing a greater burden on small business.

Discriminatory Treatment of Various Parties

- The Administration proposes a limit of 10 percent of total response costs for one group -- generators and transporters of municipal waste -- yet other municipalities that are owner/operators of MSW sites are left to try to settle their continued retroactive joint and several liability with the federal government subject to their ability to pay.

- Notwithstanding the process by a neutral allocator to consider all the facts and determine all parties' fair shares of liability, the bill provides that EPA will separate municipal parties and de minimis parties from this process and work out settlements with them on its own.

- Cities also appear to have gained an exemption from liability if they do not conduct MSW pick up themselves, but grant permits and licenses to other parties to perform that function.

Speed of Cleanup

EPA's own figures prove that "enforcement first" has not accelerated cleanup at all. Neither does this plan.

- The Administration's allocation system adds a multi-year administrative cost allocation process to the current system which will further delay actual site remediation.

- Using the Administration's own timetable, you can add up three years of searches, notifications, allocations, red tape, settlement talks, hearings, public comment, and who know's what else before you even have a final allocation of shares, not even actual costs. It is still a pretty good system for lawyers, which I suppose is why it's popular with the Department of Justice. And it's not a bad system for those big businesses who have the records and time to wait for the process to finish. But it's a horrendous system for everyone else.

The Orphan Share Initiative

The Administration's plan offers up $300 million in "new funding" for payment of what it considers orphan shares -- i.e. shares attributable to identifiable parties who are "insolvent or defunct", plus excess municipal generator shares (over the 10% cap), and shares of parties who otherwise have their liability limited.

- This limited conceptualization of "orphan shares" distributes the costs of all unidentified shares to the identified solvent PRPs, thus maintaining their sense of inequity.

- All orphan share amounts over $300 million will be distributed to solvent PRPs.

- While the Administration says funds for this purpose will be separately appropriated, the bill does not say this, and, even if it did, we believe Congress will lump the basic Superfund and this new program together, thus creating competition between the existing Superfund and this new program. Thus, spending on orphan sites and other priorities will come in conflict with this demand to reduce the liability of current, solvent PRPs.

- No new funding source for this purpose is identified, so financing will be subject to existing budget caps (and thus be in competition with other spending programs).

- Like the new insurance trust fund (EIRF), none of this new funding will expand cleanup or pay for other priorities. All of it will reduce the liability of large PRPs who now are forced to pay the orphan share.

- While paying orphan shares is a common complaint of PRPs, having the Government pay it will hardly alter the basic dynamic of the warfare of financing at Superfund sites. Said another way, parties will fight almost as hard over an undetermined liability for 80% of the costs as they will over 100% of the costs.

Impact on Greenfields/Brownfields

To its credit the Administration recognizes that this is a major problem, and that the current liability system is a positive disincentive to development and voluntary cleanup during the sale of property, contrary to the claims of its defenders.

- The bill's full exemption from liability for new buyers of contaminated property is a major break with long standing ideology and should be applauded. It will combat the disincentive to invest in inner cities.

- All the problems of the liability system in this area remain for all other sites; states may not experiment; they can only be delegated the program if they have a liability system just like the federal law, and use it.

PRP/Insurer Fund

I am sure insurers, through their trade associations and individual companies, will offer detailed critiques of the proposal. I know insurer members of ASAP are prepared to do so. Here let me just point out a few problems we see.

In truth, the insurer fund is a clever shell game. Unlike ASAP's broad-based proposal, the new tax on insurers is money which would not increase total cleanup spending or spending on other priorities. And that leaves aside the question of whether the proposal is even workable. I invite you to read it and draw your own conclusions -- if you can get through it.

The fundamental problem with the proposal is that it deals with a peripheral, derivative issue. The Administration's stated purpose for this fund is explicitly and solely to cut insurer/PRP transaction costs. By limiting itself to this narrow issue, it guaranteed that this plan would have no real impact on the liability-created problems of the Superfund program.

Even if this proposal solved all the PRP/insurer fights, that would do little for public health, for the pace of cleanups, and even for ending disputes between and among the Government and PRPs over financing of site costs. The recent RAND transaction cost report noted that only 1 percent of PRP costs were for disputes with their insurers (while around 35 percent were transaction costs).

- The proposal raises $500-700 million in new annual funding for Superfund from the insurance industry. But, like the National Commission proposal, it uses every dime of new funding to merely reduce the existing liability of solvent PRPs. None of that money is used to expand cleanup or fund other priorities.

- When new funds are needed for sites with no PRPs and for other key priorities, we cannot understand why hundreds of millions of dollars in new tax revenue will be raised from insurers and spent to pay for past PRP costs, including PRP legal fees dating all the way back to 1981.

- The subsidy of future PRP legal fees by this fund will also fuel the PRP side of the battles between the government and PRPs at sites. PRPs (whether or not they settle at sites) will have an average of 40 percent of their legal bills paid by this new fund within 60 days of submission to the Fund.

- Insurers today pay about 10 percent of Superfund costs. This proposal hikes that to 40 percent. And it doesn't even provide assurances that litigation will actually end. That is the worst of all worlds for insurers and does nothing for the overall program.

- We are not aware of a single insurance company which supports this plan, notwithstanding the involvement of some insurance representatives in drafting it.

- By requiring proof of seven years of sequential insurance policies to benefit from the new fund, most small businesses are automatically excluded from the benefits of this fund. How many of you can find copies of your insurance policies from the 1970s and early 1980s?

Point Six: Public Participation; Community Empowerment

The Administration's plan calls for very positive new provisions to involve the public in Superfund decision making. Many of the specifics of the Eight Point Plan are in the bill. Unfortunately, these will cost more than $50 million a year, and no new funding is provided. Thus, any resources for public participation will come out of existing Superfund money. Again, this is an unacceptable trade-off.

The Administration bill does not address the community empowerment agenda of the Eight Point Plan: training of citizens in impacted communities in remediation skills, and involving minority businesses in cleanup.

Point Seven: Prospective Liability

Much has been made by the Administration of the value of the Superfund liability system in causing parties to exercise care in the disposal of hazardous waste. We believe the Administration has confused the value of liability for old disposal with liability for current and future disposal. But we do not disagree on the latter.

We find it extraordinary that, notwithstanding this position, and its unwavering commitment to site-specific liability, the Administration is willing to limit the liability of municipalities (the entities which control the vast majority of waste disposal in our country), not just for past disposal, but also for current and future disposal to 10% of the cleanup costs if the city (three years after passage of the law) puts in place a system to collect household toxic waste just twice a year. This is a major step backward in incentives for proper disposal of a very large amount of our society's hazardous substances.

This same future liability exemption applies to corporate small quantity generators of hazardous waste, but no such collection responsibility is imposed on cities for such waste. (Up to 200 pounds per month of hazardous waste per generator would thus be essentially exempt, hiding within the same 10% MSW cap.)

Point Eight: Program Coordination

The Administration's proposal does narrowly mention the need to coordinate with other agencies in Title I dealing with public participation: "The Administrator shall coordinate with other departments or agencies as necessary in carrying out the responsibilities of this subsection." Yet it does not recognize the importance of developing a mechanism to do this for all aspects of the program.

EPA recognizes the need to spur economic development in affected communities and appropriately includes measures that encourage land re-use and voluntary cleanup activities. Administrator Browner said in her testimony last week: "Economic redevelopment of contaminated sites is an essential component of this legislation." Yet EPA has committed only to a demonstration project, and no new money is raised to pay for it.

More fundamentally, EPA cannot effectively address this widespread problem simply through Superfund reform. The agency must look to other agencies for assistance and support. EPA does not have the required expertise or background to do this.

IV. CONCLUSION

This Subcommittee knows well the failures of Superfund. You and others have documented the unconscionably inadequate cleanup record, the staggering waste of public and private resources on legal and liability battles, the disenfranchisement of citizens which erodes confidence in government at all levels, and the suppression of economic dreams as entire communities wait, and wait, and wait for action.

Let us not settle for reform which falls well short of addressing these problems. Enactment of a bill is not what should drive us. Instead, we should only settle for a bill that truly gets the job done. I would prefer no bill at all to one which perpetuates in the name of reform many of the injustices and failures in place today.

Let us not mistake cobbling together a bill which satisfies some vocal and visible constituencies for a bill which will result in a successful program. Such a bill may be politically feasible, but if it doesn't work, it's not much help to anyone.

I believe this Administration and this Subcommittee want a successful Superfund program. I am pleased that President Clinton indicated his bill is a starting point, not an end point; and I was pleased in my meetings with the Administration that they indicated flexibility on every issue, including the final shape of liability reform. I believe this attitude, coupled with a genuine commitment to serve the interests of all Superfund stakeholders, means we can all find common ground.

Thank you. I look forward to working with you.

Attachment A

ESTIMATES OF SUPERFUND NPL SPENDING: TODAY AND UNDER THE PROPOSAL

			FISCAL YEAR 1992 (in millions of dollars)	PROPOSED (in millions of dollars)
Cleanup		Orphan & multi-party sites	1600	2200-2770
		Single-party sites	550	550
		Emergency removal	250	250
		Total	2400	3000-3570
"Enforcement"			200	50
Other	Headquarters	Overhead & research	300	Redirect
	Natural resources	Natural resource restoration	under 100	Up
	Community programs	Public health	50	Up
		Public participation	5	Up
		Remediation training in affected communities	0.02	Up
		Coordination of other federal programs	0	New
		Total	450	570-1000
Total			3050	3620-4620

SPENDING ASSUMPTIONS AND EXPLANATION

ASSUMPTION FOR CALCULATION

For the purposes of calculation, we assume a 1986 liability cutoff. No cutoff date has been chosen yet. The actual date will be selected with the goal of speeding cleanup, and reducing transaction costs and disputes. The quality of waste records, waste management regulations, and available disposal facilities will be considered.

TOTAL SPENDING

Fiscal year 1992 spending is the sum of FY92 PRP settlements ($1.48 billion), as estimated by EPA, and actual gross FY92 outlays ($1.47 billion). The latter figure was printed in the FY94 "Budget of the United States Government" and includes some spending which will be recovered in the future. While settlements are only commitments to spend, not actual spending, there is no record of how much PRPs actually spent to clean up NPL sites in 1992. For obvious reasons, spending lags years behind settlements. However, since real annual settlements have held steady at just under $1.5 billion for each of the last three years, we believe that they now approximate actual spending.

Breakdowns of FY92 outlays are not available; in estimating the breakdown among cleanup, enforcement and the several "other" spending categories, we have had to extrapolate from EPA's FY92 budget for Superfund commitments and obligations.

Proposed spending is 20-50% higher than current spending.

CLEANUP SPENDING

Total -- FY92 spending on cleanup is the sum of PRP settlements ($1.48 billion) and outlays for direct site cleanup (estimated at $920 million).

Proposed spending represents a 40-75% increase over current clean-up spending at multi-party and orphan sites. Overall proposed spending is 25-50% higher than 1992 spending (or more if less is spent on "other" activities). According to a 1991 study by the University of Tennessee, the proposed spending level of $3-3.57 billion is more than sufficient to clean all of the sites on the NPL over the next 30 years. This assumes an expanded NPL of 3000 sites and improvements in remedy selection, including consideration of sites' future use.

Multi-party and orphan NPL sites -- Current spending is calculated using the assumption that 70% of all PRP settlements (less $85 million in settlements for emergency removals) is spent at multi-party or orphan sites. Thus, PRP settlements for multi-party sites are estimated at $920 million. One recent study estimates that 70% of all NPL sites not owned by the U.S. government are multi-party sites. (The other 30% are single-party sites where there is only one PRP.) Nevertheless, 70% may be an overestimate; site research indicates that disputes over remedy selection, cost allocation and other issues are much more serious at multi-party sites and delay settlement, often indefinitely.

In addition to the $920 million in PRP settlements, we estimate that $680 million from the trust fund were spent at multi-party and orphan sites. $680 million is slightly more than 70% of all trust fund cleanup spending and is thus consistent with the fact that EPA spends as much of its insufficient cleanup funds as possible at orphan sites.

Single-party NPL sites -- Current spending is estimated at 30% of PRP settlements, or $445 million, plus $105 million in trust fund spending. The 30% estimate is conservative for the same reasons

that the 70% multi-party site estimate may be high. $105 million is a best guess based on EPA's extreme reluctance to spend trust fund money to clean sites where a viable PRP may be liable. Nevertheless, single-party cleanups have progressed more quickly and wasted less money than multi-party cleanups because they do not involve disputes over responsibility for costs.

Our proposal would not affect single party sites, so single-party spending remains unchanged.

Emergency removals -- Current spending is calculated by discounting the $200 million in FY92 Superfund removal commitments and obligations -- because outlays are generally somewhat lower -- and adding $85 million for PRP work. The latter figure assumes that 34% of all removal spending is by PRPs; in fiscal year 1992 PRPs started 34% of all removals.

The proposal would maintain current spending levels for Superfund's successful removal program. Parties who legally disposed of waste at multi-party NPL sites before 1987 would no longer be liable; trust fund expenditures would replace money which is currently spent by such parties.

ENFORCEMENT

EPA has defined "Enforcement" narrowly so as to include only the costs of offices exclusively dedicated to enforcement in current spending calculations. In fact, much of the "cleanup" budget is spent on work which does not directly advance cleanup or reduce health risks, but which is needed to support fundraising and litigation efforts: analytical testing to relate material on sites to PRPs, overtesting, litigation-quality documentation, PRP record development, and support for remedy designs to withstand PRP challenges. These savings could be shifted to real cleanup spending, but they are not quantifiable.

Under the proposal, enforcement spending at multi-party sites could be slashed. Almost 80% of all these sites would be entirely removed from the liability system, and so require no enforcement spending. Given these substantial savings, a much smaller total enforcement budget would nevertheless allow increases in spending for raising funds at single-party sites and from PRPs who broke the law or disposed of waste after 1986.

"OTHER" CATEGORIES

Overhead and research -- This money represents overhead costs for headquarters staff, research and development, and a variety of other expenses. It also includes EPA oversight costs at federal facilities.

To the extent possible, the proposal would decentralize Superfund spending, cutting Washington overhead spending and freeing up more resources to be spent in affected communities. Studies by GAO and EPA's inspector general have suggested numerous changes to cut overhead costs and spend remaining monies more efficiently. EPA oversight costs at federal facilities would be reimbursed by the agencies responsible for those facilities.

Natural resource restoration -- The current law has, with a handful of exceptions, failed to address any natural resource restoration. A completely separate process and the prospect of many years of litigation delay restoration -- usually indefinitely.

The proposal would bypass litigation and provide funds to go to work immediately to repair natural resources. Spending would be increased. Further, swift action would head off further contamination migration and damage, reducing both environmental and monetary costs.

Public health -- Far too little money goes for public health outreach, research and testing. To fund the program from one day to the next, EPA must devote resources and energy to chasing PRP money. The result is a program focused on fundraising to the detriment of public health. Typically, no public health specialists arrive at Superfund sites until years after an NPL site is designated, if at all; investigators searching for PRPs are often the first on the scene. Cleanup proceeds -- or stalls -- depending on the outcome of site-by-site PRP fundraising negotiations or litigation. Where PRP negotiations stall or no viable PRP can be found, site cleanup may be completely ignored, regardless of how great a potential health risk the site may pose.

The proposal would focus the entire program on public health protection. Health specialists would be the first on the scene, testing and educating communities neighboring suspected toxic health hazards. Local doctors would be trained to spot and treat the effects of exposure to toxins. Research into these effects would be expanded.

Public participation -- Superfund's FY92 community relations budget was $450,000, and 30 full time equivalent (FTE) employees were detailed to community relations. By assuming an average cost of $75,000 per FTE, we have calculated EPA's total FY92 community relations personnel cost at $2.25 million, yielding a total FY92 community relations budget of $2.7 million. In addition, EPA awarded 37 technical assistance grants (TAG's) to help communities near Superfund sites deal with technical site data. At a maximum value of $50,000 apiece, the TAGs' total value is less than $2 million.

Current spending on public participation is inadequate. Too few resources are devoted to involving the public. TAGs are too small, limited to three years, and renewable only once. The problems of inadequate funding are greatly aggravated by Superfund's current fundraising focus. EPA staff devote much of their time to tracking down and then negotiating with PRPs in meetings closed to the public. EPA and PRP lawyers screen all information before it is released to make sure that it will not hurt their bargaining/litigation position. Affected communities are often kept in the dark as to possible exposure -- or the lack thereof -- and the reason that cleanup has not begun. Their only source of information may be infrequent EPA community meetings, and usually the first opportunity to comment does not come until a ROD is proposed

The proposal would provide more financing for citizen outreach, community working groups, and TAGs. Innovative programs, including bilingual briefings and door-to-door outreach, would be increased. Affected communities would be involved in the process of testing and remedy selection from day one.

Remediation training in affected communities -- Virtually nothing has been spent on remediation training for the people living near contaminated sites. In 1992, EPA for the first time made a single grant of $87,000 to Cuyahoga Community College to set up a pilot program for outreach and remediation training to inner-city residents. Less than $20,000 of the grant money was spent in 1992.

Under the proposal, new programs will be designed and funded that provide affected communities with opportunities for minority job training and the involvement of minority businesses in environmental cleanup contracts.

Coordination of other federal programs -- Superfund itself cannot solve all the interrelated problems of communities negatively affected by toxic waste. However, the proposal would set aside Superfund money for a local agency to coordinate other government programs and services and focus them on helping affected communities recover, both economically and socially.

Attachment B

ESTIMATES OF WHERE THE MONEY COMES FROM: TODAY AND UNDER THE PROPOSAL

		FISCAL YEAR 1992 (in millions of dollars)	PROPOSED (in millions of dollars)
Taxes & Appropriations	Broad-based business taxes and line item contributions	1200	2400-3000
	State share; State and municipal PRP liability	?	300-600
	Federal appropriations from general revenue	230	300-400
	Total	1430	3000-4000
Private-party settlements & cost recoveries	Settlements at single-party sites	500	500
	Settlements for lawful pre-1987 waste disposal at multi-party sites	1040	0
	Settlements for illegal or post-1986 disposal at multi-party sites	80	80
	Settlements for emergency removals at non-NPL sites	40	40
	Total	1660	620
Total		3090	3620-4620

FY92 total tax & appropriations figures understate actual expenditures by the sum of state matching shares, believed to be under $100 million; the FY92 total is thus similarly understated. State and municipal spending pursuant to PRP liability is now included in FY92 private-party settlements & cost recoveries figures; under the proposal, increased state cost shares would be balanced by eliminated state and municipal liability.

The above figures do not include settlements for natural resource damages, which are believed to have totaled under $100 million in FY1992. Under the proposal, natural resource damages would continue to be collected at single-party sites and for waste disposed of illegally or disposed of after 1986. The fund would pay to restore natural resources damaged by lawful pre-1987 disposal at multi-party sites.

Because interest is an intragovernmental transfer, it is included in neither the FY92 column nor the "Proposed" column.

WHERE THE MONEY COMES FROM
ASSUMPTIONS AND EXPLANATION

ASSUMPTION FOR CALCULATION

For the purposes of calculation, we have assumed a 1986 liability cutoff. No cutoff date has been chosen yet. The actual date will be selected with the goal of speeding cleanup, and reducing transaction costs and disputes. The quality of waste records, waste management regulations, and available disposal facilities will be considered.

TOTAL

The fiscal year 1992 total figure is the sum of all Superfund taxes, appropriations from general revenue, PRP settlements, and recoveries from PRPs. All figures come from EPA documents.

Proposed total program revenue represents a 17-50% increase over current revenue and spending (exclusive of private sector transaction costs).

TAXES & APPROPRIATIONS

Total -- FY92 taxes and appropriations is the sum of Superfund taxes and federal appropriations from general revenue.

Proposed taxes and appropriations are 40-110% higher than current levels.

Broad-based business taxes and line item contributions -- In FY92, $1.2 billion in Superfund taxes were collected. These taxes came in three forms: petroleum tax , chemical feedstock tax, and the corporate environmental income tax.

The proposal calls for a 100-150% increase in broad-based business taxes and line item contributions. Current petroleum and feedstock taxes would be retained. The environmental income tax (EIT) would be expanded and a tax would be levied on smaller businesses. The small business tax would be levied on facilities officially classified by EPA as small quantity generators (SQGs). It would be assessed on a sliding scale; larger businesses would pay more per facility, and smaller businesses would pay less. An alternative would be to apply such a tax to SQGs and large quantity generators owned by companies which do not pay the EIT. Additional taxes on insurers are part of the proposal. (See attached example.)

State share; State and municipal PRP liability -- States are currently required to match 10% of all trust-fund spending at orphan sites within their borders; they are required to match 50% of trust fund expenditures at sites owned by municipalities. States must also pay operation and maintenance costs after cleanup at all sites within their borders. We do not have information regarding the total amount paid by states in FY92, but it is believed to be less than $100 million.

In addition, state and municipal PRP liability is large and growing: municipalities are involved at about one third of all NPL sites. Liability stems from owning and operating sites, generating and transporting waste, and past regulatory actions. There are no national records of total payments and commitments made pursuant to this liability, but they are included as part of the totals for "private-party" settlements and cost recoveries.

Under the proposal, states would be required to pay 10-15% of total program costs, based on

expenditures on sites within their borders. The increased state contribution reflects the removal of old state and municipal PRP liability for old waste disposal.

Federal appropriations from general revenue -- Annual appropriations from general revenue have fluctuated over the last several years. In FY92, $234 million was appropriated.

Proposed appropriations from general revenue are higher to reflect the removal of federal liability for lawful pre-1987 waste disposal at private, state, or local government multi-party NPL sites. EPA would be reimbursed for its oversight costs at federal facilities. Federal facility cleanup financing would not be changed in any other respect.

PRIVATE PARTY SETTLEMENTS & COST RECOVERIES

Total -- EPA estimates the total value of PRP work commitments pursuant to settlements or orders issued in FY92 at $1.48 billion. In addition, EPA recovered $180 million dollars from PRPs in FY92, yielding a total of $1.66 billion. Settlements have essentially plateaued, increasing at less than 1% over the rate of inflation over the last three years (FY90-FY92).

Under the proposal, settlements would fall as EPA would no longer seek to compel work from PRPs whose liability stems from lawful pre-1987 waste disposal at multi-party sites.

Settlements at single-party sites -- Current settlements and recoveries is calculated using the assumption that 30% of total settlements and recoveries are for single-party sites. One recent study estimates that 30% of all NPL sites not owned by the U.S. government are single-party sites.

The proposal would not affect single-party sites. PRPs would remain liable, and settlements would not be affected.

Settlements for lawful pre-1987 waste disposal at multi-party sites -- Current settlements and recoveries are estimated at 70% of (non-removal) settlements at all sites for lawful pre-1987 waste disposal.

The proposal would eliminate liability for lawful pre-1987 waste disposal at multi-party sites.

Settlements for illegal or post-1986 disposal at multi-party sites -- The $80 million in current revenue assumes that 5% of all settlements and recoveries are for illegal disposal or for post-1986 disposal. A recent study found no evidence of illegal disposal by any party at 85% of all NPL sites not owned by the U.S. government. The study also found that almost 80% of all NPL sites had closed before 1987.

The proposal would not affect settlements for illegal disposal or disposal which occurred after 1986. Parties would remain liable for any such disposal.

Settlements for emergency removals at non-NPL sites -- We have calculated current settlements assuming that PRPs pay 34% of an estimated $250 million in FY92 removal costs. (In 1992, 34% of all removal starts were conducted by PRPs.) We have further assumed that just under half of the resulting $85 million (34% of $250 million) was spent at non-NPL sites.

The proposal would not affect the funding of removals at non-NPL sites. EPA's removal program has swiftly and efficiently addressed health risks.

Attachment C

Financing Option

The following describes one acceptable approach to financing the Superfund program.

Non-site Specific Funding

Oil Tax	$550 million (current policy)
Chemical Taxes	$250 million (current policy)
Broad business taxes	$1350 million (e.g. 2x EIT for large businesses; $100 million for small businesses[1])
Insurer tax	$300 million
State share (10%)	$300 million
Federal Government	$300 million

Site Specific Funding

PRP payments at single party sites	$500 million
PRP payments for post-1986 disposal and illegal disposal	$80 million
PRP recoveries for non-NPL emergency removal	$40 million
Total	$3.670 billion

[1] The small business tax would be levied on facilities officially classified by EPA as small quantity generators (SQGs). According to EPA, as of December 15, 1993 there were 187,645 SQGs in America: an average tax of $533 per SQG would raise $100 million. Smaller firms would pay much less than that per SQG facility. Larger firms would pay more. An alternative would be to apply such a tax to SQGs and large quantity generators owned by companies which do not pay the EIT.

Attachment D

UNFUNDED NEW PROGRAMS PROPOSED BY THE ADMINISTRATION

- A specialized "orphan share" program, capped at $300 million; no funding source has been identified for this, but it more than absorbs the proposed increase in the authorization.
- Agency for Toxic Substances and Disease Registry -- not less than $80 million per year. (Increase not funded.)
- Research, development, and training demonstration grants -- limited to $60 million in FY 1995, $70 million in FY96, and $75 million thereafter. (Increase not funded.)
- Alternative or innovative treatment technologies -- not more than $40 million per year.
- Citizen Information and Access Offices in each state -- limited to $50 million per year.
- Multiple sources of risk demonstration projects -- limited to $30 million over the next five years.

No pricetag has been specified for the following provisions of the Administration's plan:

- Cost of full PRP searches.
- Cost of pursuing all non-settling PRPs rather than forcing other PRPs to do this.
- Community working groups.
- Partial payment of the costs of any additional remedial action required due to a failed innovative remedy (but cannot exceed $40 million).
- Assistance to state voluntary cleanup programs.
- Increased Technical Assistance Grants.

STATEMENT OF CAROLYN BELL
CEO, Community Health Resources, Inc.
Before the House Subcommittee on Transportation and Hazardous Materials
Re: Superfund Liability Reform
February 10, 1994

Thank you for the opportunity to submit a statement on this important issue before the subcommittee today. Reforming Superfund is one of the most important public health priorities before Congress this session. I have spent my entire career working as a public health professional. I have researched the effects of toxic substances on public health, conducted training sessions for citizens and those in the workplace, and written a book describing the types of toxins to which we can be exposed in everyday life.

The failure of the Superfund program to respond to the serious threats posed by hazardous waste deeply troubles me. After nearly 14 years, thousands of sites containing hazardous wastes continue to expose millions of Americans to health risks. The results are disastrous: many suffer disease and shorter life spans from prolonged exposure to toxins.

Because the current Superfund program is preoccupied with delay and dispute, millions of dollars are spent each year on transaction costs and only a fraction on health assessments. Full-scale health investigations are being conducted at an annual rate of only 15 % of the eligible sites. Instead of public health professionals, lawyers are at the forefront of the process. This is not what the framers of the original Superfund law intended in 1980.

I am proud to join Dr. Ben Chavis and the many diverse groups of the Alliance for a Superfund Action Partnership ("ASAP") in urging Congress and the Administration to fundamentally reform Superfund to refocus on cleanup and public health priorities. I have known Dr. Chavis for many years. His commitment to this initiative represents an understanding few bring to this process. As I have, he has witnessed the profound effects that hazardous waste impose on communities, especially communities of color. ASAP's Eight Point Plan recognizes that a successful Superfund must change the inefficient liability system that merely distracts the program from fulfilling its primary purpose.

ASAP's Eight Point Plan not only calls for the cleanup process to be put back at the forefront; it recommends that we use the other, existing resources of the government to assist those affected communities. This coordinated and comprehensive approach will help those communities recover from a legacy of hazardous waste problems.

The time for comprehensive reform is long overdue. Our citizens deserve a more efficient, effective Superfund program that puts the public's interest and its health first.

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**Testimony of the Honorable J. Phillip Odom,
Mayor of Hastings, Nebraska
Before the Subcommittee on Transportation and Hazardous Materials;
Committee on Energy and Commerce
United States House of Representatives**

February 10, 1994

Thank you for the opportunity to submit a statement regarding Superfund reform. The frustrations we in Hastings have experienced under Superfund have led us to join Local Governments for Superfund Reform (LGSR) and the Alliance for a Superfund Action Partnership (ASAP). We believe the reforms advocated by these two organizations are the best possible way to reduce the litigation and waste associated with the Superfund program.

I would like to describe our experience with Superfund and, perhaps, help reduce the negotiation, litigation and adversarial warfare that has characterized Superfund over the last thirteen years. It is my hope that we can direct our attention away from the disparate interests of individual stakeholders and focus on how we can make Superfund work for everyone.

The City of Hastings, Nebraska, population 22,000, has been involved as a PRP under Superfund since 1983. The City became liable when it opened and tested an old municipal water supply well -- which had never been used by the City -- and placed it on-line. Although the well water tested clean, the City soon began receiving numerous complaints regarding the water's odor. The well was immediately shut down and new water samples were sent to the EPA for testing. The results of those tests indicated that the water was contaminated with petroleum and other materials. Three other wells in the vicinity were also shut down and new water supply wells were constructed.

The EPA's testing and subsequent investigation of the sources of contamination of the first well indicated that contamination came from no less than seven subsites, whose pollution "plumes" had co-mingled in the groundwater. These subsites include two closed landfills, an industrial facility, an old coal gasification plant (now the local police station), a former U.S. Navy ammunition depot and two grain handling facilities. EPA identified a total of seven PRPs for these seven sub-sites (together known as the Hastings Groundwater Contamination Site) and named the City as a PRP at three of them.

Cost estimates for cleanup at the seven sites range from $20-30 million for each site, far exceeding the City's ability to pay. Further, Hastings faces the potential of lawsuits being filed against it by other PRPs under Superfund's liability system.

More than a decade has passed since Hastings was named a PRP, yet to-date cleanup has started at only one site (an orphan site where no PRP was found). The other sites are only now in the investigation or cleanup design stage.

It's generally accepted that the costs associated with pollution should be borne by those who benefit from the goods and services that are the cause of that pollution. Yet, with Superfund, we ask only a few to bear enormous cleanup costs for activities that benefitted a large portion, if not all, of society. These costs are so great they encourage parties to litigate, sometimes for years, at great cost to one another and to society.

Last Thursday the Clinton Administration introduced its Superfund reform proposal during a hearing before this subcommittee. Unfortunately, that proposal fails to address the fundamental problem with Superfund -- its retroactive, strict, joint and several liability system.

Superfund's primary goal is to protect human health and the environment. Yet, this clearly has not been the focus of EPA's enforcement efforts. Rather, EPA has directed its energies toward raising the money necessary to pay for cleanup. Years of cleanup delays, inefficiencies and ever-increasing transaction costs should by now have convinced everyone of the need to change the way money is raised for Superfund.

Few, if any, observers argue whether the United States should have a program to clean up old hazardous waste sites; the real question is whether the program, in its current form, is the most effective and fairest method of raising the money we need to clean up Superfund sites as rapidly and effectively as possible.

Superfund has achieved few cleanups; it is a program which seems to lead everyone -- small and large businesses, schools, hospitals, local governments, churches, non-profit organizations and insurers -- into the courtroom; it is a law which benefits only attorneys and consultants: not the citizens who live near polluted sites, who have a right to expect timely cleanup, not communities, especially low-income communities, which cannot attract the financing necessary for economic development, not small businesses, whose existence is threatened by even the smallest trace amounts of hazardous substances on their premises; not local governments whose tax bases and economies are endangered; and not big businesses, which must allocate large amounts of resources to legal and consulting activities and expensive cleanups.

The single most important problem with Superfund is its liability and funding system. The most contentious aspect of this system is its retroactivity. Retroactive liability makes sense when applied to willful polluters who failed to operate in compliance with

then applicable federal, state and local waste disposal practices, but it makes less sense when applied to those who acted in good faith, according to the applicable laws of the time, and it makes no sense at all when one considers that the ownership and operation of public waste disposal facilities and other infrastructure by local governments have always been distinctly public functions, which they could not and cannot avoid.

Local governments have four broad responsibilities at Superfund sites. They must satisfy the public's need to have the risk eliminated in a timely manner; they must protect the local tax base and economy; they must return polluted, non-productive land to productive, taxable status; and they must control their costs at those sites. The Administration's Superfund reform proposal would not help local governments meet these important responsibilities.

Because LGSR members consider themselves stewards of their communities, they view a Superfund site as a community issue, not just a local government issue, a community health issue, an environmental issue or a business issue. LGSR and ASAP believe that meaningful reform should consider the effects of a Superfund site on the entire community and its economy. From this perspective it make more sense to eliminate the conflict over liability and direct society's energies toward resolving the problem.

Keeping in mind our responsibilities as local government officials, LGSR has made a series of recommendations in alignment with those of ASAP which includes an expanded Environmental Income Tax to increase funding and liability revisions that eliminate retroactive, strict, joint and several liability at multi-party sites, and implementing a broad-based business tax to fund cleanups at those sites. Site-by-site financing would continue for single-party sites, for parties which disposed of waste after a fixed cut-off date and for those who violated the law at the time of disposal.

Prospective Superfund liability, along with other environmental laws, regulations and market forces, will continue to serve as a strong incentive for proper waste management, now and in the future. However, liability for cleanup of wastes disposed of after the cut-off date should be proportional to responsibility.

The process used to allocate cleanup costs among PRPs and the government should be fair and binding, and the entire cost of any orphan share should be paid by the Superfund.

The EPA should be encouraged to provide mixed funding and *de minimis* and *de micromis* settlements with immunity from third-party cost recovery actions. Such settlements should include language allowing the federal government to seek further relief if information not known at the time of the settlement is discovered indicating the settler doesn't satisfy the *de minimis* or *de micromis* criteria.

The nation's resources are finite hence, site prioritization should be reformed to reflect whether a site poses a serious public health risk. A preliminary risk assessment process should be established to evaluate risks at Superfund sites. Issues of environmental equity would be included in this process. This would move those sites which pose the greatest threat to human health to the top of the list.

The EPA should be required to uniformly identify and cite all PRPs. Currently, the EPA tends to identify only a handful of the most obvious "deep pockets" PRPs then removes itself from this part of the process, leaving those identified to fund the costs of remediation and identification of and reimbursement from other PRPs. This is a key element in increasing transaction costs and prolonging the amount of time necessary to move through the process.

It's time to acknowledge that Superfund has failed to fulfill its purpose. It's time to make substantive changes to the law that will allow it to fulfill that potential. It's time to reform Superfund's funding and liability mechanism and direct the resources currently being spent on transaction costs and litigation toward cleanup. Thank you for you attention.

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John F. Spisak
Chief Executive Officer

Statement of John F. Spisak
CEO, Industrial Compliance, Inc.
Golden, Colorado
Before the House Subcommittee on Transportation and Hazardous Materials
RE: Superfund Liability Reform
February 10, 1994

Industrial Compliance is pleased to join Dr. Ben Chavis and the other members of the Alliance for a Superfund Action Partnership ("ASAP") in urging the Subcommittee to adopt ASAP's "Eight-Point Plan" for comprehensive Superfund reform. That Eight-Point Plan goes to the heart of what is wrong with Superfund in reforming the retroactive joint and several liability regime. Unless and until that retroactive liability is changed no one should expect the program to perform any better than the miserable and wasteful record it has compiled in the past.

From my perspective as an environmental professional working on Superfund remediations, I see first hand how the punitive and legalistic retroactive liability regime runs up costs needlessly as PRPs fight EPA every step of the way in the process. Instead of being a true "polluter pays" system, in reality, Superfund is a "deep pocket pays" system. The net effect is to punish profitable companies for past activities which were, for the most part, lawful and generally acceptable industry practice at the time. And who, in reality, bears these costs imposed on the "deep pocket" company? The company's owners, the millions of individuals and corporate investors including pension funds of the employed and the retired, college endowments, and the portfolios of churches and even environmental groups.

The protracted, punitive pursuit of American industry also has substantial adverse impacts on American consumers and our economy. The billions of dollars in Superfund litigation costs -- as well as any ultimate clean up expenses -- incurred by American industry are passed along to consumers in the cost of goods and services and in reduced jobs and economic investment. In effect, consumers are already paying an invisible Superfund "tax" buried in the price of goods and services, higher unemployment and reduced economic competitiveness which totals billions of dollars each year.

Until Superfund is changed these invisible taxes will continue indefinitely. Moreover, the huge financial resources dedicated by American industry to fighting the stark inequities of Superfund are diverted from far more socially productive enterprises such as research and development of new products, investment in capital goods or facility expansion, and increased employment, all of which could lead to enhanced economic welfare of the Nation.

In most cases, companies are willing to pay their reasonable share of the cleanup costs. But they are vehemently opposed to paying the entire cost or a disproportionate share of cleanup, especially when their practices may have been legally or environmentally acceptable at the time of the disposal. The problem is severely exacerbated by the fact that these companies must pay the so-called "orphan shares", attributable to entities either no longer in existence or incapable of paying.

Superfund's stimulation of lawsuits is wholly predictable. Massive litigation is America's normal reaction to victimization by government. Business owners rightly demand accountability from corporate boards, high financial returns on their investments and security for their investments; government impositions on any of these demands are vigorously litigated.

Indeed, Superfund's structure, unfairness and punitive attitude toward the "polluter" virtually **compels** the stewards of American business to defend and litigate on behalf of their shareholders, investors, and owners. Unless Superfund's structure and administration is substantially changed, American business should not be expected to change its litigious behavior.

ASAP's Eight Point Plan directly resolves the threshold, crippling problem caused by retroactive liability by eliminating such liability for many sites prior to 1987. The Eight Point Plan can do that since it includes a funding scheme that is both fair and adequate and thus allows retroactive liability to be supplanted. No longer will there be litigation over who was at fault, who should pay, how expensive should the remedy be, how clean should the site be. Instead the money spent in Superfund will be applied to actual site cleanup, speeding remediation at more and more sites across the nation.

Reforming retroactive liability makes the other elements of the Eight Point Plan possible: prioritization of expenditures based on health risks; enhanced community participation; remedy selection reform; and enhanced broad based funding. But without such reform of retroactive liability none of these objectives are attainable.

In contrast to ASAP's plan, the Administration's proposal falls far short of what is needed and virtually guarantees continuation of the sorry and wasteful record posted by Superfund over the last 13 years. The Administration plan does not accelerate remediation; it adds more legal process. The Administration's proposed cost allocation process is unfair to small and large businesses in numerous ways. The Administration adds no net additional money for actual cleanup after consideration of all the other costs it creates. The Administration's plan give EPA even stronger, punitive legal authorities to use against PRPs who may challenge the agency's dictates.

The Administration's proposal is a major disappointment; it is a menu for "no change" when major, structural change is needed. As a member of ASAP we look forward to working with the Congress to fashion Superfund reform that is worthy of the effort along the lines of the Eight Point Plan

Industrial Compliance is a national consulting, engineering and environmental services company, headquartered in Golden, Colorado with offices in Dallas, Houston, Knoxville, Little Rock, Monterey Park, Overland Park, Phoenix and Sacramento. For further information contact John Spisak, 303-277-1400.

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February 25, 1994

Representative Al Swift
Chairman of Transportation, Hazardous Materials
1502 Longworth Avenue
House Office Building
Washington, D.C. 20515-4702

Dear Representative Swift:

I am writing because of Alcan's conviction that Superfund needs fundamental reform. That conviction is not a result of theorizing but rather a result of intense involvement in the Superfund process, and in particular, as a result of the extended efforts resulting from litigating such fundamental propositions as whether or not milk is a CERCLA hazardous substance. See United States v. Alcan Aluminum Corp., 964 F.2d 252 (3rd Cir. 1992) and United States v. Alcan Aluminum Corp., 990 F.2d 711 (2nd Cir. 1993).

As silly as that proposition may seem, the reality is that the polluter's pay scheme embodied in the present liability scheme and incorporated in the administration's proposal will necessarily result in forcing the administration of Superfund to the point at which consideration of the absurd is commonplace. Moreover, the polluter's pay scheme places primary responsibility for administration of the law on a judiciary that is ill equipped to deal with the technical demands that is placed upon them and contributes to a widespread perception essential elements of fairness expected from the judiciary have been lost.

In our view the polluter's pay scheme must be abandoned for two reasons. First, piecemeal attempts to remedy objectionable items are merely treatment of symptoms. Since these symptoms are driven by fundamental flaws in the underlying doctrine, it is inevitable that as one symptom is treated another more serious one will manifest itself. A careful review of the present scheme will reveal that is why SARA failed.

Second, since the doctrine is impractical in terms of assigning responsibility, the term "polluters pay" is, in fact, a misnomer. Reality is that the scheme is a polluter's subsidy program and the "rough justice"

system advocated by some is nothing more that more effective subsidy program with the unfortunate side effect of creating the incentive for extremely costly and time consuming litigation. Stringfellow is an excellent example of how that will work. The State of California along with the US EPA filed suit among a number of generators seeking remediation costs under CERCLA. Since it was clear that the State Of California (the EPA's surrogate) was the truly culpable party ,the defendants counterclaimed and the recent decision of the Special Master assigned up to 100% of the liability back to the State.

The issues raised in this letter have been addressed in more detail in other contexts and we would like to share these with the Committee. We have included a number of amicus briefs who address the issue of polluter's pay scheme on individuals, schools, local governments and business climates. Some directly address the subsidy character of the scheme. The comments of these parties deserve this Committee's considered attention since these are the comments, not of theoreticians, but people and institutions who have been touched by Superfund.

My remarks before the American Bar Association concerning the corrupting influence that Superfund has had upon the Court system, as well as the amicus brief of the New York State's Conference of Mayors which is critical of the judicial system's handling of Superfund, strongly suggest that imposing detailed responsibility for the administration of Superfund upon a judiciary, which is ill-equipped to handle it, may well have unanticipated side effects.

Finally, I have enclosed a letter to Richard Frandsen, Counsel for the Committee on Energy and Commerce in which I explain at some length why the "polluter's pay scheme" cannot be fixed, but must be replaced.

Alcan joined the Alliance For A Superfund Action Partnership ("ASAP") because this group thoughtfully considered what is wrong with the present law and what is required to remedy the problems.

Very truly yours,

Lawrence A. Salibra, II
Senior Counsel

LAS:iy

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November 3, 1993

Richard Frandsen, Esquire
Counsel, Committee on Energy & Commerce
2125 Rayburn House Office Building
Washington, D.C. 20515-6115

Dear Dick:

I am writing you to express a deep concern that policy decisions are being formulated about altering the Superfund law that pay scant attention to the lessons learned from the Alcan experience under the current law. You may feel a meeting at this point is not timely, but a recent letter by Congressman Dingell and others concerning Treasury's Superfund proposal has me very worried that if we do not get together shortly, it will be impossible to secure the support of Chairman Dingell for reform measures that genuinely will result in quicker and better clean-up at Superfund sites.

Dick, the system is broken in a very fundamental way. Although Congressman Dingell's cost concerns are certainly legitimate, they should not preclude a comprehensive review of the liability scheme. Recently, the *Stringfellow* defense group celebrated the 10th anniversary of the Stringfellow litigation. It would be most unfortunate if we were discussing the same issues just before the 20th anniversary of the *Stringfellow* litigation.

It is nonsensical for EPA to hold anyone liable for the presence of metals in their waste even when the actual concentrations, as defined by EPA standards, were completely safe. Indeed, they were below background levels. The problem is clear -- when one tries to assign liability in a complex chemical and historical environment, the transaction costs (legal-consultant fees) get so high that they bring the process to an utter standstill and do not justify the

cost by any significant return. The two potential benefits from directly assigning liability for the problem are (a) to punish someone for causing the problem, and (b) to discourage future improper conduct. In the vast majority of Superfund cases these objectives are never anywhere near achieved, and are virtually irrelevant to how real liability is assigned. The aim of "punishment" is usually not justified from the history at the site, since these sites were state or federally regulated sites, and state-of-art at the time. If there was bad conduct, the government was almost always the bad actor: Stringfellow (state evaluation of site appropriateness flawed), PAS (state supervision of licensee flawed), New York v. Exxon (city official bribed by state licensed operator to make illegal disposals).

Regulating future conduct is also a pointless objective. The public and the media seem to associate the "polluters pay" scheme in Superfund with illegal midnight dumpers rather than the reality -- a reputable person or company complying with the details of the law and, therefore, leaving a paper trial that allows it or him (like Mr. Blackstone and his septic tank waste) to become a PRP. These same law-abiding citizens now comply with the detailed requirements of RCRA as they complied with the law in the past, so creating incentives for future conduct appears unwarranted.

Polluters pay is very costly and pointless. It brings the system to an effective halt if you are really serious about implementing it correctly.

Faced with costly, time consuming and an impractical scheme, the EPA had to get around polluters pay to make the system move at all. Hence, joint and several liability is the creation of the polluters pay reality. It is a bludgeon to move the system. However, Alcan I (United States v. Alcan, 964 F.2d 252 (3rd Cir. 1992), Alcan II (United States v. Alcan, 990 F.2d 711 (2nd Cir. 1993) and its progeny are going to defeat joint and several even as it now "appears" to exist. As we do, costs will further increase and cleaned sites will decrease. Those who believe that you can "fix" polluters pay without fundamentally changing the liability scheme do not understand this interrelationship.

Simply put, the EPA had to argue to keep reducing the standards for liability beyond anything justified by science to get the system to move at all. Giving the EPA anything short of the absolute right to impose liability as they choose would be unacceptable because it would inevitably shut the system

down. When you read the opinions in Alcan I and Alcan II, you get the sense that the courts are struggling against antithetical objectives.

So what's wrong when you start reducing standards of liability? Well, it certainly speeds things up for the EPA in the short run, but suddenly reality intervenes again and you get three disturbing consequences. First, the liability scheme propels you toward the absurd so fast the courts are forced to stop it and costs start going up anyway -- they just call causation a new name ("divisibility") and make believe they really did something new. Second, all of us have higher costs since lower liability standards allow you to sue everyone. Eventually, judges and Congressmen will be PRPs. Third, we look back at our polluters pay liability scheme and discover that as the liability standards were attenuated to move the thing along it transformed the polluters pay scheme into a polluters subsidy scheme, wherein the worst offenders often pay minimal percentages of the clean-up costs -- the result being allocation is largely based on volume and not its content.

"Fixes" like elimination of joint and several or de minimus settlement options are all illusory. Let me illustrate this by the following example relating to de minimus settlement notions. Assume the following set of facts roughly similar to Stringfellow. There is a site that is acidic, containing some mobile metals, and highly mobile TCE. Company A put in a large volume of metals. Company B put in a very small volume of a highly concentrated acid. Company C put in a small volume by comparison to Company A of TCE and Company D put in a large volume of dilute sodium hydroxide. Who is de minimus? If you use volume (which is usually the case), it is Company B and Company C, but it could easily be argued they really caused the problems. Company A's metals would not be a problem because without Company B's acid, the metals would not be mobile. Company C caused a wholly unique problem involving a unique remedy geographically distant from the metals problem. What should we do with Company D? By volume, Company D's contribution of waste is the largest. Sodium hydroxide is clearly hazardous. However, it actually reduced the mobility of the metals since it neutralized the acid. Company A and Company B might also argue that they are de minimus with respect to Company C and Company D because they were a lesser volume than Company D and their plume is quite small as compared to Company C. The point is that de minimus is in the eye of the beholder, suffers from the same practical problems that the definition of hazardous substance did in Alcan I and Alcan II (remember, everything in the universe is a hazardous substance after the Alcan decisions) and is an illusory fix. Inside

the beltway people too often evaluate concepts with little regard for their practical application.

You cannot really fix the serious problems with Superfund without changing the liability scheme. Too much focus is on who pays the bill. The position expressed by Congressman Dingell and others are legitimate, but as a beltway outsider I understand that in the end I will always pay the bill, so my concern is that I pay as little as possible. A form of public works program achieves all of the sought-after objectives, except the one of not calling the funding mechanism a tax. I understand that Congressman Dingell does not want to call it a tax; however, if a more informed electorate understood the real consequences, understood they are really paying enormous amounts for unproductive lawyers' fees and ten-year dinner celebrations for Superfund defense groups, they would gladly recognize the common sense, economic sense and legal sense of the treasury proposal.

Superfund reform must be a process of both understanding and education. If the SARA amendments taught us anything, it is that we just spun our wheels. I look forward to meeting with you and discussing this issue more fully.

Best regards.

Sincerely,

Lawrence A. Salibra, II
Senior Counsel

LAS:iy

Mr. SWIFT. Without objection, all of those will be entered into the record at the appropriate point. Thank you, Dr. Chavis. I recognize Deeohn Ferris.

STATEMENT OF DEEOHN FERRIS

Ms. FERRIS. Thank you, Mr. Chairman and members of the subcommittee, for your invitation to appear today to talk about Superfund liability proposals. Thank you, again, Mr. Chairman, for bringing to the public policy table the interests of people of color, who are most affected by Superfund issues.

At the outset, it's important to note that people of color affected by hazardous waste sites are interested in the entire scope of this debate. Focusing today on liability, however, I make the following points.

Consistently critics of the Superfund programs cite existing impediments to achieving the original risk elimination objective of the statute, i.e., accomplishing effective, efficient hazardous waste clean up which is protective of human health and the environment. The regulated community, community organizations, public interest groups and experts agree, that the pace of site clean up is slow.

At the end of fiscal year 1993, only 52 sites have been cleaned up and deleted from the NPL, and out of nearly 1,300 sites remedial action has begun at only 541. Although over the past 3 years the pace of clean up has been somewhat faster, there is a considerable backlog of sites in communities that have yet to be evaluated by EPA for inclusion on the NPL.

To increase the numbers of completed cleanups the Agency has shifted focus away from the crucial task of evaluating sites, many of which are in communities of color. An examination of the fiscal year 1993 targets reveals that while remedial design and remedial action work has accelerated, several regions have fallen short of their targets for site investigations.

As a result of the emphasis on pace of cleanups, the liability scheme and transaction costs have further diverted attention and resources away from the most critical problem, which is getting sites listed so that Federal clean up action can be initiated. Critics point to mounting clean up costs including high administrative costs, contract mismanagement and wasted trust fund resources. Citizens are concerned about whether clean up is protecting human health and the environment, the permanence of remedies is uncertain, and the long term efficacy of clean up remedies is unclear.

The most intensive focus of criticism relates to claims that transaction costs associated with Superfund enforcement and the liability scheme escalate expenditures by government and private parties alike. Among insurers and responsible parties in Superfund cases the surrogate for cost cutting across the board is eliminating retroactive strict joint and several liability.

These concerns as well as recommendations to improve EPA performance in cost cutting are well documented. However, it is important to note that experts agree that costs can be reduced within the present liability system. While some parties and insurers have called for changes to the Superfund enforcement and liability system to reduce litigation and transaction costs as the most critical cost cutting measures, before such a change can be justified the

Federal Government should explore the possibility of streamlining the clean up process and reducing costs within the present system.

For example, one area that has significant impact on the effectiveness and cost of clean up is technology. The Agency's inability to develop innovative technologies, identify clean up and technology needs and compile reliable cost and efficacy data contribute to high costs, and are areas of inquiry with regard to implementing improvements within the present system.

Also, emphasis on improving contract management controls and oversight as well a scrutiny of the high percentage of trust fund moneys expended on Agency administrative costs by EPA and Congress is warranted. Additionally, a better managed enforcement program and stepped up cost recovery actions, accompanied by regular evaluations of the adequacy of ongoing cost recovery efforts, is likely to achieve cost savings.

Under existing law, EPA has not aggressively pursued the use of settlement authority which, according to the General Accounting Office, could reduce some of the most controversial litigation connected with the program. GAO reports that use of settlement tools is not encouraged among EPA regional offices and their use is not fully operational, but usually is limited to pilot projects and selected regions.

Presently, the consequences of changing the liability standard are unknown, and there is insufficient information to show that the liability scheme is slowing the process in communities of color. For example, an examination of how long it takes to complete remedial investigation feasibility studies demonstrates that there is a difference between fund lead clean up and those performed by responsible parties where liability is at issue. It takes EPA approximately 9 to 10 percent longer to complete an RIFS in fund lead cleanups, not those in which responsible parties are involved.

There is an expectation among the proponents of this change that ipso facto industry and government will hire fewer lawyers, pay fewer legal and expert fees, sue less, and the clean up process will be streamlined. There is insufficient information, however, about the ultimate impact in terms of whether the change will actually result in speedier, more effective cleanups.

Furthermore, in the absence of information about the consequences, changing the liability standard cannot be justified without first attempting to reduce costs within the present system.

While members of the environmental justice community are not hostile to concepts such as allocation, instead of enacting a new program which could essentially nullify the standard, perhaps Congress should explore a pilot program which tests the efficacy as a cost reduction measure of such new initiatives as allocation.

In conclusion, any holistic Superfund debate must include discussion and examination of questions regarding the liability standard. However, before we overturn a tool which has proven a valuable disincentive to irresponsible waste disposal, let's study these issues and make decisions based on facts.

This concludes my prepared remarks. I would be happy to answer questions after the rest of the panel finishes.

[Testimony resumes on p. 412.]

[The prepared statement of Ms. Ferris follows:]

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TESTIMONY OF DEEOHN FERRIS

PROGRAM DIRECTOR

ENVIRONMENTAL JUSTICE PROJECT

LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

BEFORE THE

SUBCOMMITTEE ON TRANSPORTATION AND HAZARDOUS MATERIALS

COMMITTEE ON ENERGY AND COMMERCE

U.S. HOUSE OF REPRESENTATIVES

FEBRUARY 10, 1994

Mr. Chairman and Members of the Subcommittee, I appreciate the opportunity to appear before you today to examine the Clinton Administration's proposed "Superfund[1] Reform Act of 1994."

The Lawyers' Committee for Civil Rights Under Law is a non-partisan, non-profit organization formed in 1963 at the request of President John F. Kennedy to involve the private bar in the provision of legal services to victims of racial discrimination. The Lawyers' Committee implements its mission through legal representation, public policy advocacy and public education on civil rights matters. I am Program Director of the Lawyers' Committee's Environmental Justice Project, which focuses on developing interdisciplinary cooperation and

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[1] Comprehensive Environmental Response, Compensation and Liability Act, as amended 42 U.S.C. § 9601 et seq. (CERCLA).

strategies to prevent and remedy the disproportionate environmental risks experienced by people of color and the poor.

The goal of the Environmental Justice Project is to promote equal environmental protection and develop remedies for the adverse consequences of prior discrimination. Our objective is to obtain environmental equality by providing legal and technical resources to communities of color and the poor in their efforts to combat environmental discrimination and eliminate all barriers to equal environmental protection.

Introduction

Based on my work with communities at risk due to toxic exposures at Superfund sites and a preliminary assessment of the Administration's proposal, my testimony highlights issues connected with positioning protection of public health and the environment as the foundation upon which this nation's hazardous waste cleanup law is built.

As we approach the Superfund reauthorization effort, it is clear that few unequivocally applaud past Superfund performance. Collectively, communities, industry, and government[2] are critical about whether the Superfund program has actually achieved Congressional goals. Discontent and frustration is especially pronounced amongst low-income communities and communities of color. These communities, disproportionately exposed to environmental hazards across the board[3],

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[2] See, e.g. Superfund Administrative Improvements, U.S. Environmental Protection Agency, Final Report, June 23, 1993.

[3] See e.g., Environmental Racism: Reviewing the Evidence, Paul Mohai and Bunyan Bryant (Paper delivered at the University of Michigan Law School Symposium on Race, Poverty, and the Environment, January 1992).

have also been disproportionately affected by Superfund's ineffectiveness.

For example, according to the widely acclaimed National Law Journal report, "Unequal Protection: The Racial Divide in Environmental Law," communities of color will wait up to four years longer than white communities in getting a Superfund site cleaned up.[4] Not only is Superfund disproportionately ineffective, but Superfund is also discriminatorily implemented. For example, according to The National Law Journal report, permanent treatment remedies were selected 22 percent more frequently than containment technologies at sites surrounded by white communities.[5] In contrast, at sites surrounded by communities of color, containment technologies were selected more frequently than permanent treatment by an average of 7 percent.[6] The findings are clear: Not only are people of color differentially affected by pollution, they can expect different treatment by the government.

This disparate treatment by the government is especially alarming in view of the 1987 Toxic Wastes and Race in the United States report which found that, "Three out of every five Black and Hispanic Americans live in communities with uncontrolled toxic waste sites."[7] Similarly, an earlier report by the U.S. General Accounting Office (GAO),

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[4] The National Law Journal, Vol. 15, No. 3, September 21, 1992, Page S4.

[5] Id.

[6] Id.

[7] Toxic Wastes and Race in the United States: A National Report on the Racial and Socio-Economic Characteristics of Communities with Hazardous Waste Sites, Commission for Racial Justice, United Church of Christ, New York, New York, 1987.

catalyzed by the PCB landfill protest of an African American community in Warren County, North Carolina, revealed the connection between race and the prevalence of off-site hazardous waste landfills in eight EPA Region IV states.[8] Studies conducted in 1993 extend these findings. According to a report published in Risk Analysis, with respect to site location and distribution of cleanup plans or EPA Records of Decision (ROD) across communities with sites listed on the Superfund National Priority List (NPL): (1) the percentage of African Americans and Latinos in communities with NPL sites is greater than is typical nationwide; and (2) communities with relatively higher percentages of people of color have fewer cleanup plans (signed RODs) than other NPL sites.[9]

Due to this deplorable record, environmental justice activists have galvanized to develop and advocate a broad range of reforms to Superfund. Having experienced the most profound deficiencies of Superfund implementation, communities of color and low income communities are uniquely positioned to offer meaningful suggestions for improving the program. These suggested reforms touch every phase of the Superfund process, including assessment of health risks, allocation of liability, and selecting remedial technologies. As a primary reform, environmental justice activists are demanding innovative programs that will constitute significant improvements in the role of

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[8] U.S. General Accounting Office "Siting of Hazardous Waste Landfills and Their Correlation with the Racial and Economic Status of Surrounding Communities (Washington, DC, 1983)

[9] "Social Equity and Environmental Risk," R. Zimmerman, Risk Analysis, Volume 13, No. 6, December, 1993.

local communities, and positioning public health as the centerpiece of reform is essential.

This testimony provides input on reforms which would provide immediate relief to communities in distress and is organized as follows:

(I) Overview of the Proposed "Superfund Reform Act of 1994."

- A. Native American Programs
- B. Community Participation and Human Health
- C. State Role and Voluntary Response
- D. Remedy Selection

(II) The Liability Scheme

- A. Liability and Allocation

Background

Fairness is the mantra in the current public policy debate regarding Superfund reform. The fairness issue and solutions to achieve it are essential to remedying the consequences of discriminatory environmental programs and policies. The paramount concern is achieving fairness in communities experiencing disproportionate impact and preventing unfairness in the future is primary. In contrast, countless studies have been funded and conducted concerning costs to government and industry while few inquiries are underway concerning the cost of failure to protect human health and the environment. These and other deficiencies reinforce the critical need for early, often and continuous involvement in decisionmaking on Superfund reform by people most and worst affected by these risks.

Historically, the community-based environmental justice movement has concentrated on discriminatory exposures encompassing ambient, indoor workplace, and economic environments. Through this lens, activists promote a comprehensive Superfund reauthorization platform

encompassing revisions to how sites are ranked for listing on the NPL, establishing cleanup standards, selecting treatment technologies, performing health assessments, assuring that liable parties are held responsible for cleanup costs, and enhancing public input.

I. OVERVIEW OF THE PROPOSED "SUPERFUND REFORM ACT OF 1994."

While the entire Presidential proposal is relevant to environmental justice concerns, based on a preliminary analysis, these comments focus on four parts:

A. Native American Programs

B. Community Participation and Human Health

C. State Role and Voluntary Response

D. Remedy Selection

The liability provisions of the proposal are examined in Part II below.

A. Native American Programs

The proposed "Superfund Reform Act of 1994" is silent on facilitating sovereign governance and the ability of Native Americans to protect themselves and their sacred sites from pollution exposures. A more holistic approach to statutory reauthorization ensures availability of adequate funding and training opportunities, as well as Tribal access to EPA Superfund program managers. Sovereign Tribal governments have not shared in technical assistance and federal funding to develop environmental infrastructures at levels provided to the States. In view of these deficiencies, Tribal governments are unable to adequately implement the Superfund program. As Tom Goldtooth, who as National Council Officer heads the Indigenous Environmental Network,

has observed, "Without tribal environmental programs in place, the protection of our lands and people is jeopardized."[10] EPA must be compelled to adequately fund and work closely with Tribes to address the special cultural and jurisdictional issues encountered when cleaning a Superfund site affecting Native American communities.

B. **Community Participation and Human Health Concerns**

(i) Community Involvement:

It is commendable that Title I of the Clinton Administration's proposed bill underscores the significance of community input and protecting public health. Section 102 of Title I would be strengthened by a few modifications. Briefly, the proposal should require mandatory, early and more active citizen participation. As drafted, this section grants extensive discretion to government by attenuating public input until the remedial investigation/feasibility study (RI/FS) stage of the cleanup process. Instead of postponing public input until the RI/FS, the government should be required to solicit community views as early as possible during the initial site assessment phase. Moreover, citizens should be granted an enforceable right to participate throughout cleanup.

In my testimony before the Senate Committee on Environment and Public Works Subcommittee on Superfund, Recycling and Solid Waste Management (July 28, 1993), I provided a detailed plan for improving community access to and participation in the cleanup process, as well

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[10] Statement of Tom Goldtooth before the Committee on Government Operations Subcommittee on Legislation and National Security, U.S. House of Representatives, April 28, 1993.

as the Technical Assistance Grant Program. I, hereby, submit this statement for today's hearing record.

(ii) Human Health:

Multiple cumulative and combination exposures and synergistic effects are virtually unexamined areas of inquiry in terms of impact on communities of color and low income areas inundated with pollution sources. Favorably, Sections 106 through 108 of Title I center on multiple risk sources. These sections authorize pilot projects in communities experiencing disproportionate exposure, require assessment of multiple risks and augment the hazard ranking system (HRS) by adding multiple risk as a scoring factor. Studies mandated by these sections should be accompanied by an agenda which prioritizes cleanups in these areas. Sanctioning studies without creating a remedy leaves the effect of these provisions unclear. Equally important, nothing in the proposal responds to communities in distress by requiring EPA to re-score old sites under the new HRS.

If sites are re-scored under a revised HRS which contemplates multiple source exposure, more communities adversely affected by these hazards will be listed on the NPL and, thus, eligible for Superfund cleanup. Additional issues to be considered in the ranking hierarchy are socio-economic factors, lack of access to adequate health care, nutrition deficiencies, and other environmental factors which could elevate risks from exposure to hazardous waste.

The small number of pilot projects and project funding are other areas of concern. In view of the potential effects of multiple and disproportional exposures, ten demonstration projects in ten communities over five years is too few over too long a period of time

in relation to the numbers of affected people of color. Also, the $30 million authorization to finance this venture may be inadequate if circumstances in these areas are complex.

Notably, the titles concerning human health protection do not deal with the role of the Agency for Toxic Substances and Disease Registry (ATSDR),[11] problems associated with the role of ATSDR in cleanup decisionmaking, fulfilling the Agency's mandate to develop the Toxic Substances Disease Registry and conduct meaningful assessments of community health. As noted in my July 28, 1993, statement before the Senate, communities question the adequacy of assessments performed by ATSDR and the responsiveness of these assessments to citizen concerns. Public interest groups[12], community activists, GAO[13], as well as EPA[14] are aware of ATSDR's dismal history of reaching out to communities. Comprehensive Superfund reform must address these deficiencies.

C. **State Roles and Voluntary Response**

Titles II and III of the Administration's draft cover the state role in cleanups, facilitating voluntary cleanups and economic redevelopment. With regard to these three components there are three central issues. First, state implementation and enforcement of

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[11] 42 U.S.C. § 9604 (i).

[12] Inconclusive by Design: Waste, Fraud and Abuse in Federal Environmental Health Research, An Investigative Study by the Environmental Health Network and the National Toxics Campaign Fund, May, 1992.

[13] See generally, Superfund: Public Health Assessments Incomplete and of Questionable Value, (GAO/RCED-91-178, August 1, 1991).

[14] Environmental Equity: Reducing Risk for all Communities, Volume 2: Supporting Document, U.S. Environmental Protection Agency, June 1992, page 19.

environmental programs in communities of color and federal oversight of these programs must afford equal environmental protection. Concomitant with responsibility for equal environmental protection is the federal obligation to ensure that states are fulfilling this guarantee. Currently, decisions made by federal and state governments perpetuate unequal protection. Therefore, provisions in Superfund legislation which would confer upon states a greater role must ensure fulfillment of the obligation to cleanup communities of color facing hazardous waste risk. The United States government must retain the authority to take action when states cannot or refuse to do so.

Second, the Administration's economic development goals are laudable. However, caution is the watchword to prevent the law from encouraging placement of new polluting industries in cleaned up areas. Attention should be focused on locating economic development opportunities which will not replicate negative health and environmental consequences. Due to industrialization of residential communities of color, neighborhoods are faced with hazardous waste sites and other deleterious environmental exposures. The cornerstone of any scheme to reform Superfund is preventing repetition of these mistakes.

Third, consistently, communities of color and low income communities are coerced into choosing between jobs and environmental protection. While the Administration's objective to remove obstacles to redevelopment of contaminated sites is praiseworthy, Superfund must not exacerbate this dilemma.

D. Remedy Selection

(i) Cleanup Standards:

The core of Title V of the Administration's proposal relates to establishing generic cleanup standards for specific chemicals and a national protocol for conducting risk assessment. Sites located in areas where state standards are more stringent would be remediated to state levels instead of generic cleanup levels or federal site-specific risk-based levels. The provisions governing cleanup standards would be strengthened by adding language to limit EPA discretion to utilize site-specific risk assessments to instances where they are more protective of human health and the environment. In the past, site specific risk assessment has led to cleanup inconsistencies from region to region, state to state, city to city, and neighborhood to neighborhood.

Commendably, Title V encourages removal actions which, historically, have proven effective in eliminating immediate threats to health and the environment. However, this advancement is negated by provisions which encourage cleanup decisionmaking based on future land use without consideration of the impact of discrimination and segregation on land use planning and zoning in communities of color.

In the past, lack of access to the political process, red-lining by banks, other lenders and insurers, housing discrimination, economic and educational disadvantages have adversely affected the mobility and quality of life of people of color. These disadvantages are manifested by incompatible land uses, i.e., residential neighborhoods surrounded by pollution sources. Cleanup decisions based on future land use that fail to address these defects will perpetuate

discrimination.[15] The Administration's proposal creates community working groups (CWG), ostensibly, which will assist with determining future land use. Even so, it appears that the voice of an affected community could be diluted by other interests represented on the CWG. Furthermore, the proposal should include a presumption of residential use in cases where people are living on or adjacent to a site.

(ii) Remedial Alternatives:

Section 503 of Title V eliminates the statutory preference for permanent treatment remedies. Permanent treatment is recommended only for discrete areas where wastes are highly mobile and highly toxic. However, those sites or areas which don't meet this criteria are vulnerable to a preference for containment technologies which could fail to eliminate risk. If a containment remedy is selected, the Administration's proposal does not provide assurances that institutional controls will be established and continuous monitoring will occur to safeguard the integrity of the site and public health over the long term.

II. THE LIABILITY SCHEME

Consistently, critics of the Superfund program cite existing impediments to achieving the original risk-elimination objective of the statute -- accomplishing effective, efficient hazardous waste cleanups which are protective of human health and the environment. The regulated community, community organizations, public interest groups and experts agree that the pace of site cleanups is slow. At the end of FY 1993, only 52 of these sites have been cleaned up and deleted

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[15] "Future Use Would Continue Past Inequities," D. Ferris, The Environmental Forum, November/December 1993.

from the NPL, and out of nearly 1300 sites, remedial action has begun at only 541.[16] Although over the past 3 years the pace of cleanup has been somewhat faster, there is a considerable backlog of sites in communities that have yet to be evaluated by EPA for inclusion on the NPL.

To increase the numbers of completed cleanups, the Agency has shifted focus away from the crucial task of evaluating sites, many of which are in communities of color. An examination of the FY 1993 targets reveals that while remedial design and remedial action work has accelerated, several regions have fallen short of their targets for site investigations.[17] As a result of the emphasis on pace of cleanups, the liability scheme and transaction costs have further diverted attention and resources away from the most critical problems, i.e., getting sites listed so that federal cleanup action can be initiated.

Critics point to mounting cleanup costs including high administrative costs, contract mismanagement and wasted trust fund resources. Citizens are concerned about whether cleanups are protecting human health and the environment. The permanence of remedies is uncertain and the long-term efficacy of cleanup remedies is unclear. The most intensive focus of criticism relates to claims that transaction costs associated with Superfund enforcement and the liability scheme escalate expenditures by government and private parties alike. Among insurers and responsible parties in Superfund

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[16] 4th Quarter FY 1993 Superfund Management Report, December 6, 1993.

[17] 4th Quarter FY 1993 Superfund Management Report, December 6, 1993; 4th Quarter FY 1993 Targets and Accomplishments Report, September 30, 1993, U.S. Environmental Protection Agency.

cases, the surrogate for cost-cutting across-the-board is eliminating retroactive strict, joint and several liability.

These concerns, as well as recommendations to improve EPA performance in cost-cutting are well-documented. However, it is important to note that experts agree that costs can be reduced within the present liability system. While some parties and insurers have called for changes to the Superfund enforcement and liability system to reduce litigation (which is cited as the principal reason for cleanup delays) and transaction costs as the most critical cost-cutting measures, before such a change can be justified, the federal government should explore the possibility of streamlining the cleanup process and reducing costs within the present system.

For example, one area that has significant impact on the effectiveness and cost of cleanup is technology. The Agency's inability to develop innovative technologies, identify cleanup technology needs, and compile reliable cost and efficacy data contribute to high costs and are additional areas of inquiry with regard to implementing improvements within the present system.[18] Also, emphasis on improving contract management controls and oversight, as well as scrutiny of the high percentage of trust fund monies expended on Agency administrative costs by EPA and Congress is warranted.[19]

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[18] Superfund: EPA Needs to Better Focus Cleanup Technology Development, (GAO/T-RCED-92-92, September 15, 1992).

"Superfund: Progress, Problems and Reauthorization Issues," Statement of Richard L. Hembra, Director, Environmental Protection Issues, Resources, Community and Economic Development Division, April 21, 1993.

[19] Superfund: EPA Cost Estimates Are Not Reliable or Timely, (GAO/AFMD-92-40, July 29, 1988).

Additionally, a better-managed enforcement program and stepped-up cost recovery actions accompanied by regular evaluations of the adequacy of ongoing cost recovery efforts is likely to achieve cost savings.[20] Under existing law, EPA has not aggressively pursued the use of settlement authority which, according to GAO, could reduce some of the more controversial litigation connected with the program. GAO reports that use of settlement tools is not encouraged among EPA regional offices and their use is not fully operational, but usually is limited to pilot projects in selected regions.[21]

Presently, the consequences of changing the liability standard are unknown and there is insufficient information to show that the

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Superfund Contracts: EPA Needs to Control Contractor Costs, (GAO/RCED-88-182, July 29, 1988).

EPA's Contract Management: Audit Backlogs and Audit Follow-Up Problems Undermine EPA's Contract Management, (GAO/RCED-91-5, December 11, 1990).

Superfund: EPA Has Not Corrected Long-Standing Contract Management Problems, (GAO/RCED-92-45, October 24, 1991).

[20] "Superfund: EPA Action Could Have Minimized Program Management Costs," Statement of Richard Hembra, Director, Environmental Protection Issues, Resources, Community, and Economic Development Division, July 10, 1993.

Superfund: A More Vigorous and Better Managed Enforcement Program Is Needed, (GAO/RCED-90-22, December 14, 1989).

[21] "Superfund: Little Use Made of Techniques to Reduce Legal Expenses," Statement of Richard Hembra, Director, Environmental Protection Issues, Resources, Community, and Economic Development Division, June 30, 1993.

"Superfund: Techniques to Reduce Legal Expenses Have Not Been Used Often," Keith Fultz, Director of Planning and Reporting, Resources, Community and Economic Development Division, November 4, 1993.

"Superfund: Limited Use Made of Techniques to Reduce Legal Expenses," Keith Fultz, Director of Planning and Reporting, Resources, Community and Economic Development Division, November 8, 1993.

liability scheme is slowing the process in communities of color. For example, an examination of how long it takes to complete RI/FS studies demonstrates that there is a difference between Fund-led cleanups and those involving responsible parties where liability is at issue. It only takes EPA approximately 9-10% longer to complete an RI/FS in Fund-led cleanups.[22] There is an expectation among proponents of this change that ipso facto industry and government will hire fewer lawyers, pay fewer legal and expert fees, sue less and the cleanup process will be streamlined. There is insufficient information, however, about the ultimate impact in terms of whether the change will actually result in speedier, more effective cleanups. Furthermore, in the absence of information about the consequences, changing the liability standard cannot be justified without first attempting to reduce costs within the present system. Instead of enacting a new program which, essentially, nullifies the standard, Congress should explore a pilot program which tests the efficacy as a cost-reduction measure of such new initiatives as allocation.

A. Liability and Allocation

(i) Final Covenants Not To Sue and Discretionary Covenants: Section 408 of Title IV modifies EPA authority to issue covenants not to sue. Deleting CERCLA § 122(f)(1) and replacing it with the proposed language repeals a key rubric of existing law which mandates that all covenants not to sue must be in the public interest.[23] Final covenants not to sue must be conditioned upon achieving adequate protection of health and the environment.

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[22] Supra, note 18.

[23] 42 U.S.C. § 9622(f)(1)(A).

Title IV also deletes CERCLA § 122(f)(3), which provides assurances that remedies will be completed prior to issuance of governmental releases for liability. Without § 122(f)(3), the public must rely solely on government foresight related to covering unexpected costs and the "premium" which would be assessed under the Administration's proposal to ensure that sites are completely cleaned up. The potential deficiencies of this approach are acutely important in view of the absence of a citizen role in deciding about releases from future liability.

Section 122(f)(4) of CERCLA also is eliminated.[24] These seven factors form criteria integral to determining the appropriateness of a covenant not to sue. They are:

(a) the effectiveness and reliability of the remedy, in light of the other alternative remedies considered for the facility concerned;

(b) the nature of the risks remaining at the facility;

(c) the extent to which performance standards are included in the order or decree;

(d) the extent to which the response action provides a complete remedy for the facility, including a reduction in the hazardous nature of the substances at the facility;

(e) the extent to which the technology used in the response action is demonstrated to be effective;

(f) whether the Fund or other sources of funding would be available for any additional remedial actions that might eventually be necessary at the facility; and

(g) whether the remedial action will be carried out, in whole or in significant part, by the responsible parties themselves.

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[24] 42 U.S.C. § 9622(f)(3).

Finally, the Administration's proposal appears to be silent on retaining liability for natural resources damages and criminal activity.

(ii) De Micromis Liability:

Section 403 appears to define small parties who are exempted from liability for response costs. If this section is intended to address the problems associated with so-called de micromis parties, it falls short of addressing their concerns. Struggling small businesses, some of which are operated by entrepreneurs of color, disadvantaged by suits for contribution will remain unprotected by the Administration's proposal. The amounts of contribution which characterize the de micromis exemption from liability in Section 403 ("contributed less than 500 pounds of municipal solid waste [garbage] or 10 pounds or liters of materials containing hazardous substances") are so low that very few parties will ever qualify for the exemption. Small businesses or individuals could easily contribute more than 500 pounds of garbage at any one site in a matter of months.

(iii) Expedited Final Settlements:

Section 408(k) appears to create an expedited procedure for resolving de minimis and de micromis liability. However, the procedure is discretionary and the language fails to establish timing. Without safeguards to limit the Administrator's discretion, there is no assurance that the Agency will aggressively pursue expedited settlements for de minimis and de micromis parties.

(iv) Prospective Purchaser Liability:

Section 403(b) and Section 605 cover prospective purchaser liability. The definitions in Section 605(i) are particularly problematic. On its face, the Administration's proposal combines the term "bona fide prospective purchaser" with de minimis and innocent landowners. In EPA's June 6, 1989 guidance document, the Agency defines a prospective purchaser as a person who or entity that wishes to purchase property but seeks to limit future liability.[25] In accord with this definition, they do not currently own the property, are not otherwise involved with the site and, therefore, are not yet liable under existing law.

The Administration's proposal changes that definition so that it applies retroactively to current owners. This confuses defenses available to de minimis innocent landowners and could result in expanding those defenses to ineligible parties. It is unclear whether this is an intended result.

Several key components of EPA's guidance document are omitted from Section 605(i). Safeguards afforded under the guidance not contained in this section are the mandate imposed on prospective purchasers to (1) exercise due care and (2) not aggravate or contribute to releases at the site. In addition, under the current guidance, prior to entering into a prospective purchaser agreement, the government is required to consider health impact, financial viability of the prospective purchaser, and effects on the community. Without these safeguards, communities exposed to hazardous waste risk are vulnerable

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[25] "Guidance on Landowner Liability Under Section 107(a)(1) of CERCLA, De Minimis Settlements Under Section 122(g(1)(B) of CERCLA and Settlements With Prospective Purchasers of Contaminated Property," U.S. Environmental Protection Agency, June 6, 1989.

to non-viable or irresponsible purchasers who may perpetuate or exacerbate the hazards posed by the site.

(v) Allocation Procedures:

Section 409 of the Administration's proposal creates an allocation system for dividing site response costs among responsible parties. Based on the premise that community participation will yield government accountability to those whose health and environment it is obligated to protect, the proposal fails to establish a public role. Early public participation avoids excessive delays which could be caused by communities who are understandably suspicious about a closed decisionmaking process. An open allocation process will encourage decisionmaking in the public interest. Equally important, diluting the impact of retroactive strict, joint and several liability may eradicate existing incentives to waste minimization, reduction of toxics use, recycling, reuse and techniques to advance pollution prevention.

Another area of concern is the language regarding non-binding allocations. It is unclear why the government selected non-binding in lieu of a binding allocation scheme. If response cost allocation is the goal, the scheme utilized must be expeditious and constitutionally sound. Unless due process requirements are met, there is a likelihood that the allocation efforts will result in constitutional challenges. Congress should instruct EPA to undertake a detailed constitutional analysis of the legality of this binding/non-binding scheme.

Finally, the factors listed on Page 77 of the Administration's proposal should include the impact of the site on the socio-economic status and health of adversely affected communities. Other equitable factors, such as degree of care (E), degree of involvement (D), and

degree of cooperation (F) are taken into consideration in determining allocation of percentage shares. Instead of being considered in a vacuum, they should be considered in the context of the community where the disposal took place. For example, the existence of an abandoned hazardous waste site may have contributed to the reluctance of new business to locate in the area, job loss and elevated health risks.

(vi) Funding of Orphan Shares:

Proposed Section 409(e) governs funding of orphan shares. The Administration's proposal sets aside $300 million per fiscal year to pay unallocated shares at sites. This figure is a cap on the amount the government will pay in any given year, and it is unclear how or if orphan shares will be paid if the cap is exceeded. In addition, it appears as though the language in this provision creates an industry entitlement to reimbursements for costs incurred that are attributable to the orphan share. The question is where is the source of this $300 million since there are no new taxes associated with funding the orphan share? On its face, this proposal creates the potential for diverting funds from site cleanups in order to reimburse industry for orphan shares. Once funds are diverted, communities of color are likeliest to be hardest hit.

Conclusion

Core provisions of the "Superfund Reform Act of 1994" promote the concept of fairness to industry. Presidential efforts to ensure that industry parties are not unfairly treated are commendable. Efforts to protect human health and the environment must be equally vigorous, particularly in the cases of those most susceptible to adverse health

effects, such as sensitive populations and people who are disproportionately exposed.

Favorably, the President's reform proposal moves forward the environmental justice agenda by factoring in multiple exposures, creating community working groups and fostering public involvement. This testimony recommends additional improvements to the draft bill which would balance the Superfund cleanup process to promote the interests of communities adversely affected by hazardous waste sites, both those on the NPL and those which need to be listed.

Mr. SWIFT. Thank you, very much, Ms. Ferris. I recognize now, Harriet James.

STATEMENT OF HARRIET JAMES

Ms. JAMES. Good morning. I am Harriet James. I am here today representing the National Federation of Independent Business. The NFIB is the Nation's largest small business advocacy organization, representing more than 600,000 members nationwide. Mr. Chairman, thank you for inviting NFIB to testify on what small business owners view as the most critical element in Superfund reform, the liability structure.

In 1980, Congress may have envisioned a system that would only catch a few large intentional or irresponsible polluters. However, the reality has been very different. We now have over 25,000 parties that are responsible in Superfund lawsuits, many of which are small businesses. We have all heard many horror stories, but overwhelmingly, our membership has indicated that the liability scheme in the current statute is where reform is vital.

While numerous proposals have been brought forward to reform the liability problem, there is no perfect solution. Therefore, NFIB has not taken a position on any particular proposal. The bill that was recently introduced on behalf of the administration contains some very laudable ideas as well as others, that raise significant concern for us.

At this point, I would like to outline an agreement that is the product of many months of discussions between two very unlikely allies, the small business community and the environmental community. While our perspectives are vastly different, we desired similar end results, the settlement and clean up of Superfund sites in an expeditious manner.

The NFIB, the Printing Industries of America and the Small Business Legislative Council, in conjunction with the Environmental Defense Fund, the Natural Resources Defense Council, and the Sierra Club, believe that the following recommendations will adequately address small business concerns without jeopardizing Superfund's environmental objectives.

This agreement is a delicate balance which we hope the subcommittee will seriously consider including in any Superfund reform legislation that it reports.

First, our agreement establishes an expedited, streamlined allocation process similar to that included in the administration's proposal, that will quickly allocate responsibility among all parties involved at a Superfund site. All parties would be protected from third party lawsuits during the entire allocation process and after a settlement process is reached.

We are all aware of the lengthy timeframe from the issuance of the 104(e) letter to the final determination of liability. While this unknown liability is a major concern for all PRP's it is often a survival test for small business. Our agreement proposes an expedited allocation process that must be completed within 18 months. Additionally, we believe that the designation of *de minimis* parties should be made within that same timeframe.

We recommend that the *de minimis* parties be entitled to a complete release of liability if they agree to pay their fair share of

clean up costs plus a premium that would reflect the uncertaint of such cost projections.

As the subcommittee is aware, EPA has a propensity to dismiss such imposed deadlines. In order for us to ensure that these deadlines are met, we propose that if the 180 day deadline for allocation is exceeded by more than 2 months, the premium for small business is forfeited by EPA. If EPA's deadline is exceeded by more than 4 months, small business *de minimis* parties will not be required to pay the premium or their share of cleanup costs unless EPA can show just cause.

Further, the allocator has the option of designating small business *de micromis* parties. If declared, these parties would not be subject to a settlers premium. Along these lines, the administration's bill also recognizes this separate class of small contributors. However, the threshold step for qualifying as a *de micromis* party under the administration's bill is overly restrictive.

One of the most crucial aspects of the administration's bill is the ability to pay test. While the bill briefly mentions such a provision, the language is vague at best. As the subcommittee is aware, nothing is gained either for the environment or for the economy, when businesses are forced to close their doors due to an unreasonable settlement offer.

An additional important protection is included in our agreement for those businesses having 20 or fewer employees and $1.8 million in annual revenues. For those falling under this threshold the burden of proof would fall on the government to show that the small business owner can indeed pay their share.

The administration's bill continually refers to small business. However, nowhere in that bill is it defined. We have included in our agreement a definition that incorporates an employee threshold such as 100 employees or fewer, and uses the definition included in the Small Business Act. We also, like the administration, recommend requiring EPA to develop procedures for a structured settlement process whereby small business has the option of fulfilling their Superfund obligations over a period of time.

Finally, we suggest that a small business assistance section be established at EPA that would disseminate information on Superfund and the allocation process, and serve as a facilitator in that process.

As an aside, NFIB would like to applaud the intent included in the administration's bill to clarify EPA's statutory authority to implement their current rule on lender liability. Access to capital as we all know, is the life blood of small business.

Mr. Chairman, we feel that this agreement addresses most of the concerns that our members have expressed with Superfund, and we feel that these can easily be incorporated into the context of legislation now being put forward. If passed, we think these reform suggestions will dramatically reduce the unnecessary litigation, ensure that money will indeed go toward its intended purpose and, most importantly, that sites will be cleaned up.

We thank you for this opportunity and for your interest in the small business concerns with Superfund. I will be pleased to answer any questions you may have.

[The prepared statement of Ms. James follows:]

NFIB
National Federation of
Independent Business

STATEMENT OF

HARRIET L. JAMES
LEGISLATIVE REPRESENTATIVE

NATIONAL FEDERATION OF INDEPENDENT BUSINESS

Subject: Superfund Reform

Before: Subcommittee on Transportation and Hazardous Materials
Committee on Energy and Commerce

Date: February 10, 1994

Good Morning. I am Harriet James and I am a legislative representative for the National Federation of Independent Business (NFIB). The NFIB is the nation's largest small business advocacy organization, representing more than 600,000 small business owners in all fifty states. The typical NFIB member has five to eight employees and grosses $250,000 in annual sales. Our membership reflects the general business profile in that we have the same number of retail, service, manufacturing, and construction businesses that make up the nation's business community. NFIB sets its legislative positions and priorities based upon regular surveys of its membership.

I want to thank you, Mr. Chairman, for inviting NFIB to testify before this subcommittee. I commend you for dedicating this hearing to what small business owners across America view as the most critical element in Superfund reform---the liability structure. No issue in this very complex public policy debate will have a more direct impact on the present and future economic viability of many small businesses than this section. Today, I would like to express our member's concerns with Superfund and outline an agreement that has been reached between the small business community and the environmental community.

Superfund's Unintended Effects

We know that when Superfund was originally passed in 1980 it was commonly believed that the number of hazardous waste disposal sites and the costs to clean them up were relatively small and the process for identifying those responsible for clean up would be relatively simple.

We now have a 13 year history that graphically paints another picture. We now have exorbitant clean up costs, lengthy delays, a lawyers' bonanza, and thousands of businesses caught in the trap. Today's system is fraught with the wrong incentives: incentives to prolong clean up, incentives to continue expensive litigation, incentives to drag even the smallest contributors through the lengthy process, and even incentives for EPA to turn its head in some areas.

When examining the few sites that have been cleaned up, the costs associated with such cleanups, coupled with the staggering amount of money that has gone directly to lawyers' coffers, it is easy to see that the fault and liability system currently in Superfund is flawed. Congress may have envisioned a system that would only catch the few, large, intentional or irresponsible polluters, however, the reality has been very different. We now have over 25,000 different potentially responsible parties named in Superfund lawsuits. Obviously, a majority of these are not of the Fortune 500 list, but are small businesses.

Since Congress last reauthorized Superfund, we have experienced an increasing number of complaints and questions from our membership. The effect of the current liability system is permeating all segments of the small business community. There isn't one segment whether it be a retail store, a professional service business, or a construction business that has not been touched.

Small Business Attitudes

It is important to keep in mind the unique nature of a small business owner when you examine their reaction to environmental legislation. Small business owners wear many hats. Two of the most important are being both a business owner and a citizen of a community. They drink the water, breathe the air, and fish in the lakes. They want a healthy environment both for themselves and their children. Our members have indicated to us through our surveying that they believe in the "polluter pays" concept and have shown that they are willing to pay a bit more for a clean environment. But in return they also expect the government to be fair and responsible. It is this lack of fairness and responsibility in the area of Superfund that is causing a groundswell of anger, distrust, and in many cases, despair.

We have all heard the horror stories such as the pizza parlor owner in New York who was named a PRP for throwing out her pizza boxes. It was with the continuing emergence of these kinds of stories that NFIB began asking our members questions about Superfund in an effort to identify their specific concerns. Overwhelmingly, our membership indicated that the liability scheme in the current statue was the area they felt needed the most reform.

I would like to call your attention to a study undertaken by the American Council for Capital Formation (ACCF) in conjunction with the NFIB. This recent study surveyed small business PRP's and asked numerous questions about their experience with Superfund. Approximately 70% of the 5,000 small PRP's surveyed indicated that the liability system was the major burden of Superfund. Only 16% expressed a major concern over clean up standards and 14% named the remedy selection as the most burdensome. Thus, our focus has been on the liability system and how to make it more equitable and efficient for the small business owner.

Liability--Small Business Concerns

What are the small business problems with regard to liability? They are three-fold. First, the nature of Superfund encourages litigation. In most cases, our members are roped into the process by being named as a PRP in a third party lawsuit. They are then forced to spend thousands of dollars defending themselves for actions they many times knew nothing about or have no records of to prove their innocence.

Second, many times small polluters could be eliminated from the lengthy settlement process through de minimis settlements. Unfortunately, the EPA has not placed an emphasis on offering such settlements. Most small business owners will tell you they receive very little cooperation in this regard from EPA. Many small businesses would qualify for such settlements and, the fact that they are not encouraged or utilized increases the bottleneck in cleaning up sites.

Third, the retroactivity of the statute compounds what business owners find hard to believe about the Superfund law--that is that they can today be held responsible for past actions that were legal at the time they were undertaken.

With the large number of small businesses already entwined in this web and with the increasing threat of thousands more in the future, NFIB's goal is to achieve meaningful reform in this Congress. We have had discussions with many key decision makers in an effort to develop appropriate reform of Superfund's liability system. Through these discussions, several points became apparent. There was a great desire to move a bill this year; a consensus document written by the National Commission on Superfund was embraced by many in the Administration and on Capitol Hill, and finally there appeared to be a desire by many to address the unique problems small business owners are facing with Superfund. With these points in mind we began examining different proposals.

Superfund Reform Proposals

Despite the fact that there are numerous proposals being advocated to resolve the Superfund liability problem, there is no perfect solution for small business owners. Therefore, NFIB has not taken a position on any particular proposal.

The bill that you recently introduced on behalf of the Administration serves as a valuable marker in forwarding the debate this Congress. It contains some excellent ideas as well as others that raise our concern.

Your bill will certainly help to streamline and expedite the allocation process. It's ban on third party liability is an essential ingredient if the system is to be successful. This will alleviate much of the litigation that now plagues the current system and has caused small business owners great concern. I commend the authors for placing an emphasis on creating a de minimis settlement process that is both workable and timely. We also applaud the recognition that the smallest, most trivial contributors to a site, the de micromis parties, should be exempt from the process. These minuscule contributors serve no purpose but to delay the process and hinder the ultimate goal.

Finally, the NFIB has long been an advocate of clarifying a lending institution's environmental liability. The lack of clarity as it applies to a lender's liability has had great consequences on the amount of credit available to certain types of small businesses. We have often heard our member's stories of expensive pre-loan environmental audits and monetary requirements as well as the caution of banks that just don't want to take a chance in loaning money to a potentially risky business. We fully support the intent of the proposed bill to grant EPA statutory authority to implement its current rule on lender liability. In light of the recent court ruling which rejected the EPA rule, we urge you to push forward clarification before the fear in the lending community worsens.

Mr. Chairman, there are several provisions that NFIB would like to see clarified or that we have concerns about. While references are made throughout the bill to "small business," there is no definition of what constitutes a small business. We suggest that you include a definition that incorporates an employee threshold and is defined as a small business by the Small Business Act.

One of the most crucial aspects of the proposed bill is the ability to pay test. While the bill briefly mentions such a provision, the language is vague and evasive. A stronger definition that does not leave the burden on the small business owner to bring forward information and initiate the process would be preferable. Most small business owners are not aware that such a test is even available to them, much less that they should have to initiate the process. We feel that this test should be an automatic one in which the small PRP is required to provide all the relevant financial documents.

As I indicated earlier, the recognition of a separate class of very small contributors is commendable. However, the thresholds set for qualification as one of these de micromis contributors is so low that very few businesses will qualify. The one pound or one liter of hazardous substance or 500 pounds of municipal solid waste will be impossible for even many retailers or professional offices to meet. While we do want polluters to pay, this low marker will ensure that virtually everyone is still in the process. We strongly urge you to consider a somewhat higher threshold.

An additional concern would be the lack of an explicit structured settlement process. In finding the delicate balance between obtaining money for clean up and allowing a small business to maintain its viability, a structured settlement process makes sense. It would allow for the government to recover money and the business to pay its share over a specified period of time.

Finally, we applaud the stated intention that EPA meet certain time deadlines set forth in the allocation process. These deadlines, both for the commencement of the allocation process and for de minimis settlements, are a necessary ingredient in order to have a more expeditious and decisive process. We feel that such prompt determinations are an essential element if a reformed process is to succeed. However, we have all seen that EPA has a propensity to dismiss such imposed deadlines. Therefore, we suggest that incentives need to be included in order for EPA to meet such timeframes. In fact, I will suggest such incentives later in my testimony.

Small Business/Environmental Community Proposal

Mr. Chairman, I would like to share with you and the other members of the subcommittee the outline of a proposal to address many of the small business problems associated with Superfund. This proposal is the product of many months of discussions between two unlikely allies---the small business community and the environmental community.

We originally approached Superfund reform from distinctly different perspectives. However, it became apparent that a similar end result was desired. The NFIB, the Printing Industries of America, and the Small Business Legislative Council in conjunction with the Environmental Defense Fund, the Natural Resources Defense Council, and the Sierra Club believe that the following recommendations will adequately address small business concerns without jeopardizing Superfund's environmental objectives.

The following are changes that can be made to the current Superfund program and that can easily be incorporated into the Administration's bill:

First, the elimination of third party litigation. We are all aware that too much money finds its way into lawyers coffers, not into the cleaning of the contaminated site. We propose a prohibition on third party liability litigation, and would replace it with a streamlined, expedited, and informal proceeding to quickly allocate responsibility among all parties involved in a Superfund site. Small businesses would be protected from third party lawsuits during the entire allocation process and after a settlement has been reached.

Second, one of the reoccurring problems for small business owners is that when a share is finally determined, small business owners assume that this is the end of their financial obligation. However, in reality, these settlement agreements are often challenged by other PRP's. To eliminate this injustice, we propose a ban on legal challenges to settlements reached in the allocation process. We also recommend that small business de minimis parties be entitled to complete release of liability if they agree to pay their share of clean up costs plus a premium that would reflect the uncertainty of such cost projections.

We are all aware of the lengthy timeframe from the issuance of the 104(e) letter to the final determination of liability. While this unknown liability is a major concern for all PRP's, it is often a survival test for a small business. For businesses that exist on a very low profit margin, this huge unknown has a dramatic impact on their investment and expansion decisions, their employment decisions, and most importantly, a detrimental effect on the amount of credit that is available to them from the lending community.

What our organizations propose is an expedited allocation process that must be completed no longer than 18 months after its commencement. Additionally, we believe that there should be an allocation process for de minimis parties and this determination should be made no later than 180 days after commencement of the overall allocation process. In order to ensure such deadlines are met, we propose that if the 180 day deadline, which is mirrored in the Administration's bill, is exceeded by more than two months, the small business premium is forfeited. If EPA's deadline is exceeded by more than four months, small business de minimis

parties will not be required to pay the premium or their share of clean up costs unless EPA can show just cause. Further, the allocator has the option of designating small business de micromis parties. If declared, these parties would not be subject to a settletor's premium.

A key element in this compromise for the small business community was creating an ability to pay definition that would become a required criteria when assessing a small businesses contribution. We feel we have a reasonable definition that will help all small businesses maintain their business operations without having to declare bankruptcy. Nothing is gained -- either for the economy or for the environment -- when businesses are forced to close their doors due to an unreasonable settlement offer. An additional protection is included for those small businesses having 20 or fewer employees and an annual revenue of $1.8 million dollars. For those falling under this threshold, the burden of proof would fall on the government to show that small business owners can indeed pay their share.

We also recommend requiring EPA to develop procedures for a structured settlement process whereby small businesses have the option of fulfilling their Superfund obligations over time. And finally, we suggest that a small business assistance office be established at EPA. This office would act as a disseminator of information on Superfund and the allocation process. A small business facilitator would be made available through this office to advise and assist small business owners involved in the allocation process.

Conclusion

Mr. Chairman, we feel that this agreement addresses most of the concerns that our members have expressed. If passed, we think these reform suggestions will dramatically reduce unnecessary litigation, ensure that money will go towards its intended purpose, and most importantly, that sites will be cleaned up in a timely manner. We believe these recommendations are structured so that they may easily be incorporated into the context of legislation now being put forward. We thank you for this opportunity and for your interest in the small business concerns with Superfund. I will be pleased to answer any questions you may have.

Mr. SWIFT. Ms. James, thank you very much. I recognize Mr. Reilly.

STATEMENT OF BERNARD REILLY

Mr. REILLY. Good morning Mr. Chairman and members of the subcommittee. My name is Bernie Reilly. I am corporate counsel for Dupont. I am delighted to be here today, to testify on behalf of CMA, the Chemical Manufacturers Association. Today, I will focus my remarks on the administration's liability plan.

The good news is that the plan acknowledges the need for an allocation system and would use the trust fund to pay for some of the orphan shares of the clean up. The other good news is, the plan recognizes this can be done without raising taxes. The bad news is, the administration's allocation system is not binding on the parties or on EPA. That means years of negotiating and years of litigating, because the allocator has no power to resolve anything.

We would like to suggest to this subcommittee, that you look to another bill to address the entrenched problems with Superfund liability. H.R. 3624, Congressman Boucher and Upton's liability reform proposal would thoroughly reform the liability process, inject a large dose of fairness into the system, and squeeze most of the litigation out. The Boucher/Upton system would have a mandatory and binding allocation process, a process that will end most of the legal wrangling that now adds huge costs and endless delays to cleanups.

Their plan creates an orphan share paid entirely by the trust fund. That means PRP's only pay for what they contributed to the site. They pay their fair share. Using the fund to pay for the entire orphan share would also give EPA a healthy incentive to bring all the parties to the allocation table and to select cost effective clean up remedies.

The Boucher/Upton plan is fair to small contributors at a site by allowing them to cash out early in the process, and it retains a section 106 provision that gives EPA the authority to order parties to clean up sites. The Boucher/Upton bill embraces principles well received by the EPA NACEPT Committee, and corresponds to the National Commission's liability recommendations.

With such broad support for a binding allocation process to make fair divisions of responsibility we are, frankly, disappointed that the administration is moving in the opposite direction. Let me briefly highlight our concerns with the administration's approach.

First of all, it relies heavily on non-binding allocations performed by neutral, private parties. There is no requirement for the PRP's to participate in the process. Some will simply choose not to, as they do currently. In addition, the private arbitrators cannot compel the PRP's to provide them with information. They will not have all the information they need to assign shares for clean up.

When the arbitrator's decisions are issued, parties, including EPA, are not bound by the decisions. They do not have to settle on these terms. As a brief illustration, say the arbitrator decides after 2½ years of study that the Dupont Company's rightful share of clean up costs at a site is 12 percent. Under the administration proposal EPA could reject that sum or tack on a premium.

The Agency is empowered to ignore the arbitrator's decision and assign the company with what EPA deems is the right amount. If EPA decides that Dupont's shares should really be 20 percent and Dupont balks, then we are really in a box. EPA would then be allowed to sue Dupont for all of its unrecovered costs, including the orphan share.

I can think of a lot of ways to describe the system, but fair is not one of them. Non-binding arbitrations are inherently unworkable. We have tried hard to understand why the administration has chosen such a system because that is what we have had for the last 14 years. Frankly, we are puzzled. We have heard about due process considerations but there is nothing in writing to indicate that this is a serious legal issue.

Another major problem with the administration's plan is that it places strict limits on payments of orphan shares from the trust fund. If a remedy is selected before the plan is enacted, the administration says the trust fund would pay none of the orphan share. Many sites that will cost millions and hundreds of millions to restore fit this description.

Even for new cleanups, share is attributed to unknown PRP's that are not eligible for funding. Plus, funding for the orphan share can not exceed $300 million in any one year. That amount must cover not only the fair shares of insolvent PRP's but also, the shares of municipalities and small business would get special relief under the administration plan.

The bottom line is that many PRP's will end up paying far more than their rightful share of clean up costs at Superfund sites under the administration proposal. The administration missed other opportunities to improve the program management of Superfund. For example, the bill does not even direct EPA to identify all possible parties at a site. That means the Agency can continue to cherry pick the names of the parties and submit them to the allocation process.

The administration plan also does not go nearly far enough to correct the imbalances in the current liability system. The Boucher/Upton bill does, Mr. Chairman. It embraces an approach that has won the support of business and environmental groups, it keeps the polluter pays principle in, it deals the lawyers out. It will speed clean up and lower unnecessary costs.

We urge the subcommittee to make the Boucher/Upton bill the liability portion of any comprehensive Superfund reauthorization legislation. Mr. Chairman, we want to thank you for your leadership on this issue, and for starting the reauthorization ball rolling. We look forward to testifying on the remedy selection hearing. CMA is committed to working with you and other members of the subcommittee in the following months to get true and lasting reform of the Superfund program.

Mr. SWIFT. Mr. Reilly, thank you very much. I recognize now, Mr. Dennis Minano.

STATEMENT OF DENNIS MINANO

Mr. MINANO. Thank you, Mr. Chairman. My name is Dennis Minano, and I am vice president of General Motors Environmental and Energy Staff. I am here today representing the American Auto-

mobile Manufacturers Association. Mr. Chairman, we appreciate your including us on this panel.

The AA member companies have been involved with the Superfund program since its inception. Thus, we have a substantial practical experience with the program. Our industry commends the administration and this subcommittee, for their commitment to resolve the problems with Superfund through reform. Administrator Browner's commitment to seek meaningful dialogue on this topic was reflected in her formation of the NACEPT Subcommittee on Superfund Reform.

We think the NACEPT process demonstrated how diverse parties can work together, and that any reform bill must be evaluated in its entirety. Our industry has been asked to address the liability sections of this proposal. We will have comments about the bill's other important provision as the dialogue continues.

We are pleased that several of AAMA's earlier suggestions have been incorporated into the administration's proposal. For example, payment by the government of orphan shares. We favor an allocation process that creates incentives for participation and rewards participants with certainty that their liability will not exceed their allocated or fair share.

We support a non-binding process, similar to the one proposed by the administration. We think a properly designed and implemented non-binding process can be effective in achieving some settlements. As I use the term, non-binding means that the process is incentive driven rather than compulsory. It also means that the allocations could be performed by someone other than a government agency. A non-binding process would enable the system to utilize the services of independent allocation consultants, and avoid potential concerns regarding bias toward a small orphan share.

A non-binding process would also eliminate the potential problems and transaction costs associated with judicial review of allocation. While we believe the proposal represents a major step in the direction of fairness, we believe that the proposal needs to be improved in a number of key respects, to produce a workable allocation and settlement process.

The necessary changes include the following. First, shares attributable to unidentified PRP's should not be arbitrarily allocated to PRP's willing to pay their fair share. Second, settlers should not be forced to pay the cost of pursuing recalcitrants. Third, the government should not be allowed to unilaterally reject the results of the allocation process. Fourth, the contribution to orphan shares should not be subject to a cap on an annual basis.

I would like to address these points in more detail. A major weakness in the current system has been inadequate PRP identification. The proposed changes to section 104(e) and the addition of subpoena power will help this problem, so long as the Agency uses its authority aggressively and timely disseminates the information to all PRP's. It is vital to the proposal's fairness, to assure as many PRP's are brought in as possible. We need to strengthen the incentives for EPA to do the PRP research correctly the first time.

We are pleased that the proposal provides statutory criteria to guide the allocator. We believe that additional improvements to

this criteria can be made to ensure that the allocation properly reflects the degree to which the party's involvement at the site impacts the cost of remediation.

We are concerned about the 10 percent aggregate limitations on transporters and generators of municipal solid waste, especially when they are often commercial and private companies who are in the waste business. In addition, the bill's proposal to allocate to identified PRP's any shares for waste whose source cannot be identified is a severe disincentive to settlement. There is no reason why parties, willing to pay their fair share, should also be forced to bear this additional burden.

If the government cannot identify the source of some waste, then the funds should be used to cover those shares.

We support the concept of early out for all *de minimis* contributors. We also support the long term payout of those PRP's who would otherwise be bankrupted by the process. However, we are very opposed to requiring participating PRP's to pay a premium to offset the government's pursuit of parties that are not willing to settle. This amounts to a penalty against those parties that have acted most responsibly.

EPA's authority to reject any allocation will severely undermine the integrity of the process and the incentives for early participation. We believe a non- binding system will only work if settlers know for certain that their shares will be the one allocated to them at the end of the process. If EPA can reject the allocator's decision this authority could be used to keep the fund from paying its fair share, and to unfairly penalize large corporations too often seen as deep pockets, or to reduce the share of the Federal Government as a PRP.

An unwavering commitment by EPA to fund orphan shares is essential to this bill. Accordingly, we are concerned that the proposal places an annual cap on fund financing. If the fund proves inadequate to fund the orphan shares then the concept of fair share allocation falls apart.

Finally, we support the administration's recognition that a PRP which undertakes work at a site should not be responsible for collecting contributions from those parties that did not settle. We support the commitment of the administration to provide funding for the shares that should have been by the recalcitrant, with the government pursuing the parties for reimbursement.

Once again, I would thank you for providing us the opportunity to speak on this critical issue. Thank you, Mr. Chairman.

Mr. SWIFT. Thank you, very much. Our last witness on this panel is Katherine Probst.

STATEMENT OF KATHERINE PROBST

Ms. PROBST. Chairman Swift and members of the subcommittee, thank you for inviting me to testify before you today. My name is Kate Probst, and I am a research fellow in the Center for Risk Management at Resources for the Future. RFF is an independent, non-profit research and educational organization located here, in Washington. RFF does not lobby, nor does it take positions on legislation as an organization.

Much of what I have to say is based on research being conducted with my colleagues at the RFF and the Brookings Institution. We are in the process of analyzing the economic impact of changes in Superfund's liability and taxing mechanisms on the trust fund and on key sectors of the economy. This work builds on research conducted with my colleague, Paul Portney, and published in our 1992 report, Assigning Liability for Superfund Clean Up.

In past testimony I have discussed the strengths and weaknesses of the Superfund liability scheme and various alternative approaches. My comments today focus on the financial impact of the administration bill and the changes proposed by the Alliance for a Superfund Action Partnership. Because the ASAP proposal does not include a specific cutoff date for eliminating retroactive liability for multi-party sites, I have analyzed the financial implications using two different dates, 1981 and 1987.

Both the Alliance proposal and the administration bill have major implications for who pays for site cleanups: potentially responsible parties, the trust fund, and in the case of the administration bill, the Environmental Assurance Resolution Fund. In addition to the $30 billion yet to be spent on cleaning up just those sites currently on the NPL, there are other costs that need to be accounted for in any effort to estimate the ultimate impact of proposed changes to the law.

These include the costs of cleaning up sites added to the NPL in the future, the costs of natural resource damages of non-NPL removals, defense costs, reimbursing PRP's for past costs, and finally the cost of new program initiatives included in both the administration and the ASAP proposals.

There is simply not yet enough information to allow us to reliably estimate the cost implications of these latter types of costs, like the new program initiatives. Instead, we have included rough estimates of these costs in our estimates. The greatest area of uncertainty pertains to the likely future costs of natural resource damages, which some believe could cost hundreds of millions if not billions of dollars.

According to our estimates under the current Superfund program, PRP's are spending a little under $2 billion a year on site study and clean-up costs for NPL sites, as compared to annual trust fund expenditures on these same activities, of approximately $600 million a year. Total program costs, not including transaction costs, are about $3.5 billion annually.

If the ASAP proposal became law using the 1981 cutoff date, the size of the trust fund would more than need to double in order to generate total trust fund revenues of $3.8 billion annually. If the cutoff date were 1987, the trust fund revenues would need to be increased to $4.2 billion. Given the conservativeness of our estimates regarding the cost to the fund of natural resource damages and other new costs noted earlier, it is fair to conclude that $4.2 billion probably represents a lower bound of needed trust fund revenues for this approach.

Under the administration proposal we estimate that the trust fund revenues would need to increase by just a little bit under $1 billion a year, to $2.5 billion, to cover the cost of new program initiatives and orphan shares, as defined in the administration pro-

posal. According to our calculations, the insurance fund would need annual revenues of just under $1 billion a year as well.

Both the Superfund Commission and the administration bill call for the trust fund to pay for orphan shares. The Superfund Commission leaves the definition of orphan shares quite vague, making it impossible to assess whether $500 million in additional revenues would in fact be adequate.

The administration defines the orphan shares more precisely, and we estimate that approximately $440 million a year would be needed just to cover the costs of orphan shares of identifiable but insolvent parties. That estimate does not include the shares of generators and transporters of municipal solid waste, whose allocation exceeds 10 percent.

One of the key objectives of the administration and the ASAP proposals is to decrease transaction costs. Estimating the effect of each proposal on transaction costs is far more difficult than estimating the effect on the total cost of clean up or the need for fund revenues, because of the lack of data on actual transaction costs.

Each proposal eliminates some current transactions costs and creates new ones. The ASAP proposal would certainly reduce some transactions costs for PRP's, as there would be some sites where there would no longer be any need to assign liability to specific parties. On the other hand, that proposal would result in new government transactions costs as well as more protracted litigation at some sites, because of a more difficult legal standard.

In addition, any proposal that brings more clean up under direct government control will increase the total bill for site clean up, as PRP's have been able to clean up sites for less money than the government.

An additional facet of both the Alliance and the administration proposals is the call for reimbursement of PRP's for costs already incurred. The government has no records of what PRP's spent to date, so there will be a new transactions costs of figuring out what PRP's have spent and reimbursing them.

Both proposals are also intended to reduce insurance related transactions costs. Those kinds of costs will not decrease markedly unless insurers are absolved from all Superfund liability. That is, for natural resource damages, as well as for the clean up of all sites where waste disposal took place before 1986.

Finally, any proposal that requires the implementation of a new tax scheme will incur new transactions costs. Taxes are not transactions cost free. Transactions costs for any new tax include the cost to those paying the tax, of figuring out what their tax liability is, as well as the government's cost of enforcing that tax.

Thus, from a tax policy standpoint, it would be far more efficient and less costly to enact one broad based tax to raise another billion dollars in revenue than to enact two, three or four taxes, focused on a specific set of companies or industries.

Thank you very much, for asking me to testify here today. I would be happy to answer any questions.

[Testimony resumes on p. 444.]

[The prepared statement of Ms. Probst follows:]

Written Statement of
Katherine N. Probst*

Chairman Swift and distinguished Members of the Subcommittee, thank you for inviting me to testify before you today. My name is Kate Probst and I am a research fellow in the Center for Risk Management at Resources for the Future (RFF). RFF is an independent, non-profit research and educational organization located here in Washington, D.C. RFF does not lobby, and does not take positions on legislation as an organization. I am here today not as a representative of RFF, but to express my own views on Superfund, based on the Superfund research I have conducted over the past six years.

My remarks today are based on work being conducted jointly by researchers at RFF and at the Brookings Institution. Our current research builds on earlier work that RFF's Vice President, Paul Portney, and I completed in 1992. Our current study examines the economic implications of changes in Superfund's liability and taxing mechanisms on the Trust Fund and on key sectors of the economy. Our research has a number of components:

- An analysis of who pays under the current liability scheme and how alternative liability schemes affect the total amount of site study and cleanup costs borne by major industry sectors and by the Trust Fund;

- Estimates of how alternative liability schemes would affect the magnitude of current transaction costs incurred by PRPs (we do not estimate the magnitude of new transaction costs created by alternative liability proposals, except qualitatively);

- An analysis of the pros and cons of using alternative tax mechanisms to raise additional revenues for those liability schemes that release some PRPs from liability;

- An analysis of the economic implications on key sectors of the economy of raising an additional $1 billion annually from alternative tax mechanisms to raise additional revenues for those liability schemes that release some PRPs from liability; and, finally,

- An analysis of the financial implications of the current liability scheme on property-casualty insurers.

Most of our research for this project is complete, and we are now in the process of revising the draft manuscript of the book *Footing the Bill for Superfund Cleanups: Who Pays and How?*, which will be published some time late this summer or in the early fall.

*The views expressed herein are those of the author only. Resources for the Future takes no official positions as an organization.

In my testimony today I will focus on a few key issues regarding the current liability approach embodied in Superfund and the alternatives being proposed by the Administration, the Alliance for a Superfund Action Partnership (ASAP) and to a much lesser extent, the National Superfund Commission. Specifically, my comments address the implications of each proposal on:

1. Fund revenues
2. Total cost of site cleanup, and
3. Transaction costs.

In addition, I briefly discuss the fact that taxes are not "transaction cost-free," that is, the fewer taxes the better.

1. Needed Fund Revenues

Total Program Costs: Summary

Before presenting our estimates of the implications of alternative liability proposals on the total cost of the Superfund program and on needed revenues for the Trust Fund and the Environmental Insurance Resolution Fund (EIR Fund), I think it is important to make clear what these estimates do and do not include, and why the estimates I am presenting today are conservative. That is to say the actual program costs are likely to be higher than the estimates we have developed so far. In addition, I want to make clear that because of the lack of reliable data regarding transaction costs the estimates presented in the first part of this statement do *not* include private sector transaction costs, nor the implications of how these costs will change under different alternatives. In the third section of my statement I briefly discuss the likely implications of each proposal on transaction costs in a more qualitative fashion.

We have focused our work on developing estimates of total cleanup costs for sites currently on the NPL.[1] Both the ASAP proposal and the Administration bill have major implications for who pays for site cleanups -- potentially responsible parties (PRPs) or the Trust Fund, and in the case of the Administration proposal, the EIR Fund. Because the ASAP proposal does not include a specific date for eliminating retroactive liability for multi-party sites, I have analyzed the financial implications using two different cut-off dates, 1981 and 1987. Our

[1]See Attachment which details the major assumptions used to estimate the financial implications of each liability alternative.

estimates of the financial implications are primarily based on the change in who pays for the costs of cleaning up the approximately 1100 non-federal sites currently on the National Priorities List (NPL).

There are, however, other costs that need to be accounted for in any effort to estimate the ultimate impact of proposed changes to Superfund. These include: the costs of cleaning up sites added to the NPL in the future, the costs of natural resource damages, reimbursing PRPs for past costs, and, finally the cost of new program initiatives included in both the Administration and ASAP proposals. In addition, both these proposals call for the fund(s) to pay for certain defense costs and non-NPL removal actions. Ideally, one would have detailed estimates of each of these components to develop a reliable estimate of the cost of each proposal. Unfortunately, these kind of budget estimates are not available. Instead, we have included rough estimates for these costs in our estimate of the total costs of each alternative, as shown in Table 1. We believe that the estimates we have included are on the low end of the likely future costs.

The costs of new program initiatives are added to program management costs for the alternative proposals, and an "adder" (that is, a place-holder) for natural resource damages (NRD), the cost of new NPL sites, removals and defense costs are included under "adder for NRD and other costs." It is important to note that the costs of natural resource damages alone could be substantially higher that we have indicated, and, in fact, could end up costing billions of dollars. Finally, any proposal that completely eliminates liability for certain categories of wastes and/or sites may lead to an increase in NPL sites as parties seek to obtain fund-financed cleanups.

Table 1.

Annual Program Costs for Current NPL Sites
(millions)

	Status Quo	ASAP Pre-1981	ASAP Pre-1987	Administration bill
PRPs				
Site Study/Cleanup Costs	$1,840 (53%)	$880 (19%)	$700 (14%)	$960 (22%)
Trust Fund				
Site Study/Cleanup Costs	$610	$1,900	$2,140	$1,050
Adder for NRD and other costs (1)	$0	$300	$350	$175
Program Management (2)	$1,000	$1,150	$1,150	$1,150
Payment to PRPs of past costs (3)	$0	$440	$520	$140
Subtotal	$1,610 (47%)	$3,790 (81%)	$4,160 (86%)	$2,515 (56%)
EIR Fund				
Site Study/Cleanup Costs	N/A	N/A	N/A	$550
Adder for NRD and other costs (1)	N/A	N/A	N/A	$175
Payment to PRPs of past costs (3)	N/A	N/A	N/A	$250
Subtotal	N/A	N/A	N/A	$975 (22%)
Total Program Costs (4)	$3,450 (100%)	$4,670 (100%)	$4,860 (100%)	$4,450 (100%)

(1) This adder is a place-holder for the costs of natural resource damages, non-NPL removals, and defense costs. The cost of natural resource damages could be substantially higher.

(2) Both the ASAP and Administration proposals include many new program initiatives which we accounted for by adding $150 million to the $1 billion annual program management total.

(3) We assume that by the time Superfund is reauthorized, PRPs will have spent approximately $8 billion on site study and cleanup activities. For each alternative a different percentage of these past costs would be reimbursed by the funds.

(4) Does not include PRP or insurer transaction costs.

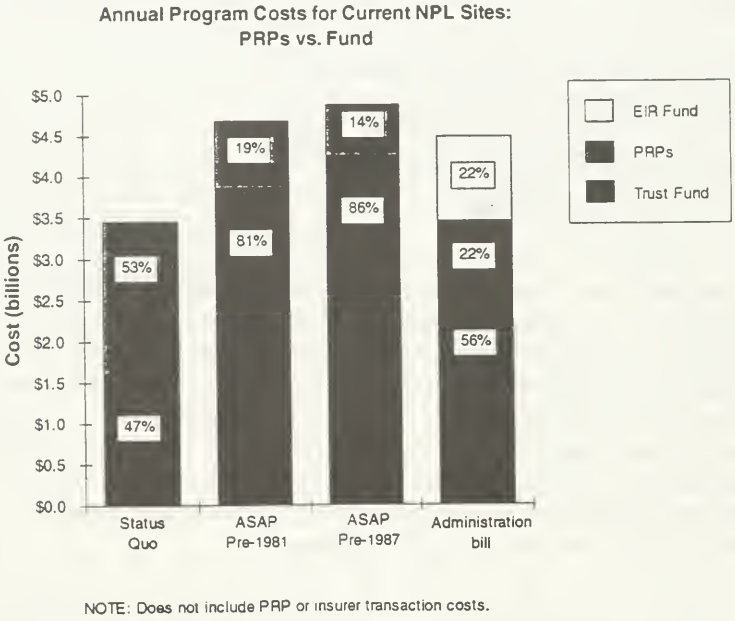
According to our estimates, under the current Superfund law, PRPs are spending a little under $2 billion a year in site study and cleanup costs for NPL sites as compared to annual Trust Fund expenditures on these same activities of approximately $600 million a year. If the ASAP proposal became law using a 1981 cut-off date, the size of the Trust Fund would need to more than double in order to generate total Trust Fund revenues of $3.8 billion annually. If the cut-off date were 1987, total Trust Fund revenues would need to be increased to $4.2 billion. Given the conservativeness of our estimates regarding the costs to the fund of natural resource damages and other new costs noted above it is fair to conclude that $4.2 billion probably represents a lower bound of needed Trust Fund revenues for this approach.

Under the Administration proposal, we estimate that Trust Fund revenues would need to increase by $905 million to $2.5 billion a year to cover the costs of new program initiatives and orphan shares, as defined in the Administration proposal. According to our calculations, the EIR

Fund would need annual revenues of just under $1 billion, which is much larger than the estimate included in the Administration bill.

Figure 1 shows the distribution of program costs according to the source of revenue: PRPs, the Trust Fund and the EIR Fund. The total cost of the current program ("status quo") is substantially lower than the three alternatives for two reasons. First, the estimate of the status quo does not include the costs of new initiatives or Trust Fund payments for natural resource damages and new NPL sites. Second, the status quo has the largest percentage of site cleanups being conducted directly by PRPs and thus garners the largest cost savings due to PRP-lead cleanups.

Figure 1.



NOTE: Does not include PRP or insurer transaction costs.

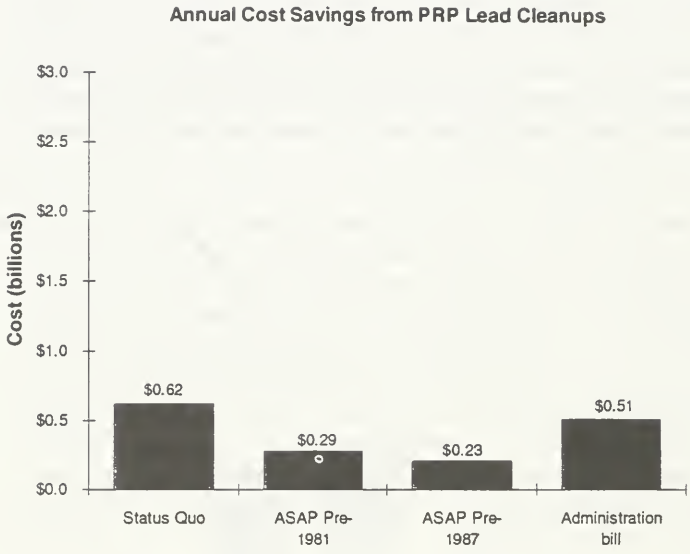
Estimating Total Program Costs: Background Information

According to our estimates, the cost of cleaning up the approximately 1100 non-federal facility sites now on the NPL is $38 billion. Just over $7 billion has been spent to date on these activities, leaving $30.7 billion in site study and cleanup costs to be incurred over the next ten years to complete cleanup at those sites now on the NPL. On an annual basis, this means that approximately $3.1 billion a year will be spent on site studies and cleanup activities for sites currently on the NPL for the next ten years

Our estimates of the impact of alternative liability proposals use this $3.1 billion a year in annual study and cleanup costs as a baseline. Under each alternative, we estimate the distribution of these costs to PRPs, the Trust Fund and the EIR Fund. We assume a 25% cost savings for those cleanups implemented by PRPs, as compared to those implemented by the government using Trust Fund resources. We assume these cost savings because of the fact that a number of studies have found that there are significant cost savings when PRPs implement cleanups (this issue is discussed in more detail later on in my testimony.) Because each alternative results in PRPs directly implementing a different number of cleanups, total cleanup costs vary for each alternative examined. As shown in Figure 2, savings due to PRP-lead cleanups are just over $600 million a year under the current program and fall to a low of $230 million a year under the ASAP proposal with a 1987 cut-off date.

Total costs to the Trust Fund and the EIR Fund are also affected by the new program initiatives included in all the major Superfund proposals. Most of the major proposals call for setting new cleanup standards, stronger roles for ATSDR and NIEHS, greater community outreach and training efforts, as well as grants to pilot economic development and environmental justice programs. To date, none of the proposals have included detailed estimates of the annual cost of these programs. To assure that our estimates take these new program initiatives into account, we have added $150 million to the program management costs of the Superfund program for all three proposals we evaluate, bringing the total annual program management costs to $1.15 billion.

Figure 2.



Both the Superfund Commission and the Administration call for the Trust Fund to pay for orphan shares. The Superfund Commission leaves the definition of orphan shares quite vague, making it impossible to assess whether $500 million in additional revenues would, in fact, be adequate. The Administration defines the orphan share more precisely, and estimates the total cost of covering these shares at $300 million annually. We estimate that the minimum amount of money needed to cover orphan shares under the Administration proposal (i.e. to cover the costs of identifiable and insolvent parties) is approximately $440 million a year. In addition, the Administration language would have the Trust Fund pay for the shares of generators and transporters of municipal solid waste if their share exceeds 10%. We can not estimate the cost of this second component of the orphan share because of a lack of a cutoff date. However, our estimates suggest that more than $300 million a year would be needed to cover orphan shares as defined in the Administration proposal.

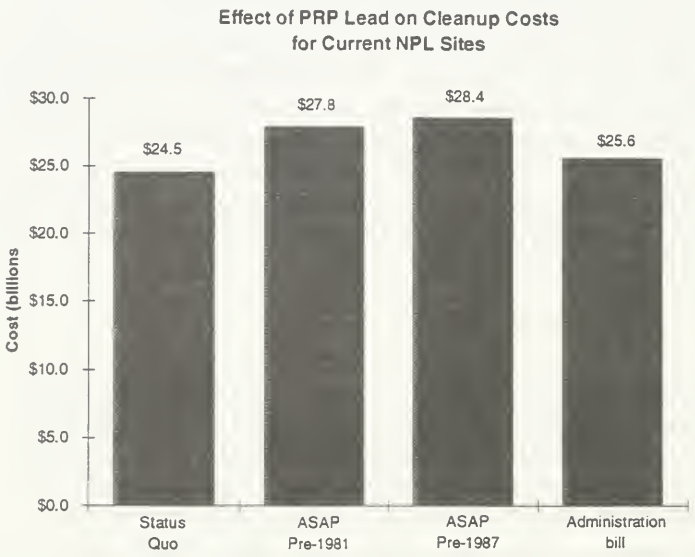
While we were able to develop estimates of total cleanup costs for current NPL sites, it is much more problematic to estimate a dollar value for several of the other costs of the program, such as the costs of the 50 new sites EPA estimates will be added to the NPL annually. In addition, both the ASAP proposal and Administration bill call for reimbursement of natural resource damages, non-NPL removal and some defense costs. We have little basis for estimating the costs of these components of the program, so we have added $300 million and $350 million in annual costs to the ASAP proposals with a 1981 and 1987 cut-off date, respectively. We have also added $350 million to cover these costs for the Administration proposal, but have split these costs between the Trust Fund and the EIR Fund. In addition, some proposals call for reimbursing PRPs for costs already incurred for which they would no longer be liable under the new legislation. These costs, which we have also accounted for, could easily amount to $8 billion by the time the law is reauthorized.

2. Total Costs of Site Cleanup

One strength of the current program is that it harnesses the efficiency of the private sector in cleaning up sites. A study of Department of Energy (DOE) cleanups found that the private sector implemented similar cleanups at a 30% cost savings over the DOE. We used a more conservative estimate of a 25% cost savings that results in an average site study and cleanup cost at PRP-lead sites of $25.8 million as compared to a government cost of $34.4 million. Any alternative liability approach that brings more cleanups under direct government responsibility will result in a more expensive total cleanup bill. As shown in Figure 3 below, the lowest cleanup costs occur under the current program and the highest under the ASAP proposal with a 1987 cut-off date for retroactive liability.[2]

[2]These costs take into account the fact that $7.3 billion has already been spent on studies and cleanups for sites currently on the NPL.

Figure 3.



3. Transaction Costs

One of the key objectives of the Administration proposal and that of ASAP is to decrease transaction costs. Estimating the effect of each proposal on transaction costs is far more difficult than estimating the effect on the distribution of cleanup costs or the need for total fund revenues. The reason this is so difficult is because we know very little about the actual magnitude of transaction costs among PRPs or among insurers. To be sure, we have two excellent studies by researchers at the RAND corporation. However, Lloyd Dixon of RAND is one of the first to point out that they just don't have enough information from their small sample of sites to generalize to the NPL as a whole.

PRP Transaction Costs

The most recent RAND study of transaction costs at 18 NPL sites found that PRP transaction costs range from 19 to 27% of total costs to date. We estimated total PRP transaction costs for the NPL as a whole, using transaction costs ranging from 5% of cleanup costs for single party sites to 43% of cleanup costs for sites with more than 50 PRPs, and derived an overall transaction cost average of 14% of cleanup costs. This suggests that the average transaction cost share for all NPL sites is extremely sensitive to the types of sites on the NPL. The difference in our estimate and RAND's suggests that much better information is needed in order to estimate with any confidence the total amount being spent by PRPs on transaction costs, much less how these costs are likely to be affected by any change in liability.

While one can examine qualitatively how each alternative liability approach is likely to affect transaction costs it is extremely difficult to reach any firm conclusions about the effect of any liability approach on PRP transaction costs. Each proposal eliminates some current transaction costs and creates new ones.[3] The ASAP proposal would certainly reduce some transaction costs for PRPs, as there would be some sites where there would no longer be any need to assign liability to specific parties. On the other hand, the burden of proof at the remaining sites would be much higher, which would increase transaction costs at these sites. An additional facet of both the ASAP proposal and the Administration bill is the call for reimbursement of PRPs for costs already incurred for which they would no longer be liable. This requirement creates new transaction costs in accounting for and reimbursing past costs.

Insurer Transaction Costs

In the 1989 RAND study, the authors estimated that the insurance industry as a whole was spending $150 million a year for Superfund related transaction costs. Most experts agree that this number has risen over the last few years, although there are no new estimates. Eliminating liability for pre-1981 multi-party sites would probably not lead to a major decrease in insurers' transaction costs, because there would still be litigation over insurance coverage. Insurance-related transaction costs will not decrease markedly unless insurers are absolved from most of their Superfund liability (i.e. for natural resource damages and cleanup for all sites where waste disposal took place before 1986). Following this logic, any proposal that employs a cut-off date of 1986 or later and covers all CERCLA-related liabilities should result in a major

[3]Paul Portney and I discuss this issue in our 1992 report *Assigning Liability for Superfund Cleanups: An Analysis of Policy Options*.

decrease in insurance-related transaction costs.

4. Tax Mechanisms - the Fewer the Better

Some of the proposed changes to the Superfund law call for a number of new taxes to finance an increased Trust Fund.[4] Not surprisingly, these taxes are levied on those companies who are expected to benefit from the proposed changes to the liability system. Thus, ASAP proposes a doubling (at least) of the corporate environmental tax, a tax on property-casualty insurers and a tax on small businesses.

It is important to note that taxes carry with them their own "transaction costs." That is, any new tax results in administrative costs. These include the cost to those paying the tax of figuring out what their tax is as well as the government's cost of enforcing the tax. Thus, from a tax policy standpoint, it would be more efficient (i.e. less costly) to enact one broad-based tax to raise $1 billion than to enact two, three or four taxes focused on a specific set of companies or industries to raise the same revenues.

* * * * *

Thank you very much for asking me to testify here today. I would be happy to answer any questions.

[4]This section is based on the work of Don Fullerton of Carnegie Mellon University, one of my co-authors of the forthcoming RFF/Brookings book on the economic impact of Superfund.

Attachment: RFF Assumptions Used to Estimate the Cost Implications of Alternative Superfund Liability Proposals

The cost estimates presented in this statement are based on analyses conducted by researchers at Resources for the Future for our forthcoming book *Footing the Bill for Superfund Cleanup: Who Pays and How?* to be published jointly by RFF and the Brookings Institution. This book, written by Don Fullerton, Bob Litan, Paul Portney and myself analyzes the economic impact of alternative Superfund liability and tax schemes. It builds on an earlier study, which I co-authored with my colleague, Paul Portney.

This attachment describes our assumptions and methodology for costing out the implications on the funds (the Trust Fund and the Environmental Insurance Resolution Fund (EIR Fund)) of liability and financing proposals being proposed by the Alliance for a Superfund Action Partnership (ASAP) and the Administration. For the purpose of analyzing the ASAP proposal we have examined two cutoff dates for eliminating retroactive liability for multi-party sites: 1981 and 1987. The data used is our best judgment based on a thorough review of multiple EPA sources of information on current NPL sites.

Our analysis examines the cost of site studies and cleanups for the current 1107 non-federal sites on the NPL.

It is important to note that the cost estimates do *not* include detailed estimates of the costs to the fund(s) of:

- New sites added to the NPL in the future,
- Natural resource damages, non-NPL removals and duty to defend costs (which are covered in the ASAP and Administration proposals),[5]
- Decreased cost-recovery at fund-lead sites,
- New program initiatives included in the legislative proposals (greater community outreach, setting cleanup standards, environmental justice initiatives, etc.),
- Long-term Trust Fund implications should additional remediation be needed at some of the sites where PRPs are released from liability.

[5]A place holder is included for these costs in Table 1, but it is not based on any independent analysis.

In addition, this attachment does not address:

- Increases or decreases in public or private sector transactions costs,
- Effects of a "public works" approach on the speed and cost of site cleanup,
- Financial implications to the states of an increase in fund-lead sites,
- Implications of changes in the federal Superfund law on similar state laws.

Neither do these estimates take into account any changes in cleanup standards that might be made as part of the reauthorization. The Administration claims that their proposed changes in cleanup standards could achieve a 25% savings in cleanup costs. They provide, however, no justification for this claim and it seems highly unlikely.

Key Assumptions

Unfortunately, much of the essential data needed to reliably cost-out various proposals are simply not available, e.g., accurate data on site-specific cleanup costs or the likely costs of "orphan shares."[6] Absent such data, we must rely on a more simple-minded approach, the key to which is stating clearly the assumptions being used. In addition to articulating the elements of a proposed change to liability standards, assumptions need to be made about each of the following:

- Number of sites,
- Average cost of site cleanup,
- Amount spent to date on site studies and cleanups,
- Time period over which cleanup costs are incurred,
- Percentage of cleanup costs now being paid by PRPs,
- Costs shifted to the Trust Fund under each alternative (e.g. percent of costs attributable to pre-1981, -1986 and 1987 waste disposal; percentage of costs attributable to multi-party sites; percentage of costs associated with illegal disposal, etc.), and,
- Percentage of site costs attributable to orphan shares.

[6]If the proposal includes funding of orphan shares by the trust fund, an unambiguous definition of what constitutes the "orphan share" is critical. Some have suggested the orphan share include the cleanup costs of municipal solid waste; others have suggested orphan shares include the shares of current owners/operators who purchased contaminated properties. Some define the orphan share simply as the share of any PRPs not financially viable. Needless to say, which of these categories of PRPs is considered "orphan" has tremendous implications for the size of the orphan share and the additional revenues that would be needed by the trust fund.

These assumptions can be used to estimate the cost of new sites added to the NPL.

Each of these are discussed below.

Number of sites

In our estimates, we assume that the current NPL has 1,107 non-federal facility sites. Assuming 50 new sites are added each year for the next ten years would increase the NPL by 500 sites, or add approximately 50% to the costs of cleaning up the current NPL. It should be noted that a change in the liability standards could dramatically increase the number of sites added to the NPL in the future. For example, if liability is eliminated for any category of sites -- pre-1981, pre-1987 sites, or co-disposal landfills -- this would create an incentive for owners and operators of similar types of sites not yet on the NPL to get them listed there to obtain Trust Fund-financed cleanups.

Average site cleanup costs

According to analysis by RFF, the average site study and cleanup costs for an NPL site is $34.4 million, approximately $30 million for remedial action costs and $4 million for site studies. These numbers are "as built" costs, that is, they are not discounted. Our site estimates are based on research conducted by the University of Tennessee and by the U.S. EPA. Our estimates are slightly lower than those just released by the Congressional Budget Office. (The CBO numbers appear to be lower, but in fact are higher than our estimates as they are presented in discounted rather than "as built" dollars.) Our estimates are slightly higher than EPA's, which use an average cost for remedial actions of $25 million.

The total cost of cleaning up 1107 NPL sites employing an average site cleanup cost of $34.4 million is $38.0 billion.

Amount spent to date on site studies and cleanups

According to research by the Congressional Budget Office, approximately $7.3 billion has been spent to date for site studies and remedial actions by PRPs and EPA. Subtracting this amount from the estimated total cleanup costs for the current NPL leaves $30.7 billion in cleanup costs to be incurred in future years.

We assume that by the time Superfund is reauthorized, PRPs will have spent approximately $8 billion on site study and cleanup activities. For each option a different percentage of these past costs would be reimbursed by the funds.

Time period over which cleanup costs are incurred

Most people are concerned not only with the total eventual cost of NPL cleanups shifted to the Trust Fund, but also with the annual implications for required revenues. In order to estimate the latter it is important to know the period over which costs would be spread. For example, in our 1992 report we assumed, mostly for the sake of convenience, that cleanup costs would be spread over ten years: this is the average length of time between an NPL listing and completion of construction activities. Recently, some have suggested that cleanup costs (that is, the costs of remedial designs and remedial actions) are more likely to be incurred over a shorter time frame, such as a five year period. This assumption makes an important difference in terms of Trust Fund revenues required each year. If, for example, the cost of a change in liability for current NPL sites is about $10 billion, additional annual Trust Fund revenue requirements would be $1 billion if these costs are incurred over ten years, but would double to $2 billion if incurred over five years.

We assume that future costs of cleaning up current NPL sites will be spread over the next ten years. Because many of the current NPL sites have been on the NPL for some time, this means that we are allowing site cleanups to take longer than ten years on average overall.

Percentage of cleanup costs now being paid by PRPs

Any estimate of the shift in cleanup costs from PRPs (as a result of site-specific liability) to the Trust Fund requires a baseline assumption of how cleanup costs are distributed between the Trust Fund and PRPs. Costs shifted to the Trust Fund under a new liability approach pertain only to those cleanup costs now being paid for by PRPs as a result of the liability standards. Recent EPA data suggests just over 70% of cleanups (at the RD/RA stage) are PRP-lead. There is no data available, however, regarding what percentage of cleanup *costs* are being paid by PRPs as compared to the Trust Fund. If one assumes that PRPs are picking up 70% of annual site costs of $3.1 billion, this would imply annual EPA spending on site studies and cleanup of over $900 million and PRP expenditures of $2.2 billion. We know, however, that the EPA spends only about $600 million each year on sites studies and cleanup. Thus, to make sure that our estimate of the current program is consistent with known EPA expenditures, we assume that under the

current liability system PRPs are paying for 80% of cleanup costs with the Trust Fund picking up the remaining 20%. This would put current annual Trust Fund expenditures at $600 million and PRP expenditures at $2.5 billion.

For those cleanup costs paid by PRPs we assume a 25% cost-savings over government led activities. A recent study for the Department of Energy found that the private sector is able to complete similar cleanups at a 30% cost-savings over the government. Other experts, at EPA and CBO, have suggested savings on the order of 15 - 25%. These cost savings are applied to those cleanups implemented directly by PRPs under each liability alternative. Thus, PRP-lead cleanups average $25.8 million as compared to the government average of $34.4 million. Because there is a different average site cleanup cost depending on who -- the government or the PRPs -- are conducting the cleanups, each liability approach implies a different total cleanup cost for the same NPL sites. The more cleanups implemented by the PRPs, the less expensive the total cost of cleanup.

In order to calculate the costs attributable to the Trust Fund and the PRPs, we first calculate the 80%-20% split for the PRP-lead vs. EPA-lead sites as described above. We then take away 25% of the total cost to PRPs to account for the cost savings associated with PRP-led cleanups.

Costs Shifted to the Trust Fund

Each alternative we examine releases a different set of PRPs from liability. Under the ASAP proposal, PRPs at multi-party sites are released from liability except in cases of illegal disposal. We estimate the implications of this change in liability for two cut-off dates, 1981 and 1987. Our estimates of the percentage of sites that fall into each category is based on RFF's NPL database. This database has been refined and revised since the publication of *Assigning Liability for Superfund Cleanups: An Analysis of Policy Options* in 1992.

Pre-1981 Wastes: According to our database, 55% of sites for which information was provided, ceased their waste disposal operations before 1981. According to EPA, at the remaining sites, approximately 50% of the wastes were deposited before 1981. Thus, we assign 77.5% of site costs to the "pre-1981" category.

Pre-1986 Wastes: According to our database, 81% of sites ceased waste disposal operations before 1986. There has been no analysis of the percentage of waste at the remaining

19% of sites that was deposited before that date. We again assume that 50% of wastes at these latter sites is "pre-1986" lacking any better data. This brings the total percentage of site costs attributable to pre-1986 activities to 90.5%. Under the Administration proposal, the EIR Fund covers 20, 40 or 60% of costs to the PRPs. We used an average of 40% of costs covered by the EIR Fund with the remaining 60% paid by the PRPs.

Pre-1987 Wastes: According to our database, 83% of sites ceased waste disposal operations before 1987. There has been no analysis of the percentage of waste at the remaining 17% of sites that was deposited before that date. We again assume that 50% of wastes at these latter sites is "pre-1987" lacking any better data. This brings the total percentage of site costs attributable to pre-1987 activities to 91.5%.

Multi-Party Sites: We assume that 27% of sites are single-party sites, leaving 73% multi-party sites. This is based on data included in RFF's 1992 report (in Appendix A) that indicates that 27% of the non-federal NPL sites are "owner/operator" only, which we treat as single-party sites.[7] This is consistent with more recent RFF data that found that 33% of sites where information was available have one or two PRPs. We did not, in our most recent research effort, have adequate information to determine which sites had only one PRP. It is important to note that how a "single-party" site is defined has major implications for the cost of the proposal. If any site that was ever owned by two entities is considered "multi-party" it could well be that all NPL sites would fall into this category.

Illegal Disposal: RFF data in the 1992 report suggest that at 6% of multi-party sites, illegal disposal was the primary cause of contamination.[8] At another 2% of sites, contamination was caused by a combination of permitted and illegal operations, so we assign half of these costs to the Trust Fund. Thus, we assume that 7% of cleanup costs overall are attributed to illegal disposal.

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[7]The percentages used are presented on page 53 of the 1992 RFF report, which are those that apply to the NPL as a whole. The percentages presented on page 55 of the RFF report, that pertain only to pre-1981 sites, are not used because this latter data does not include information on the overlap between single party sites and those where illegal disposal took place.

[8]According to RFF's 1992 data, illegal activities caused contamination at 10 % of the sites where data were provided, but 39% of these sites were "owner/operator" only. The costs of all single-party pre-1981 sites have already been accounted for, so they are not double-counted here.

Percentage of Site Costs Attributable to Orphan Shares

Under the Administration proposal, the Trust Fund will cover the costs at sites with non-viable shares. EPA estimates that the non-viable share for owner/operators and generator/transporters is $270 million annually.[9] This translates to an 18% share of the $1.5 billion that EPA estimates PRPs are spending annually. Therefore, we assume that the orphan share under the Administration proposal is 18% of total PRP costs.

[9]"Mixed Funding Evaluation Report: The Potential Costs of Orphan Shares," US EPA, Office of Solid Waste and Emergency Response, Office of Waste Program Enforcement, September 1993.

Mr. SWIFT. Thank you very much, all of you. I am intrigued that, normally when we get into environmental legislation the disagreements tend to be between the business community and the environmental community. This is a situation in which they tend to be within the environmental community and within the business community, and the two gentlemen sitting on the far right of the panel both represent important companies in our economy, and have a fundamental disagreement on whether the process by which we allocate shares should be binding or not.

Congressman Boucher has worked very hard on this issue, and I think commendably so. It seems to me that there are problems, legitimate problems, either way you go that we need to address, and that it's possible that there may be some compromises that are not just compromises on policy split the baby but some ways of working out between those two positions, something that will strengthen the weaknesses that do exist in either approach.

I am hopeful that in the days ahead, we can bring together the various people who advocate binding, advocate non-binding and who have other disagreements on that allocation scheme, so that we can work out something with which there will be broader comfort levels.

I just wanted to ask each of you if you felt that there was—first of all, do you disagree with my analysis that each side, because the proposals are so complex themselves, that they have some weaknesses themselves. Do you see that there is room where we might be able to work out reasonable compromises.

Mr. MINANO. Bernie, do you want to go first?

Mr. REILLY. Go ahead.

Mr. MINANO. Fine. We are agreeable on this side of the table, Mr. Chairman. I would suggest that the views expressed by Bernie and the CMA folks are based on the same goals. I think both industries have the same goals, of faster clean up, workable system. I think there is consistency and a shared view there that we have.

I think from our perspective though, what we are trying to add to the dialogue has been our experience. Our experience has been in the many sites that we have been involved with, with small and medium size business is that, if you have a fair process, if you have a fair formula and people can assign some certainty to it, then the process will work.

Clearly, there are other perspectives on that. We think that process can work if it's approached that way. We also believe that if when you do have a binding process there is a tendency for it to become a very stiff and regimented approach, and may encourage a more litigious approach to the problem when, indeed, that is what got us into difficulty.

I think as was expressed by you, Mr. Chairman and Congressman Boucher this morning, there are obviously approaches that should be discussed and thoughts can come together.

Mr. REILLY. I agree, and we have committed to work with each other to come up with a common position, so that we don't look like the Tower of Babel that we normally look like in these situations.

I think the reason you see the chemical manufacturers come out where they do on binding is, we have had so many allocations pending for so long and there doesn't seem to be any right answer.

We are willing to basically take a rough justice answer, a highly imperfect answer, just to get it behind us.

We know that there will be some possibly bad allocations that grow out of this, but we are willing to take a bad deal in one spot for a better deal in another, just to get these behind us. That's what is motivating our approach to binding. I am convinced, that we can get together with our brothers in industry and come up with a single tale to allow this process to continue.

Mr. SWIFT. I am sure that there are others besides industry that have concerns on how it gets worked out. Primarily, if we don't get locked early on in pride of authorship and wait and have our pride of authorship in the compromise we work out, I think we ought to be able to work out these things and probably come up with a better piece of policy than maybe either proposal as they stand today.

Let me address Mr. Roberts on a question. We obviously have some very serious disagreement on the whole question of whether you keep joint and several or you don't. As you know, as I have expressed it to you, I have never been a great fan of joint and several. It does seem to me that the administration approach and some other approaches have addressed some of the things that I found most obnoxious about it, and that it has been significantly improved in terms of its fairness and doability and so forth.

The environmental community has always had as a bottom line, joint and several in part, because of the polluter pays underlying principle, and in part because they see it as an inducement prospectively for people to behave properly if they know that down the line they are going to get nailed on a joint and several if they misbehave.

How much flexibility is there within the environmental community to proceed with consideration of abandoning it all together and going with some other approach, either as ASAP has proposed or as others might propose?

Mr. ROBERTS. I think in the environmental community as a group and certainly in the EDF, we have given a great deal of thought to ways to reform the liability system or whether to leave it alone. We have taken very seriously the recommendations of people like Dr. Chavis and others about looking at it.

After carefully evaluating and frankly talking to people like Kate Probst, who have done a tremendous amount of research on it, and we have come to the conclusion, a firm conclusion, that we need to retain the current strict joint and several liability system. By incorporating an allocation procedure like was recommended by the National Commission on Superfund and is also in some sense in the administration's bill, we can take out of that current system a lot of the very high transaction costs and unfairness in that system, but at the same time maintain something that we hold very dear which I said in my opening remarks, which is that we need to preserve incentives to not only take care of business in the future but one of the things that's lost in the discussion of retroactive liability is that many businesses are taking care of old problems before they become big old problems.

That sort of activity of cleaning up the messes from years ago is something that you would lose, frankly, if you eliminate retroactive liability.

Looking at the transactions costs and the incentives and, frankly, how we are going to raise the money to replace the system that we have now—which nobody seems to be very straightforward in answering—have left us with the very firm and fairly unalterable conclusion that we need to keep what we have and make modifications to that system so that it works a lot more smoothly and effectively.

Mr. SWIFT. Mr. Wallace, and I think we should say for the record you are the executive director of ASAP, I listened with care to the goals that Dr. Chavis indicated your organization hopes to achieve. I didn't find a great deal of disagreement with the goals at all.

But I guess I would suggest that the administration's approach addresses those goals. To what degree is there some flexibility within your organization if we keep the goals in mind rather than specific methods of achieving those goals. What flexibility have you got to work with us?

Mr. WALLACE. Mr. Chairman, we have a great deal of flexibility to work with you. The basic point that we see however in the liability area or the funding reform area is, both the current system or the administration's proposal or other proposals that we have seen absent the ASAP proposal, basically leave the incentives to fight and to litigate in. They are not eliminated.

In some ways the administration has made strides in the right direction toward eliminating the fighting, and they have perhaps eliminated some of it. But as long as you leave the basic structure of fighting particularly about the old sites in place, then you aren't going to be able to achieve, we believe effectively, some of the goals that we would like to see.

I think we do share the goals with many others in the State.

Mr. SWIFT. We need to work with you. I think that when this whole debate started out it's fair to say that it was between get rid of it or keep it, period. Keep it as is, or get rid of it all together. I think the keep it as is people have moved, not all of them. I mean, within the environmental movement there are some people that have not signed on to this approach because they think that the movement that has been made to date is too much.

I guess it's your move, and we would like to look forward to working with you in seeing what we can do to try and see if we can't address the sets of goals that your organization has, which I think are by and large legitimate and shared broadly, and see what we can do. We will look forward to working with you and with Dr. Chavis in that regard.

Mr. WALLACE. Thank you.

Mr. SWIFT. The gentleman from Ohio.

Mr. OXLEY. Thank you, Mr. Chairman. Mr. Wallace, I would like to follow up on the line of questioning from the chairman. Your coalition proposes to repeal the site specific retroactive liability and replace it with a trust fund that would be financed by broad based taxes.

I have two questions regarding this. One, will small business actually support a tax of $100 million for such a fund? Two, do you believe any other proposals offer any real hope of relief to small business?

Mr. WALLACE. Taking your first question first, I think you will find a diversity of opinion within small business. We have heard from some small business representatives this morning. There are a number of small business associations and individual small businesses within ASAP, and there have been approximately 4,500 letters to the President indicating that 4,500 different small businesses would support paying the increased tax in order to achieve the certainty of result that the ASAP approach would provide with regard to not having to worry about whether or not you were going to be sued, litigated or not litigating.

We have a number of small business representatives in the ASAP coalition that would support paying the tax as an alternative.

Mr. OXLEY. Let me switch then, to Ms. James. What reaction would NFIB have to that proposal?

Ms. JAMES. In the past we have been in discussions with the groups associated with ASAP. Our members have typically not been one to support tax increases. However, I should say for the record that we have supported the elimination of retroactive liability.

We feel like our agreement that we have reached with the environmental community does address that to a great degree, and will relay the concerns of most of our members with that issue.

Mr. OXLEY. Let me ask you about recordkeeping requirements. As you know, they weren't required until 1986 on waste disposal. Unlike big business, small business had some difficulty producing records or even perhaps keeping any records at all until that time.

Am I correct, that the administration plan may work great for the large business but could really hurt small business, which may even end up with higher shares than they would face today?

Ms. JAMES. That is not my understanding of the administration's plan. We have always had a problem with recordkeeping. We still have a problem with recordkeeping today. Under the administration's plan, certainly, we acknowledge that there will be some businesses that will have a greater burden, if you will, because of those who manifest waste currently or some other things.

We think on the whole, that this proposal is sound. I might add, again, we have not fully supported the administration's proposal. I am not as familiar with all of the aspects as I should be at this point.

Mr. OXLEY. What about the specific question on ability to pay, the amendment that would shift the ability to pay. How does that square with NFIB?

Ms. JAMES. We salute the administration's plan to have an ability to pay test. We think that is an essential required criteria that they should do every time that they issue an allocation. I will tell you that under our agreement what we have shown is that with the ability to pay we think the administration needs to have a little bit heavier hammer.

We think there need to be some incentives for EPA to undertake this ability to pay test, with some strict time deadlines as well.

Mr. OXLEY. Without the change in the ability to pay, then your testimony is that small business in fact would be hurt.

Ms. JAMES. Absolutely.

Mr. OXLEY. Mr. Roberts, in the past allocation has generally been determined by volume of waste contributed to a site. And, while not easy, it is relatively straightforward. Yet, it still takes 3 to 5 years to complete the allocation process.

The fair share approach taken by both the administration plan and the Keystone Commission proposal, which I understand you favor, requires that allocation be assessed by more complex factors such as mobility and toxicity. Is that your understanding? What makes you think that allocations could occur in an 18 month period? This seems to fly in the face of what we have seen in the past.

Mr. ROBERTS. We have actually spent a fair amount of time—let me answer those with two questions. Let me try and tackle them. One is, whether these factors make sense or would be easier to apply. We have tried very hard to look in the court cases to see what factors in fact are used. The problem with that exercise is that many of these things get settled out of court, and we don't know really what the fundamental basis for allocations in fact was.

What we did was, the Commission went back as did the administration, and turned to—Vice President Gore—at the time Congressman Gore, and had a set of factors that he had suggested adding to the original Superfund law. Those factors in fact have been used by courts when they have gotten around to doing it themselves, as a basis for allocating shares.

In those factors it lists the amount of hazardous substance, not the amount or volume of waste in total, that was deposited at the site by the potentially responsible party. We are mimicking what was already laid out in that set of requirements and that courts have frequently used.

In terms of the timeframe, there is one sort of silver lining if you can call it that, about the long delays in clean up, is that many of the sites in the Superfund list have been with us for quite a long time. So, the ability for allocators to quickly take into account all that has been collected in the preceding 10 years in many cases of sites that we already know about, can automatically be plugged into this allocation process.

One of the benefits is recognizing that we have about 1,100 sites that have already been well past the RIFS stage. So, the ability for them to quickly get their hands on all the relevant information about PRP's should be relatively straightforward.

I think there is clearly a question for new sites, about whether or not those timeframes can be met. Your question is a legitimate one. I think we were unclear in the Commission as to whether or not they need to be extended that circumstance. Given the fact that the vast majority of sites are well known and well understood at this point, we thought that those timeframes made sense.

Mr. OXLEY. You responded to a question by the Chair, and you quoted the high transaction costs and unfairness of the current liability scheme; joint and several liability and retroactive liability. I think probably everybody who even has a nodding acquaintance with Superfund would have to agree.

I guess the real question is whether the proposal that is out there tends to mitigate that unfairness and in some cases uneven applicability of the law. Are you satisfied that the administration

proposal does that, or are there other things that you personally would like to inject into the process, assuming that you want to keep joint and several and retroactive, which you testified that you did.

Mr. ROBERTS. Many of those things I laid out in our testimony, but let me sort of tick off the high points. There is an issue of fairness and cost effectiveness, and all of those are relevant issues and things that we take very seriously. But there's also a question of cleaning up sites, which is what this program is supposed to be all about.

The fact that we place so much importance on that is why we focused principally in our testimony on how orphan funding is paid for. Clearly, setting aside Federal dollars to pay for orphan shares at sites is a way of easing unfairness. In our view, it ought not to be paid for on the backs of the communities who are waiting for their sites to be cleaned up.

We don't want to see funds diverted, from what we currently spend for the Superfund program, to pay for what polluters now pay. We are not objecting to the fact that you should create funds in addition to those resources for that purpose, to inject fairness. Right now, we are very concerned that the administration bill doesn't create a bright enough line between the funds that we are currently providing for clean up work and the funds that they would set aside for this purpose.

That's a really important issue that cuts against the grain of the program's objective, of actually getting sites cleaned up for these communities.

Mr. OXLEY. Let me interject. You heard Mr. Laws testify that the lid on the orphan fund was $300 million a year. We also had a suggestion from somebody on the panel that indicated that at a minimum it would be something like $440 million.

Mr. ROBERTS. One of the things that is of concern to us is that I am not sure that it's a cap. One of the things that the administration——

Mr. OXLEY. You mean, the $300 million?

Mr. ROBERTS. That's right. One of the things that the administration's bill does is, it sets onto the mandatory side of the budget ledger orphan funding. In other words, creating an entitlement for orphan funding as opposed to being part of the appropriations process.

It's like social security or Medicare. All they said is that you can get no more than $300 million from that side of the budget. It doesn't necessarily say the government isn't obligated to pay way more than that. Our worry is that they will pay for it by tapping into the ongoing program activities of the Superfund program.

Mr. OXLEY. That clearly is a question, because the indication from him is that if they reached $300 million, they would look into the next fiscal year and you would essentially have a carry over which, of course, presents the potential problem of unfunded responsibility and reliability far into the future.

I think a lot of us as policy makers are very wary of going down that road. I am glad that we were able to air that out a little bit. Does anybody else have any comments about that specific issue?

Mr. WALLACE. Yes, sir. We, at ASAP have a similar concern about the administration's proposal in that, we believe a number of the proposals that the administration makes in the environmental justice arena and some of the other changes that they would propose programmatically, that if the orphan funding outstrips what they would expect with the $300 million cap a lot of these other initiatives would not have money to pay for them.

One of the reasons that we chose our approach was that you could on a balance sheet or ledger figure out exactly how much money you were going to raise, exactly what you were going to spend that money for, and then allocate it appropriately and not have to fight about it.

Mr. OXLEY. Thank you. Thank you, Mr. Chairman.

Mr. REILLY. Could I add just a bit on funding. Right now, the Superfund taxes are raising almost $2 billion a year, and only about $1.5 billion a year is going into the actual Superfund program. There is money there. We also think that if we reform liability some of the $200 million a year that Justice is putting into enforcement should be available for clean up and other purposes to include the orphan.

We are also highly optimistic, that the administration's plan to reduce remedy costs will go forward. That also should put less of a burden on the fund. So, we think with all of that, there should be enough money to pay the full orphan share.

Ms. LAMBERT. We are always glad to hear optimism around here. The Chair recognizes the gentleman from Colorado.

Mr. SCHAEFER. I have no questions.

Ms. LAMBERT. The Chair will recognize herself. I had a couple of questions. First of all, I would like to congratulate and thank Mr. Roberts and Ms. James for their willingness to work together and to work with my office, along with NRDC and the Printing Industry and others.

I think you have certainly achieved a great deal, and I applaud your efforts and willingness to get started on that. I think that one of the most important things that we see in solving the problems of the Superfund is, everybody willing to come to the table to address the issue which you stated a moment earlier which is, get busy cleaning up the sites. I look forward to working with you in the future.

In your testimony you did mention that the liability costs should be based on a small business' ability to pay. I think we have to define ability to pay. Who should really make that definition. Should that be statutory, should it be regulatory?

Ms. JAMES. We would suggest that it be in statutory language.

Mr. ROBERTS. Absolutely. I think that one of the things that is very important is to clarify it for everybody involved in this process. One of the things that we believe is that certainty is a good thing in the allocation process. Certainly, understanding precisely what the parameters are for an ability to pay test is a useful exercise. It speeds the process and limits the amount of controversy and confusion.

Ms. LAMBERT. Do you have any suggestions on what that definition should say? Do you have an idea?

Ms. JAMES. We have looked at various definitions. We do have a few suggestions. What we have seen in the past with ability to pay is that it takes into account the financial records of the small business. That varies on a case by case basis, so we would need to set some parameters which we are willing to work on. We actually haven't gotten down to the nitty gritty, if you will, yet.

Ms. LAMBERT. You also noted in your testimony that small businesses seldom have records of their waste disposal, to prove their innocence or their percentage of contribution. Is it really possible for an allocator to actually determine whether small business contributed less than one percent of the total waste? How do you prove that *de minimis* share?

Mr. ROBERTS. I think that what we felt was that there is going to be a tremendous amount of uncertainty in any allocation exercise. One of the things that we support at EDF as part of the Commission, is very aggressive both to identify PRP's at sites and use the government's full authority to collect information from those who are identified, so that you get as much as you can on the table.

I think Bernie Reilly is absolutely right. Any time you engage in an allocation process it's going to have a form of rough justice to it. People will fall on one side of where they think they should have or another.

The idea that we have—and I think it's embodied in this approach—is to try and quickly solve the question as best we can with what we do know, and try and get the issues behind us. I think what we discovered in our discussions was, many small businesses are more anxious to get the issue behind them than to really have a big fight about whether it's a little bit more or a little bit less than a precise number.

It's getting a number early in the process, so that they can settle and be done with it.

Ms. LAMBERT. They are willing to in a sense, pay for or certainly make a contribution, in order to get to that point.

Mr. ROBERTS. Right.

Ms. LAMBERT. Should the allocators consider current management practices or past management practices in determining liability and allocation share?

Mr. ROBERTS. One of the things that's in the President's proposal as well as in the Commission's recommendations is, the allocator has a number of factors to consider, something that Mr. Oxley and I were just speaking about.

One of those factors is whether or not they engaged in prudent conduct or imprudent conduct at the time. That is one of the things that the allocator takes into account in deciding what a share looks like.

Ms. LAMBERT. Just a couple of more questions for both of you. Mr. Roberts, you have worked along side with the NRDC and the Sierra Club with this small business proposal. Do you feel like you will have the grass roots support from the various other environment groups in the field?

Mr. ROBERTS. I think that the Sierra Club is one of the largest grass roots groups in the country. I think that sort of answers the question. They have 600,000 members in chapters around the coun-

try. None of the decisions that we made as a group were done without consultation with those grass roots.

Ms. LAMBERT. That's great. I am always the one that gets caught by the bell. Ms. James, you noted that obviously you represent a lot of this independent business and you have worked with the Printing Industries and a few others.

Along those same lines, do you feel like even though you do represent a large percentage of the truly small businesses, do you expect an enthusiastic support from other small business industries, and do you intend to contact them and work with them?

Ms. JAMES. Certainly, that is our intent. I mean, NFIB represents one in nine of every business in the country along with the Small Business Legislative Council, who has several million memberships, 400 some associations. It is certainly our intent to go forth from this process and elicit the support of other small business organizations for this proposal.

Ms. LAMBERT. Great. Mr. Minano, I was sorry that I was late, and didn't get to hear all of your testimony. I was able to read some of it previously. You did support a non-binding allocation system and the use of private allocators.

Mr. MINANO. That's correct.

Ms. LAMBERT. Can you tell me why, do you think that's more cost effective than the Administrative Law Judges?

Mr. MINANO. We think there's a couple of alternatives, as mentioned earlier this morning, the Administrative Law Judge process or option is available. As you heard also this morning, it looks as if that would be an increase in the number of Administrative Law Judges and would formalize the process, and may be an overburden on the process.

We suggested the independent allocator, because that has been used at many of the sites that we have been involved with, where there was large and small business. We found that process worked and is a viable option. That is our basis for suggesting that to you.

Ms. LAMBERT. Does anyone else have comments on whether they feel that's a cost effective——

Mr. REILLY. The gripe that we would have and that led us to use ALJ's in the binding system is, it's good to have a voluntary process among the parties that want to make Superfund work and that are the progressive companies. But it rewards the companies that don't want to play ball. There are still a fair number of fairly large companies out there that have just sort of ignored the system, and these sites are being cleaned up by the parties that want to make it work.

We would like to make it more painful for those companies to sit outside the system. That's why we wanted a more formal process and a binding result.

Mr. SWIFT. Would the gentlelady yield on that point?

Ms. LAMBERT. Certainly.

Mr. SWIFT. In that regard, don't you believe that the underlying retention of joint and several poses an incentive to the bad guys. They get left with everything that's bad about the current system if they don't play ball up front. Isn't that some kind of an incentive to get them to be more cooperative?

Mr. REILLY. Yes, that's an incentive, but that incentive is in the current program too. Somehow they have made peace with sitting outside the system, and letting the cooperative parties do the work. It may be more painful under this new regime, assuming that they—say the allocation is not binding on them. Then, who is going to chase them down?

That's one of the problems that we have right now is, when the cooperative parties clean the site up and we are paying more than our fair share, very often when we go to the agencies and Justice and say chase down the non-cooperators they say look, the site is being cleaned up. We are resource constrained. We just don't have the horses to go after them.

We have a concern under a non-binding process, that there will still be an incentive to sit out of the sites.

Mr. SWIFT. Thank you. That helps me understand your point of view.

Mr. WALLACE. You asked for all the comments about the allocation system. One of the difficulties that we have with it is the combination of the old system and then a new system overlaid on top of it. We are concerned, that the litigiousness to some degree of the old system will remain and then you will have a new battleground, with the allocator and a possible challenge to the allocator's decision. That bodes with some possible continuing fighting as opposed to a directing all of those resources toward clean up.

Ms. FERRIS. May I make a comment about the allocation system, not necessarily directed so much to your question relating to cost effectiveness but this is a general commentary.

I think that the allocation system outlined in the administration bill and discussed by panelists represented at this table is a promising concept. However, throughout the pending debate about reauthorization of Superfund and indeed at this table here today, the only individuals at the table who have really mentioned the issue of fairness to communities are Dr. Chavis and myself.

I think it's important to recall what is the essential underpinning of this program. As we examine allocation and other alternatives in the concept of Superfund reform, we have to remember that it is communities at risk which we serve.

In terms of the allocation system, I do mention that it is promising. I would like to inject the notion of protecting communities back into the discussion about that particular concept, and that is this. Within the framework of the administration's proposal there are factors listed upon which determinations about allocation will be based. There are some equitable factors which are mentioned such as degree of care, degree of involvement. There is another factor which I am just not recalling immediately.

I think in the context of factors upon which allocation determinations are based there must also be considerations regarding socioeconomic impact of that hazardous waste site and the impact of adverse health effects on communities which are victimized by that site.

Ms. LAMBERT. Thank you. Mr. Wallace, you have taken an approach somewhat different from the administration's proposal. The administration has included in its bill a section that addresses en-

vironmental justice. How would you amend the administration's bill to expedite the cleanups in minority communities?

Mr. WALLACE. Well, the administration's proposals that deal with environmental justice and other community empowerment and economic development aspects of this problem fall short in our opinion, because if you take into consideration the issues raised earlier about the size and the cost of the orphan share and where the money is allocated within the program, all the administration has called for is a few demonstration projects that take into account public health, that take into account environmental justice, that take into account socio-economic impact.

What we are proposing is that the program be changed to make these also core values of the program, and that the program be oriented to take care of these kinds of needs in the community. In order to do that, it's going to cost something.

The way we see the administration proposal and the National Commission on Superfund proposal, there is not enough money allocated toward serving those other community needs. In one extent what we would want to do is add additional resources to it. That brings you back to the question of where are those resources going to come from.

That's why we have been working through the broad and diverse coalition of business, insurance, and other people, to try to get some more consensus that some of those businesses would be willing to pay for those activities as a tradeoff with restructuring the liability system. I believe there's even an NFIB survey which some of our members participated in, where the results indicate that they would be willing to make those payments as a tradeoff.

Ms. LAMBERT. Thank you. I will finish up. Those are my questions. I will pass on to any other members here that would like to ask questions.

Mr. SWIFT. I just have one question. One way that ASAP has proposed paying for—we were just discussing it—elimination of the retroactive liability is by doubling the corporate environmental tax. I was wondering what the other end of the table thought about that.

Mr. REILLY. The standard response from the chemical industry, Mr. Chairman is, we don't think any more money is needed for Superfund. But if more money is needed, it should come from the broadest possible tax. At least the corporate environmental tax meets that criteria.

Mr. SWIFT. What about the automobile folks?

Mr. MINANO. Obviously, the question of taxes is an important issue. But if approached, the tax issue should be on the broadest possible basis. We suggest that as you look at the orphan share approach and that it's applied fairly based from the comments here, that it would be fast and quick move on clean up and can be accomplished.

Mr. SWIFT. Would it be fair to say that your answers are that if all preferred alternatives failed, this would be something that you could reluctantly settle for? Am I putting words in your mouth?

Mr. REILLY. Well, I guess if we are really relieving society broadly of responsibilities, of course, our answer would be general revenues. If industry is getting the relief and it's focused on industry

and the tax must come from industry, then we would say as broad based as possible and the corporate tax gets that.

There's a small wrinkle there in that, the corporate environmental tax does chop at somewhere around $2 million. If small business—we do support relief for small business. If small business is going to get some relief which they richly deserve, a little bit of sting in the tax would probably be appropriate also.

Mr. SWIFT. And, finally Ms. James, I understand this is your first time appearing before a Congressional hearing.

Ms. JAMES. That's correct.

Mr. SWIFT. I think your membership has every right to be proud of you.

Ms. JAMES. Thank you.

Mr. SWIFT. I thank all of you.

Ms. LAMBERT. I thank the panel for their patience and their contribution today. We will stand in recess until we vote. The chairman will reconvene.

[Brief recess.]

Mr. SWIFT. The subcommittee will come to order. I would particularly like to thank the members of our last panel for their patience. The calendar is such a problem with this legislation, that we are trying to limit the number of hearings we hold. In order to be sure that we cover all of the bases, it makes each one a little bit longer. For that, I apologize. Again, I thank you for your cooperation.

I think everybody is at the table. I will introduce you in the order listed on the program. That way, we begin with Gale Norton, the attorney general of the State of Colorado. Welcome.

STATEMENTS OF GALE NORTON, ATTORNEY GENERAL, STATE OF COLORADO; ALFRED POLLARD, DIRECTOR, GOVERNMENT RELATIONS, SAVINGS AND COMMUNITY BANKERS; MICHAEL S. McGAVICK, SUPERFUND IMPROVEMENT PROJECT; TIMOTHY HARKER, ON BEHALF OF NATIONAL PAINT AND COATINGS ASSOCIATION; AND LANCE MILLER, ON BEHALF OF ASSOCIATION OF STATE AND TERRITORIAL SOLID WASTE MANAGEMENT OFFICIALS

Ms. NORTON. Good afternoon Mr. Chairman, and members of the committee. I am Gale Norton, attorney general of the State of Colorado. I am also chair of the National Association of Attorneys General Environment Committee. I am here to testify regarding issues related to reauthorization. Certainly, this is an issue of great impact on the States. We are very concerned about the hazardous waste sites in our States, and the way in which those are cleaned up.

Our association has been studying CERCLA, and we recently passed a resolution that was based on the 13 years of experience by States in the implementing of CERCLA. I would like to just briefly summarize the key points.

This resolution provided that the existing strict joint and several liability standards should be maintained, Congress should consider means of reducing transactions costs, CERCLA should be amended to clarify that the States are not liable as a result of environmental regulatory activities at CERCLA sites. CERCLA should not pre-

empt the operation of State law, and CERCLA should be amended to provide for the delegation of the Federal Superfund program to States with adequate programs of their own.

The issues addressed in the proposed bill are immensely complex. We commend the administration for its attempt to deal with the most pressing and controversial problems with the Superfund program. Our review, however, has identified a number of problems, both with the concepts presented and also with the actual language adopted which in some instances creates unfortunate confusion and ambiguity.

I would like to reserve the right to supplement my testimony because we have only had a week to review the proposal, and have been scrambling to try to find consensus in a very short time.

Mr. SWIFT. Without objection, any additional material you might submit will be made a part of the record.

Ms. NORTON. Thank you, very much. Obviously, the current liability system has produced wasteful results. It has resulted in higher transactions costs than are justified, given the amount of clean up accomplished. There are even lawyers, like myself, who feel that there has been too much litigation.

The administration's bill provides significant reforms to address these concerns, without abandoning the joint and several liability scheme. Whether the proposal is sufficient to redirect our precious human and financial resources from the courtrooms to clean up, is difficult to predict. However, based on our cursory review, the Act seems to offer some constructive improvements.

Just to briefly review those, we think that generally the nonbinding allocation proposals and the proposals to try to deal up front with allocations out of court, are good ideas. We would like to see some greater finality for the responsible parties. That's something that, while it causes problems for us as regulators in trying to estimate up front what the costs are going to be, certainly the ability of businesses to be able to predict their liability is something that is important.

I think it may be helpful for us as we try to resolve cases at an early stage and to settle cases, to be able to have that possibility.

We have some concern about having the Gore factors, the allocation scheme factors, spelled out in the statute itself. The sites differ tremendously. I think that there are some alternatives that might also provide good ways of allocating responsibility. I don't think it's advisable to tie the allocator's hands by mandating factors in the statute. The appropriate approach may be adopted by the allocator to suit the particular circumstances of the site.

This would allow us to learn more as we go through the process of trying to decide how an allocation system ought to work, to be able to adopt what we have learned from experience.

Our Association of Attorneys General has not yet taken a position on exempting *de micromis* PRP's from liability. In general, that seems to be a good proposal. Likewise, we agree with the part of the bill that encourages more fair and expeditious settlements with *de minimis* parties.

I would like to move on to the point of the role of the States. While we are pleased that the administration's current bill attempts to increase the State role at CERCLA sites, we are very

concerned about the way in which it goes about it. Essentially, the administration has retained the ability to second guess States, and has prevented States from allowing their own State laws to operate at CERCLA sites.

I have had the experience, myself, in trying to settle a Superfund site lawsuit where the State had the lead knowing that the EPA was waiting to perhaps step in. It made it very difficult to try to settle. It make it difficult for us to reach consensus, both with the community and with the responsible party, when we knew that might not be a final agreement and EPA could step in at any time.

The existing programs are working very well in many States, the State operated programs. There does not see to be any particular reason for disrupting them. As I have noted, we have only had a short time to examine the administration's bill. The States have not had the opportunity to get together to define a specific position on the provisions. That is something that we certainly intend to do.

I am especially concerned and very disappointed, in the administration's provisions that deal with a lawsuit in which my State has been involved, *United States* v. *Colorado*. The administration has very clearly made an attempt to amend every provision on which the State of Colorado was able to prevail in Federal court, saying that the State's own hazardous waste laws through RCRA should apply at Federal facilities.

This is something of great concern to me. I would hope to have the opportunity to discuss this in more detail. Very clearly, the outcome of this may be exactly the opposite of what the administration has presented. Rather than having more Federal ability to preempt State law, having the effect of accelerating the process and making the process run more smoothly, it puts the States in a position of having to create a record that is suitable for litigation at every point throughout the process.

It puts us in the position of having only the very end of the line as the opportunity for litigating our position, so that we can adequately protect the State. That is something that is going to only cause problems and delays rather than accelerate the process.

I thank you very much for the opportunity to present the views of the State of Colorado. Thank you.

[Testimony resumes on p. 485.]

[The prepared statement of Ms. Norton follows:]

STATEMENT OF
GALE A. NORTON
ATTORNEY GENERAL OF THE STATE OF COLORADO
BEFORE THE
SUBCOMMITTEE ON TRANSPORTATION AND HAZARDOUS MATERIALS
OF THE COMMITTEE ON ENERGY AND COMMERCE
U.S. HOUSE OF REPRESENTATIVES

FEBRUARY 10, 1994

Good morning Mr. Chairman and members of the Subcommittee. I am Gale A. Norton, Attorney General for the State of Colorado and Chair of the Environment and Energy Committee of the National Association of Attorneys General ("NAAG"). It is my honor to come before you today to testify regarding issues related to the reauthorization of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980. As you are undoubtedly aware, CERCLA reauthorization and its impact on hazardous waste site cleanups are of immense concern to the states. Accordingly, NAAG has been studying CERCLA in an effort to identify areas of common concern. Our further goal is to propose changes to that legislation which will result in a process that is more effective, more efficient, and more equitable to all parties concerned.

Based on the states' collective experience with Superfund over the past thirteen years, NAAG passed a resolution at its July, 1993, meeting, which addresses a number of issues relating to CERCLA and its implementation. The resolution's key points are:

1. The existing strict, joint and several liability standards must be maintained in order to ensure effective enforcement and to preserve the federal treasury;

2. Congress should consider means of reducing transaction costs at multi-party sites, such as developing more effective procedures for settling with de minimis contributors

and making more government funding available for sites with significant orphan shares of liability;

3. CERCLA should be amended to clarify that states are not liable as a result of environmental regulatory activities with respect to CERCLA sites;

4. CERCLA should be amended to clarify Congressional intent not to preempt the operation of State law at CERCLA sites;

5. CERCLA should be amended to provide for the delegation of the federal Superfund program to states with adequate programs of their own; and

6. CERCLA should be amended to clarify that the fund will cover 90% of the cost of remediation, including long-term operation and maintenance costs.

The reauthorization bill recently proposed by the Administration attempts to address each of these concerns with the exception of preemption. I will discuss each of these issues in greater detail below.

As this committee is aware, the issues addressed in the proposed bill are immensely complex. We commend the administration for its attempt to deal with the most pressing and controversial problems with the Superfund program. Our review, however, has identified a number of problems, both with the concepts presented in the proposal as well as with the actual language adopted which, in some instances, creates unfortunate confusion and ambiguity. Although I have discussed some of these issues below, I would like to reserve the right to supplement my testimony, pending more detailed review of the bill and discussion with my staff and peers. We have only had a week to review the proposal, and that is insufficient time to

ultimately determine whether the proposal is workable and would result in a net improvement to the current system.

In my testimony today, I would like to focus on those liability reforms designed to address the issues of transaction costs and fairness, and touch on the proposed Act's provisions dealing with state delegation. Finally, I would like to address the provisions of the bill aimed at reversing United States v. Colorado, 990 F.2d 1565 (10th Cir. 1993), which recognized Colorado's right to exercise its delegated RCRA authority at the Rocky Mountain Arsenal, a contaminated site just northeast of Denver.

LIABILITY

I do not intend to subject the members to an extensive litany regarding the all-too-familiar criticisms of the existing Superfund liability scheme. The complaints can be grouped into two basic categories: 1) the current system is wasteful -- resulting in higher transaction costs than are justified, given the amount of cleanup accomplished; and 2) the system is unfair -- resulting in inequitable allocation of costs among potentially responsible parties.

The Administration's bill provides significant reforms to address these concerns without abandoning the fundamental strict, joint and several liability scheme. These reforms are not expected to increase radically the financial burden on the existing Superfund which, it is acknowledged, is inadequate to deal with the thousands of sites that may require some degree of cleanup. EPA apparently believes that significant increases in funding will not be required to cover orphan shares as defined in this Act or to fund the more thorough potentially responsible party (PRP) searches that will be necessary. The hope is, I believe, that additional

expenses resulting from these reforms will be counterbalanced by savings realized from curtailed litigation.

Whether this hope is realistic, I cannot say. Whether the proposal is sufficient to redirect our precious human and financial resources from the courtrooms to cleanups is difficult to predict. However, based on our cursory review, the Act seems to offer some constructive improvements.

CURTAILING TRANSACTION COSTS

Non-binding Allocation

One of the most significant proposals to deal with the problem of transaction costs is the creation of mandatory, expeditious, non-governmental allocation procedures to determine the relative contribution of potentially responsible parties (PRPs) up front and out of court. Specifically, the bill attempts to provide PRPs with incentives to settle early with EPA. For example, cost recovery lawsuits will not be allowed until sixty days after completion of the allocation process, and certain benefits of settlement would no longer be available to PRPs, once the United States has brought suit against them.

The greatest incentive to settle is the fact that Superfund would pick up the tab for orphan shares identified in the allocation process. In addition, settlements will include greater finality for the PRP, a goal that has been advocated with great urgency by industry which, under the current system, cannot escape or predict future costs which may accrue. Under the new law, a PRP could actually walk away from a site, if it accepts its allocation, complies with the consent decree, ensures that the remedy is performed, pays any required premium, and has natural resource damage claims allocated along with response costs. While regulators may find

it difficult to make these estimates early in the process, the benefits of finality and certainty for business make this worthwhile. Furthermore, this process may benefit regulators by eliminating one major obstacle to settlements.

As with the current system, settlers receive protection from contribution lawsuits brought against them by non-settlers. Such protection extends to PRPs that have resolved their liability to states, with the exception that such settlement would not preclude the United States from recovering its response costs against the PRPs. A similar provision allowing states to recover response costs against PRPs who settle with the United States should be added to the bill. This is especially important because EPA, in some instances, has failed to obtain reimbursement for state response costs in its settlements. The broader ramifications of this provision, which appears to relieve settlers of liability under state and common law, will be discussed below.

Neither EPA nor the PRPs are required to accept the decision of the allocator. Where it is not accepted, parties may resort to litigation. However, EPA cannot reject a settlement based upon the allocation report, unless the settlement is determined to be unfair, unreasonable and not in the public interest. Although these are broad, somewhat ill-defined terms, the bill does convey the intent that such settlements be adopted except in extraordinary circumstances. More importantly, if the EPA rejects a settlement offer based upon the allocation report, and subsequently fares worse in a court action, it must reimburse the PRPs for costs and attorneys' fees incurred in defending the lawsuit.

PRPs cannot challenge the allocation, unless they decide not to settle. Non-settlor challenges to the allocation report must demonstrate that the conclusions are arbitrary and capricious, or not in accordance with law, based on administrative record review. Further, non-

settlers will face the specter of joint and several liability for all response costs not paid in settlement. They would also be liable for any orphan shares assessed to the Superfund. Contribution for such costs would only be available from other non-settlors.

Another suggestion I have regarding the proposed allocation scheme concerns the "Gore factors" which are used in the bill to allocate liability. These factors have been used by courts and include such considerations as volume and toxicity of waste, as well as culpability and degree of cooperation with cleanup authorities. Although the factors make sense, courts have had difficulties applying them. On the other hand, economists have suggested alternate methods for allocating responsibility that have been successfully utilized in analogous fields. (See e.g. 23 ELR 10133, March, 1993, discussing, for example, benefit-based allocation such as the "stand alone cost technique.") I, therefore, do not believe it advisable to tie the allocator's hands by mandating factors in the statute. The appropriate approach may be adopted by the allocator to suit the particular circumstances of the site. Alternately, EPA could promulgate regulations which identify acceptable methodologies and factors to be considered by the allocator. Such a strategy would allow the practice of allocation to develop as we learn more about the efficacies of each approach. I also want to point out that the provisions regarding allocation determinations, including the definition of orphan shares, discuss PRP contributions of hazardous substances, but do not include pollutants and contaminants. Because other amendments are confirming that PRPs are liable for releases and threatened releases of pollutants and contaminants, as well as hazardous substances, these provisions should be harmonized.

Although these proposals contain many good suggestions, there is some concern that they may have unforeseen effects on the program. More time will be needed to analyze whether the

bill's allocation scheme will impede cleanup progress or impose unacceptably high transaction costs on the federal and state governments implementing the program. and whether the time frames are reasonable. In addition, the question of municipal liability remains a thorny issue, not only for municipalities currently burdened with substantial response costs and transaction costs, but for the government and PRPs who will assume their shares, if they are relieved of liability. More discussion on these matters is necessary to arrive at the best solution.

De Micromis/De Minimis Contributors

Transaction costs and fairness issues have often been raised with particular regard to de micromis and de minimis contributors. The administration has proposed a de micromis exemption from liability for parties who contributed less than 500 pounds of municipal waste, or less than ten pounds or liters of hazardous substances, unless such hazardous substances significantly increase the costs of response actions taken at the site. I believe this exemption makes sense. Although NAAG has not taken a position regarding cutoff amounts and whether such parties should be exempt, we did recommend that reforms be initiated to relieve such parties of their burden under the current scheme.

I further believe that the prohibition against PRPs bringing contribution actions against "tiny" contributors is important because it is the PRPs, and not federal or state agencies, that have brought these parties into the CERCLA process at multi-party sites. I would note, however, that the bill, as currently drafted, abolishes rights of contribution against contributors of less than ten pounds or liters of material containing hazardous substances, but not against contributors of less than 500 pounds of municipal solid waste, who are also exempt, according to section 403 of the bill. This appears to be an oversight that should be corrected.

We agree with the provisions of the bill that encourage fair and expeditious settlements with de minimis parties. The administration's position that a party's de minimis status should be judged with respect to the contribution of each party, rather than the contribution of all small-quantity contributors as a class, should facilitate settlement and improve the fairness of the system.

The bill appears to provide that de minimis parties' liability will not be allocated along with the rest of the PRPs at the site, unless they decline to settle. In that case, they will be subject to joint and several liability for the whole site, with the proviso that "[t]he Administrator and the Attorney General shall issue guidelines to ensure that the relief sought against de minimis parties under principles of joint and several liability will not be grossly disproportionate to their contribution to the facility." I am concerned that such guidelines may not provide de minimis parties with the protection envisioned. Last week, the D.C. Circuit invalidated EPA's "lender liability rule," in which EPA attempted to use its enforcement discretion to provide lenders some protection from liability. It is not clear that the suggested guidelines would survive a similar challenge. We, therefore, recommend that section 407 of the bill be modified to allow EPA to promulgate regulations defining gross disproportionality.

INCREASING FAIRNESS

Exemptions for State Agencies

In addition to the issues discussed above, many classes of parties have advocated changes to CERCLA that would allow them to escape the wide net of CERCLA liability. These include bona fide prospective purchasers, trustees, lenders, municipalities, and, in some instances, the federal government. For the most part, NAAG has not taken a position on these exemptions.

It has, however, urged Congress to amend CERCLA to reemphasize and clarify CERCLA's waiver of federal sovereign immunity, which I will discuss below. It has also requested an exemption for State regulatory agencies who risk liability under the current system as a result of exercising their environmental oversight responsibilities. More detailed discussions of these recommendations can be found in the NAAG summer resolution of July, 1993.

I would also note that state governments have emergency response authorities that warrant the same exemption provided in the bill for federal agencies responding to natural disasters on contaminated lands. I, therefore, recommend amending the bill to provide the same protection to state authorities.

Also of concern to the states, though not yet reflected in a formal resolution, is a disturbing trend of claims against the states as owners of natural resources. In Colorado, our constitution provides that groundwater belongs to the State. As a result, creative PRPs have sued us because our groundwater has entered their mine tunnels, picked up contamination, and, then, been discharged to rivers and streams. Other states have defended against similar claims regarding stream beds and river banks, as well as tidal waters. Although these lawsuits have not been successful, they drain precious state resources, and delay progress on actual cleanup. CERCLA should, therefore, be amended to clearly exempt states from liability attaching solely as a result of such ownership.

PRP LIABILITY FOR RESPONSE COSTS

Oversight Costs

Of great significance to the states is the issue of response costs under CERCLA incurred by states in overseeing response actions undertaken by PRPs. Recently, courts have held that

PRPs do not have to reimburse EPA for such oversight costs. (See Rohm and Haas Co.; 2 F.3rd 1265,1275-79 (3rd Cir.1993); also see Central Maine Power Co. v F.J. O'Connor Co., No. 91-0251-B(D.Me.Nov.8,1993) (PRP is not entitled to recover its payment of EPA oversight response costs from other PRPs). The administration's bill will remedy this situation for both federal and state agencies. Although this issue is not included in the July, 1993, NAAG resolution, it will be discussed at the spring meeting, and a resolution advocating this position is likely to pass.

Costs for Releases of Pollutants and Contaminants

The administration has proposed to harmonize sections 107 and 106 with section 121 by clarifying that PRPs are liable for response costs resulting from releases and threatened releases of pollutants and contaminants, as well as hazardous substances. This amendment is necessary to correct a perceived drafting error in the original legislation. Agencies have incurred substantial costs responding to releases of pollutants and contaminants. The same policy considerations which support recovery of costs incurred in responding to the release of hazardous substances justify recovery of costs incurred in responding to pollutants and contaminants. The proposed amendment should clarify that agencies are entitled to such costs, and prevent much wasteful litigation on this issue.

STATE DELEGATION

Section 104 of CERCLA currently provides that states may apply to EPA to carry out any activities authorized by that section, including response actions and related enforcement actions. Both the 1982 and the 1985 National Contingency Plans ("NCP") contained provisions whereby EPA could enter into agreements allowing states to exercise most of the statutory authority available under CERCLA upon an individualized determination by EPA that the state

was capable of assuming such functions. The current 1990 NCP, however, contains a blanket prohibition that expressly excludes states from exercising enforcement and remedy selection authority.

I am pleased to note that the Administration's current bill contradicts the 1990 NCP on this issue and attempts to increase the states' role at CERCLA sites. The bill provides states with the opportunity to assume responsibility for the cleanup of all sites or certain categories of sites within the state through EPA authorization of a state program. States can also apply to EPA to obtain cleanup authority on a site-specific referral basis. To obtain program authorization or site-specific referral, states must prove to EPA that they posses the legal authority, technical capability, and resources necessary to conduct response actions and enforcement activities. The Administration's willingness to increase states' authority at CERCLA sites is consistent with NAAG's July 1993 resolution which includes a provision requesting that Congress amend CERCLA to provide for delegation of the superfund program to states to operate in lieu of the federal program.

However, the Administration's proposal for state delegation is presented in a form which has the states very troubled. Most disconcerting is the Administration's apparent goal of total preemption of state environmental laws. Past experience has shown that state programs are very effective in accomplishing cleanups of contaminated sites. These productive programs should not now be abandoned. NAAG members feel very strongly that CERCLA should supplement, not replace existing remedial programs that have proven effective.

The Administration has proposed to add to CERCLA a section 127, which contains the proposed delegation and referral program. The Administration proposes that section

127 be the sole means by which the states may order any action to be taken at NPL sites or those sites proposed for NPL listing. This section would preempt all state laws, including RCRA-authorized corrective action programs. If a state elects not to apply for section 127 delegation, or if a state does not have its own superfund law for which it may be authorized, then it has no authority to address threats to the health and welfare of its citizens posed by sites contaminated with hazardous wastes.[1] This proposed preemption of state laws is of grave concern to the states and its citizens.

Having had only a short week to examine the Administration's bill, the states have yet to define a specific position on its provisions. We will submit a more detailed description of the states' concerns in the very near future.

Local Involvement

In order for the CERCLA program to be successful, there must be community support for and acceptance of not only the ultimate remedy, but of the regulatory process as well. One of the benefits of the state authorization is that states are in a much better position

[1] Many states do not have their own Superfund law. Although Colorado does not have a state superfund statute, it has achieved cleanups at several sites utilizing the provisions of CERCLA that authorize states to recover for natural resource damages and response costs. In two recent settlements, Colorado v. Idarado Mine, Civil Action No. 83-C-2385 (D. Colo. 1992) and Colorado v. Asarco, Inc., Civil Action No. 83-C-2383 (D. Colo. 1993) (Globe Plant), Colorado secured agreements from the responsible parties to implement cleanup remedies and reimburse the State for all past and future response costs. The remedy for each of these sites injected some flexibility into the process by setting specific performance standards that the remedy must achieve and then giving the responsible parties the opportunity to achieve those standards through implementation of less costly remedies. If monitoring indicated that the performance standards were not being met, the responsible party would be required to implement a contingent remedy that would meet such standards.

than EPA to identify and address local government and community concerns. States are much closer to the problem and can more readily incorporate local values into the process.

CERCLA sites often include either all or part of established communities. Examples range from the mining communities of the Rocky Mountains to Love Canal. Residents of these communities and their local governments have the perception that EPA and the CERCLA process are insensitive to their interests. The process too often results in decades of investigation leading to "cleanups" that fail to take into consideration the economic and social impacts on local communities and ignore the other concerns of residents.

The designation of these communities as CERCLA sites results in decreased investment, real estate that is difficult if not impossible to sell or refinance, and increased emotional distress for citizens who are told that the contaminant levels in their community could affect their health. In some cases, the listing of an area on the NPL can severely affect local economies such as the tourist trade on which the community depends for its financial well-being. Local governments understandably want more meaningful involvement in the decisions that affect the present and future health and welfare of their citizens.

Western states have different problems, and different perceptions of those problems, than states back east. Therefore, environmental problems and how to solve them may vary considerably depending on geographic location. For example, some eastern states are unfamiliar with the kind of major mining operations, and concomitant environmental problems, with which mining states like Colorado have to deal on a daily basis.

The case of the Yak Tunnel/California Gulch Site in Leadville, Colorado is a perfect example of the problems with regulating from afar. Mining had always been the primary source

of revenue for Leadville. Since the closing of most mining operations and the listing of the area on the NPL, economic growth has been severely hampered. Not many businesses or potential home owners are interested in investing in a Superfund site, let alone risking being named a potentially responsible party (PRP).

An unspecified area generally encompassing Leadville was designated a Superfund site in 1982. Eleven years later EPA is still investigating the site. Only one operable unit, the Yak Tunnel surge pond and water treatment system has been completed. In addition, one residence was provided with alternative water.

While EPA has legitimate public health responsibilities; the citizens have legitimate social and economic concerns which local residents and elected officials believe are not being taken seriously by EPA. These individuals feel strongly that state government would be more responsive to their needs.

I am encouraged that EPA acknowledges the importance of state authority in the delegation provisions of the bill, and hope to have the opportunity to present more detailed testimony on state role in the near future. This is an extremely important section of the Administration bill and I believe contains enough issues to merit a separate hearing on its provisions.

LIABILITY UNDER STATE LAW

In its proposed liability reforms, the Administration is eroding congressional intent to hold the federal government liable to the same extent as private party polluters. It also attempts to undermine the ruling in United States v. Colorado, 990 F.2d 1565 (10th Cir. 1993), which effects congressional intent to preserve for the states independent authority to enforce their environmental laws.

As discussed above, the states agree that reducing transaction costs for CERCLA cleanups should be a high priority in re-authorizing the statute, and support liability reform that would achieve this goal. However, we are very concerned that the Administration's proposal will increase in-fighting between the regulatory agencies, which will undoubtedly lead to soaring transaction costs for government and responsible parties. After expending significant resources to safeguard the state's role at federal facilities as set out by Congress, Colorado is particularly concerned that the proposed changes will generate a new round of protracted litigation.

CERCLA was originally intended to supplement existing hazardous waste law to ensure the prompt cleanup of thousands of inactive, and mostly abandoned, polluted sites around the country. CERCLA is a remedial statute designed to respond and finance the actual cleanup of these sites. We are alarmed that the Administration's proposal needlessly expands CERCLA and encroaches upon state programs which have proven to be very successful in battling the hazardous waste crisis. If enacted, this expansion will surely lead to more dollars being dedicated to litigation, rather than to cleanup.

Having spent the past seven years battling the United States Army over its refusal to comply with State environmental laws at its Rocky Mountain Arsenal CERCLA site, Colorado has a unique perspective on the frustration and costs of litigating the respective roles of federal and state regulatory agencies at cleanup sites. The Arsenal experience provides some valuable lessons in the cost of attempting to limit the state's role at CERCLA sites, particularly where the federal government is the primary polluter.

The Arsenal is a 27-square mile Army installation, located northeast of Denver. The Army used the Arsenal as a chemical weapons manufacturing facility during and after World War II, producing the lethal nerve agent GB, mustard and phosgene gases, Lewisite, and incendiary munitions. Shell Oil Company ("Shell") later leased portions of the Arsenal, where it manufactured pesticides, herbicides and insecticides, including DDT. Improper management of hazardous wastes from the Army's chemical weapons production and Shell's manufacturing processes contributed to significant groundwater contamination on and off site.

In the early 1980's, after nearly 40 years of chemical production and disposal at the Arsenal, the Army stopped depositing waste at the site. In March of 1978, the manufacturing of pesticides ceased; and in November 1988, the Army declared that the Arsenal was no longer an active military installation, and announced that its sole mission at the Arsenal was to clean up the site.

But, the cleanup of this highly toxic area, once described by a former Army official as home of the "most polluted square mile in the United States," has been an extremely difficult and divisive process. The task has been arduous, because there is simply no foolproof way to find, and treat or dispose of, such a complex amalgamation of toxic chemicals. It is a tragic fact

that, even after cleanup at the Arsenal is complete, millions of cubic yards of hazardous wastes will still remain on the site.

Recently, the Army and Shell adopted a new means of handling the remaining hazardous liquid wastes. Between 1987 and 1989, the Army transferred approximately 12 million gallons of contaminated liquids from the noxious Basin F area to three storage tanks and a holding pond. During this transfer process, Arsenal neighbors and workers complained of strong, pungent odors and experienced adverse health symptoms, including headaches, rashes and nosebleeds.

The Army began incinerating the liquid hazardous waste presently stored in the three tanks and the holding pond in 1993. In 1994, the Army intends to finalize its remedial action plan regarding on-site contaminated soils and sediments, and contaminated ground water and surface water. In the meantime, the Army is continuing its attempt to identify the extent of the remaining contamination, and any effect that contamination has on the environment and human health.

Throughout the past decade, the State has attempted to protect the citizens of Colorado by ensuring that the United States and Shell adequately clean up contamination at the Arsenal. We believe it is appropriate and necessary for the State to have a substantial voice in decisions regarding the cleanup and management of the Arsenal. The United States must, of necessity, balance competing agency missions. The federal judge involved in Arsenal litigation since 1983 recognized this conflict and the almost impossible task that the Department of Justice has in attempting to represent these sometimes different and conflicting interests.

The State has an important role to play in the cleanup process, in that it can focus its expertise and attention on the cleanup alone. The State has attempted to bring that expertise and

attention to the cleanup of the Arsenal through participation in the process set out in CERCLA, and through the exercise of independent state hazardous waste authority.

Pursuant to the CERCLA process, the Colorado Attorney General's Office and the Colorado Department of Health, together with the Colorado Department of Natural Resources and a team of consulting experts, have consistently monitored the investigation and cleanup activities at the Arsenal. This monitoring involves reviewing and commenting on the Army's technical evaluations of the problems and proposals for cleanup and disposal, and advocating and overseeing their correct implementation.

We believe that Colorado's past endeavors to exercise this authority, coupled with its role under CERCLA, have encouraged a more thorough cleanup. For example, in 1975, Colorado ordered the Army and Shell to "cease and desist" polluting the waters of the State by allowing plumes of contamination in the groundwater to migrate past Arsenal borders. This order acted as a catalyst for the eventual construction of a groundwater contamination treatment/containment system along the northern boundary of the Arsenal. The right to enforce State environmental requirements at the Arsenal has been challenged by the United States. Thus, the State has had to institute and defend against litigation in its attempt to ensure an adequate cleanup. Under the federal Resource Conservation and Recovery Act of 1976, as amended ("RCRA"), 42 U.S.C. §§ 6901-6987, which antedated CERCLA, a state may administer and enforce its own hazardous waste management program "in lieu of" the federal program administered by the EPA, if the EPA Administrator finds the State program acceptable. Because Colorado's hazardous waste management program received EPA authorization in 1984, Colorado contends that the Army must comply with State hazardous waste laws and regulations in cleaning

up those units of the Arsenal which meet RCRA jurisdictional requirements. There are several such units located at the Arsenal.

Prior to 1986, the Army seemed to agree with Colorado. As early as 1982, the Army signed a Memorandum of Agreement with Colorado and the EPA, in which it acknowledged that the cleanup of the Arsenal was subject to both RCRA and CERCLA requirements. When Colorado received authorization from the EPA to operate its own hazardous waste management program, the Army submitted a RCRA application and its proposed Basin F closure plan to the state.

But in 1986, the Army abruptly reversed its position, claiming that CERCLA set forth a comprehensive scheme for cleaning up hazardous waste sites that precluded the independent application of RCRA. When the Army announced its intentions not to follow Colorado's Basin F Closure Plan, the State amended a previous lawsuit in order to seek the enforcement of this Plan.

The Army swiftly challenged Colorado's authority to protect the health and welfare of its citizens from hazardous waste management activities proceeding at the Arsenal under CERCLA. In 1989, the federal district court disagreed with the Army's position and clearly recognized the Colorado's independent state law authority. Despite the court's ruling, the Army continued to ignore many of the requirements of Colorado's hazardous waste laws and regulations. Hence, on September 1, 1989, Colorado issued a compliance order against the Army, citing it for over 40 violations of Colorado's hazardous waste laws and regulations at the Basin F site, and mandating that the Army meet certain requirements. In response, the United States filed suit asking the court to declare that the State did not have such authority.

After nearly four more years of litigation, the federal Tenth Circuit Court of Appeals ruled, on April 6, 1993, that Congress had expressly reserved in CERCLA states' independent authority to enforce their environmental laws at CERCLA sites. After unsuccessfully petitioning the Tenth Circuit for a rehearing, the United States recently sought review of the case before the United States Supreme Court. On January 24, 1994, the Supreme Court denied the United State's petition for review, finally putting to rest the federal government's challenge to Colorado's state law authority.

Throughout the years of contention among the United States, Shell and the State, Colorado has attempted to settle the many lawsuits spawned by the cleanup. These efforts have been unsuccessful to date. However, since Colorado's independent authority was recognized by the Tenth Circuit, earnest negotiations have begun anew.

The preservation of state authority is especially important at federal facility sites, such as the Rocky Mountain Arsenal, where the extent of the cleanup is being determined by the federal polluter. At federal facilities, EPA is severely constrained by the requirement that the "federal family" speak with one voice. EPA may not sue a sister agency, and recognizes its enforcement limitations at federal facilities:

> States are not subject to the same constraints as EPA regarding enforcement actions against Federal facilities. As a result, states generally may exercise a broader range of authorities and enforcement tools than EPA to address violations at Federal facilities. States should use the full range of their enforcement authorities to address Federal facility violations to the same extent they are used for non-federal facilities while meeting the requirements of timely and appropriate enforcement response.

EPA, Federal Facility Compliance Strategy, at VII-1 (November 1988).

It is our view that the Administration's proposal to enlarge the scope of CERCLA, while diminishing the states' independent enforcement authority, will lead to the further expenditure of federal and state resources on litigation, rather than cleanup. Such a misdirection of scarce resources is totally unnecessary, now that the respective roles of the state and federal regulatory agencies have been exhaustively litigated, and finally settled, in the Rocky Mountain Arsenal case.

Denying state authority will not eliminate conflict, especially at sites where the federal government is the polluter. If a state disagrees with the way a federal agency is handling a CERCLA site, it is forced to invest substantial resources fighting to be heard and creating a record upon which to base a lawsuit. Ultimately, if the state believes a federally-selected CERCLA remedy does not comply with applicable law, it will sue. But such a challenge cannot occur until after a cleanup remedy is selected, and often not until years later, when the remedy is completed at a site. If, after protracted and expensive litigation, the state is proven correct, the liable party will then be forced to reevaluate, redesign, and implement a new remedy. We feel it is better to reach a consensus first, and perform only one cleanup. Colorado would rather see resources devoted to up-front, improved decision-making and better remedies from the outset. The independent state law authority preserved by Congress in CERCLA §§ 114(a) and 302(d), and recognized in United States v. Colorado, gives the federal government a strong incentive to consult with the states early and often.

By amending CERCLA §§ 114(a) and 302(d) to weaken those sections' preservation of existing law, the Administration will do more than impede state RCRA enforcement at CERCLA sites. It will also frustrate State enforcement of the Clean Water Act and the Clean

Air Act. These laws were passed by Congress with the expectation that states would assume the burden of implementing them. Obviously, it would be both irrational and contrary to congressional intent if states could not enforce the programs established under these acts. We, therefore, strongly oppose the Administration's proposed changes to CERCLA §§ 114(a) and 302(d).

The Administration also proposes to amend CERCLA §§ 113(b) and 120(a) to provide that the federal courts shall be the sole forum for bringing non-compliance claims against federal polluters. Currently, states may enforce their laws in state courts. The Administration's proposal would allow the federal polluter to remove all such actions to federal court. Thus, federal polluters will have the added advantage of having state laws interpreted by forums unfamiliar with state laws, and potentially having state claims barred by the CERCLA § 113(h) limitations on pre-enforcement review. Federal polluters should not be accorded this special treatment which private party polluters do not enjoy. We oppose any attempt to thwart a state's authority to have state law claims heard in state courts.

The Rocky Mountain Arsenal experience has heightened Colorado's awareness of the special problems associated with contaminated federal facilities. Other states have suffered similar frustrations with federal polluters. Thus, the Administration's proposals to eliminate independent enforcement of state laws at CERCLA sites, and particularly at federal facilities, is disturbing. Moreover, we oppose the Administration's proposal to amend § 120(a)(4) to limit federal polluters' liability to only those sites which are currently owned or operated by the United States. We suggest that Congress reconfirm its intention to preserve state law authority, and federal polluter liability, at all sites formerly or currently owned and operated by the United States by amending CERCLA § 120(a)(4).

CONCLUSION

I would like to congratulate the administration for accepting the challenge of Superfund reform. I believe that the proposed revisions regarding allocation, exemptions, and expedited settlement of liability merit consideration. I am also heartened by the willingness to decentralize the CERCLA machine by providing for delegation of authorities to the states. I will be providing additional analysis of these specific proposals to the subcommittee in a supplement to my testimony. I am greatly disappointed with the Administration's attempt to limit their liability for federal facilities. Again, I would like to thank the subcommittee for the opportunity to appear before you and discuss these important matters.

NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

Adopted

Summer Meeting
July 7-10, 1993
Chicago, Illinois

RESOLUTION

CERCLA

WHEREAS, the Superfund Program implemented under the federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and under comparable state laws is of critical importance to assure protection of public health and the environment from uncontrolled releases of hazardous substances at thousands of sites throughout the country;

WHEREAS, the Attorneys General of the states have significant responsibilities in the enforcement of state Superfund programs including actions to compel those responsible for environmental contamination to take necessary cleanup actions and to reimburse the states for publicly-funded cleanup actions:

Liability

WHEREAS, the effective enforcement of the Superfund cleanup program and the ability to impose cleanup costs on those who are responsible for contamination depends upon the strict, joint and several liability standards established in CERCLA and similar liability standards under state statutes and judicial decisions in 36 states;

WHEREAS, the current liability provisions of CERCLA and the state counterparts serve the additional public purposes of promoting waste minimization at the source, improved management of toxic and hazardous wastes that continue to be produced, and voluntary cleanup of property incident to its sale, financing or redevelopment;

WHEREAS, transaction costs associated with application of the CERCLA liability standards can be substantially reduced by amendments to modify the application of the liability scheme at sites involving a large number of parties, particularly where many of the parties were de minimus contributors or where a significant orphan liability share exists;

Preemption

WHEREAS, CERCLA is appropriately regarded as an additional tool for regulatory agencies to utilize in effecting cleanup of contaminated sites, and not as a replacement of otherwise existing environmental law;

WHEREAS, the goal of CERCLA is to clean up as many sites as possible as thoroughly as possible and as expeditiously as possible, and this goal can best be achieved by allowing States to exercise fully all existing environmental authorities;

WHEREAS, a significant number of the most dangerous hazardous waste disposal sites in the United States are located at federal facilities;

WHEREAS, Congress has waived federal sovereign immunity under CERCLA with regard to state laws concerning removal and remedial action, including state laws regarding enforcement at federal facilities which are not included on the National Priorities List;

WHEREAS, notwithstanding this waiver of federal sovereign immunity, federal agencies refuse to acknowledge state regulatory authority over their facilities;

WHEREAS, federal agencies should be subject to the same sanctions as private industry, and state and local governments, who become responsible parties under CERCLA;

State Regulatory and Police Power Actions

WHEREAS, states are frequently subject to counterclaims under CERCLA solely based on the environmental regulatory activities at CERCLA sites;

WHEREAS, although states routinely prevail in having these counterclaims dismissed, the absence of clear language in CERCLA precluding such claims against states frequently prolongs and increases the expense of cost recovery actions;

Program Delegation

WHEREAS, the CERCLA program fails to effectively use state resources to achieve prompt cleanup of environmental contamination;

WHEREAS, the number of contaminated sites currently identified nationwide far exceeds the capacity of EPA to address on its own;

WHEREAS, many states now have proven track records in implementing effective cleanup programs;

Operation and Maintenance Costs

WHEREAS, EPA has interpreted CERCLA to require the states to shoulder the burden of all operation and maintenance costs for CERCLA cleanups; and

WHEREAS, such a policy not only imposes an unreasonable burden on the States, but also provides an inappropriate incentive for the federal government to select lower capital cost remedies that are not permanent.

NOW, THEREFORE, BE IT RESOLVED THAT THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL urges Congress to:

- retain the basic strict, joint and several liability standards now in force under CERCLA for clean up of most of the nation's uncontrolled hazardous waste sties;

- consider an alternative approach for managing the cleanup of municipal solid waste landfills if adequate funding is provided for the alternative approach;

- consider means of reducing transaction costs at other sites involving numerous responsible parties such as developing a more effective process for settling with de minimus contributors and making available more government funding as part of settlements involving sites with a significant orphan share of liability;

- amend CERCLA to reconfirm Congressional intent not to preempt the operation of State law at CERCLA sites;

- clarify that federal sovereign immunity under CERCLA is waived at federal facilities, whether or not the site is listed on the National Priorities List;

- amend CERCLA to clarify that states are not liable for any cleanup costs under CERCLA solely as a result of environmental regulatory activities with respect to CERCLA sites;

- amend CERCLA to provide for delegation of the federal Superfund program to states to operate in lieu of the federal program, based upon EPA's determination that state cleanup programs meet minimum standards or objectives, including implementation or enforcement of cleanups that adequately protect human health and the environment;

- amend CERCLA to require the president to allow states to select remedies at CERCLA sites where such states have entered into a cooperative agreement and have demonstrated, in accordance with objective criteria, their capability to exercise such functions; and

- amend CERCLA to clarify that the fund will be available to cover 90% of the cost of remediation, including long-term operation and maintenance costs.

BE IT FURTHER RESOLVED that the Environmental Legislative Subcommittee of the Environment and Energy Committee, in consultation with NAAG's officers, is authorized to develop specific positions related to the reauthorization of CERCLA consistent with this resolution, and to represent NAAG's position before Congress and to federal agencies involved in reauthorization discussions.

BE IT FURTHER RESOLVED that NAAG directs its Executive Director and General Counsel to send this resolution to the appropriate Congressional Committees, to the Administrator of the U.S. Environmental Protection Agency, and to the Attorney General of the United States.

Abstain: Attorney General Don Stenberg

Mr. SWIFT. You are most welcome. Can I ask you just a question out of order here. My State also has a woman as attorney general. How many of them are there these days?

Ms. NORTON. I believe that we are now up to 10. There has been a recent appointment, and I think that brings us up to that number.

Mr. SWIFT. Not being a lawyer I will never run for attorney general, so that I don't have to worry about the fact that you are doubling the potential opponents that a man would have by having women also considered. That's very good. Thank you.

The next witness is Mr. Pollard.

STATEMENT OF ALFRED POLLARD

Mr. POLLARD. I am Alfred Pollard, director of government relations for Savings and Community Bankers of America. Today, however, I am pleased to appear on the subject of liability standards under the environmental laws, as they impact secured parties and fiduciaries. My remarks are made on behalf of a coalition of some 70 financial institutions, creditor and borrower groups, national and local trade associations, all interested in this important subject.

I am pleased to have some colleagues from the American Bankers Association with me today, who have been bleeding advocates of securing support for legislative action. I am pleased to have followed NFIB, which has been a leading voice for the impact of this on the borrowing community.

I am going to skip quickly through my testimony in the interest of time. I will note for the committee that there is an exemption in current law for secured parties who do not participate in the management of a facility from strict joint and several liability. This exemption is very precise, and protects secured parties who do not make hazardous waste decisions regarding borrower property.

We believe that this reflects strong Congressional intent, that a mere ownership interest in property not give rise to liability.

The law contemplates coverage for lenders, guarantors, lessors and other who have a direct or indirect interest in property arising from a secured relationship, that would include people as diverse as title insurers and even government guarantors. This seemed pretty clear for 5 or 6 years, and then in the beginning of the 1980's we had a series of court cases that began to erode the clarity of this existing 1980 language.

Most notably is the case called the Fleet Factors decision which, in the language of that decision, implied that the mere capacity to become involved with lender decision making on hazardous waste could trigger liability for a secured party. That caused a major reaction in the financial community, and not just among lenders but those involved with property. This would include title insurers, guarantors and indeed, the secondary market.

There was contraction in lending which unfortunately came at a time of general contraction in lending in the United States.

What we really have is a problem of court cases. We have the Fleet decision in one Circuit, and then we have a case in Seattle, the Bergsoe decision, which actually was a fairly strong decision saying that you need to have actual participation in hazardous

waste decision making. That seemed very positive to us. Again, it depends on where you are doing business.

Notably by the longstanding efforts of Congressman John LaFalce and Senator Jake Garn and now Senator Alfonse D'Amato, the concerns of the Congress were made clear to the regulators. In 1990 the Environmental Protection Agency agreed to move toward a rule. In 1992 they promulgated such a rule. Our coalition maintained its concern with this rule throughout this period for a variety of reasons.

Some were issues that were not covered such as fiduciary liability. Others were the fact that it was just that, a rule, subject to court action. Since I was invited to testify that action has come to pass. This past Friday the rule was set aside on administrative grounds here in the DC. Circuit. Court cases, the existing statute and the rule at no time have obviated the need for clear statutory action.

The EPA rule was an important step, but even before that rule there was need for action. The rule never provided quite the certainty that we wanted to see on private party actions, it did not deal with liability under RCRA, the Solid Waste Act, and it did not cover fiduciaries.

Let me digress a moment on fiduciaries. It's worth noting that financial institutions and others frequently come into property and to contact with property as fiduciaries. This may be both voluntary and involuntary. Not explicitly covered under the law, fiduciaries face liability in an equally uncertain fashion.

I will abbreviate my point here by simply noting that common law has governed the liability in the States of fiduciaries, but recent court cases and the attempt to apply Superfund have called that into question.

There is a need for legislation. We are pleased that the administration in two separate sections has begun the process of addressing fiduciary and secured party liability. They also deal with government liability. I would note that this is in a different fashion than was referred to this morning, and it relates to receivership and conservatorship, where the government may involuntarily come into dealing with property where they had no prior dealing, not an ownership relation.

We are committed to a clarification of this existing exemption. The coalition with whom I work wants to recognize that there is no absolute bar to liability. What we are seeking and what has been sought for some time is a brighter line. This will benefit many people.

Let me end by drawing a few concepts that I have heard here today together, and some points that we would like to make in concluding.

First, I think the greatest benefit of legislation will be private funding for clean up. You heard Dr. Chavis and other witnesses talk about bringing private funds to the table. It is very difficult to bring financial resources to bear when one is uncertain of one's liability. While a lot of debate and discussion of this issue and many articles are brought forth, I really believe that's the one that the committee from a public policy view might want to look at, the ability to encourage private clean up.

Every dollar that comes from the private sector doesn't come out of Superfund. I would also suggest that it probably comes earlier. Even Bill Roberts mentioned earlier problems grow. The sooner something begins the clean up process the better, and if it's done with the private sector funding it, all the better.

Also, I would like to note the irony, that environmental liability under Superfund creates problems with compliance with other laws. Notably, two laws. One, community reinvestment. Dr. Chavis talked about working for the communities. The institutions that I represent and the ABA and others, have a statutory mandate to work in their communities, low and moderate income areas. I will assure this committee that environmental liability and the uncertainty that surround it impacts the ability to lend.

Let me tell you another set of laws that impacted, environmental laws are impacted. We had a case in California of a Hispanic metal smith who had a building—very simple situation—California and the Federal Government requiring clean air compliance. They wanted to move out of the building and the scrubber comply with the law. What do small businesses use as collateral for financing, real property.

Real property has potential of Superfund liability. We have an ironic situation of potential liability under one environmental statute impeding action on another.

Finally, Bill Roberts also mentioned pressure on remedial action, that the current scheme provides pressure. I guess I am a bigger believer in carrots than sticks. I would note that a financial community has a strong pressure in many instances to look toward remedial action. The collateral for our loan is the real property. If something can be done—in fact, if we can finance that clean up we in effect will foster that remedial action, and it's to our own benefit. Strong collateral is exactly what we like to see.

Mr. Chairman, we appreciate the opportunity. We do look forward to working with you further, both as a coalition and its individual members. We thank you for this opportunity.

[Testimony resumes on p. 512.]

[The prepared statement of Mr. Pollard follows:]

ALFRED M. POLLARD
SAVINGS & COMMUNITY BANKERS OF AMERICA

Mr. Chairman and members of the subcommittee. I am Alfred M. Pollard, Director, Government Relations for Savings & Community Bankers of America. Today, I am pleased to appear on the subject of liability standards under environmental laws as they impact secured parties and fiduciaries.

My remarks today are on behalf of a coalition of some seventy financial institutions, creditor and borrower groups, national and local trade associations, all interested in this important subject.[1]

Secured Party Liability under Superfund

Under the "owner" or "operator" definition of CERCLA, a specific exemption exists for a secured party who "without participating in the management of a facility...holds indicia of ownership primarily to protect his security interest in the vessel or facility." 42 USC 9601(20)(A). This exemption from the otherwise strict, joint and several liability standard is the central focus for secured parties who do not make hazardous waste decisions regarding borrower property.[2]

This very specific language reflects congressional intent that an ownership interest in property not give rise to liability for parties who have no ability to exercise or do not exercise control over the hazardous waste decisions affecting property.[3]

The law contemplates coverage for lenders, guarantors, lessors and others who have a direct or indirect interest in property arising from a secured relationship, such as title insurers and government guarantors.

Court Decisions

Beginning in the mid-1980s, court decisions began to erode the certainty that had been provided by the definition. Reviewing the variety of business practices of secured parties, primarily banking institutions, the courts looked to determine what behavior might constitute "participating in the management" so as to move one outside the exemption.

These cases looked to pre- and post-foreclosure situations and generally found that if a lender did not participate in the actual, day-to-day

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[1]Appendix 1.

[2]Appendix 2 provides a listing of congressional, government and private party views on the intent of the secured party exemption and its importance.

[3]Appendix 3 provides a longer overview of the exemption, court cases eroding the exemption, the EPA rule and recent court decisions.

operations of a facility, particularly in the hazardous waste decisions, the secured party would be protected. Courts have used lender business practices as evidencing a motive to act in some other capacity than as a secured party. For example, holding property for four years without attempting to sell it appeared outside the normal practices of those foreclosing on property who attempt to move property expeditiously.

In one decision, however, the courts created major uncertainty for secured parties and those who guarantee or purchase interests in property such as secondary market players. The case even created uncertainty for government entities who take property into conservatorship or receivership, such as the FDIC or RTC, or who may take property where federal guarantees are involved, such as small business loans.

The Fleet Factors decision[4] was a catalyst for action by both Congress and the Environmental Protection Agency. The case called into question the routine business practices of secured lenders, many of which have direct environmental benefits. The ruling raised the prospect that mere capacity to influence a borrower's decision making was sufficient to void the secured creditor exemption. The practical effect upon lenders was to force a review of the need to change contract terms, of the nature of incidental obligations that lenders may require, such as reviewing the borrower's environmental law compliance, and even of the types of borrowers with whom the lender would deal.

Congressional Reaction and the EPA Rule

Finding that the uncertainty of secured parties was resulting in a contraction of lending or increased costs for small businesses, dry cleaners, petroleum marketers, convenience stores, home builders, businesses operating in proximity to properties where contamination had occurred and a wide range of other fact situations, legislation was introduced in the last three congresses.

Notably, by the long standing efforts of Congressman John LaFalce and Senator Jake Garn and now Senator Alphonse D'Amato, the concerns of the Congress were made clear to the regulators.

In 1990, EPA committed to a rulemaking on lender liability under Superfund. In 1992, the regulation was promulgated and published.[5]

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[4]U.S. v. Fleet Factors Corporation, 901 F.2d 1550 (11th Cir. 1990), cert. denied, 111 S.Ct. 752 (1991).

[5]EPA, Final Rule, 57 FR 18344 (April 29, 1992)(amending the National Contingency Plan; codified at 42 CFR 300.1100 et seq.).

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While not covering as many issues as the coalition's members had hoped, the rule did provide a greater degree of certainty for secured parties and others. The rule interpreted each of the many parts of the secured party exemption and provided guidance as to who qualified as a secured party, what indicia of ownership were involved, what behavior fell within or outside the concept of participating in management or protecting a security interest and how routine business practices and even remedial actions should be treated.

The Environmental Lender Liability Coalition has consistently sought legislation not only to address what the EPA rule does not cover, but to address the fact that the rule is just that, a rule subject to court action.[6]

That action has come; the rule was set aside on administrative grounds this past Friday.

Court Decision and the EPA Rule

Once again, a court decision has created uncertainty for millions of small businesses, farms, home builders, convenience store operators and others. In an action brought by the State of Michigan and by the Chemical Manufacturers Association, the D.C. Court of Appeals has ruled that EPA had no authority to interpret the liability provisions of Superfund.[7] EPA may, of course, reaffirm its rule as a statement of agency policy and the coalition encourages EPA to do so. What is most troubling, however, is that lenders face the threat of private party contribution actions which will not be subject to the terms of the lender rule. Indeed, until this decision is overturned or legislation enacted, the uncertainty for secured parties and others has returned.

Court cases, the existing statute and the rule at no time have obviated the need for legislation to clarify the secured party exemption.

The EPA rule was an important step, but even before the recent court decision, action was needed. The reasons for legislation remain the same as the EPA rule

-- did not provide certainty as to its application to private party actions under Superfund;

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[6]Appendix 4 provides a summary of the arguments for legislation in light of the EPA rule and court challenges.

[7]Kelley v. Environmental Protection Agency, No. 92-1312, and Chemical Manufacturers Association v. Environmental Protection Agency, No. 92-1314 (D.C.Cir. February 4, 1994).

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-- did not deal with liability under the equally important Resource Conservation and Recovery Act (RCRA), which has similar definitions;[8] and,

-- did not cover fiduciaries.

A Note on Fiduciary Liability

On this last point, it is worth noting that financial institutions frequently come into contact with property as fiduciaries. Both voluntary fiduciaries-- such as trust departments and executors, and involuntary trustees-- such as bankruptcy trustees and receivers, face uncertainty.

Not explicitly covered by CERCLA or RCRA, fiduciaries face liability in an equally uncertain fashion. While lenders cannot control the activities of borrowers, fiduciaries may not have control over what properties they oversee. For example, an estate executor is delivered property after assuming a fiduciary obligation.

Common law has set liability for trustees as limited to trust assets, except where willful behavior exists; recent court cases have made this less certain.

One court has examined the issue of fiduciary liability at length and has established a series of tests for determining if a trustee should be personally liable under Superfund.[9] If a fiduciary "owns" a property at a time of threatened or actual hazardous waste disposal, then personal liability may result. If a fiduciary cannot exercise control over the property while an "owner" or if the contamination occurred prior to the fiduciary relationship, then only trust assets will be available, not the personal assets of the trustee. This again raises the specter of endless lawsuits attempting to determine a range of other issues beyond the simple guidance already available under common law interpretations.

Need for Legislation

Mr. Chairman and members of the subcommittee, the need for legislation has never been greater. The number of court cases that followed the EPA rule

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[8]EPA indicated in its CERCLA rule that it would promulgate a rule for the underground storage tank sections of RCRA. The rule has not been forthcoming in nearly two years and the Environmental Lender Liability Coalition has made clear that there is no bar to the EPA promulgating a rule for all of RCRA, not just the UST section.

[9]City of Phoenix v. Garbage Services Corporation, 816 F.Supp. 564 (D.Ariz. 1993) and 827 F.Supp. 600 (D.Ariz. 1993).

demonstrate that secured party and fiduciary liability under CERCLA and RCRA continue to require a strong legislative pronouncement.

Our coalition is committed to a clarification of the existing statutory definition and believe that the EPA rule provided valuable guidance that should be codified. We have supported slightly broader action to cover the deficiencies highlighted earlier, particularly action on RCRA.

No one is advocating an absolute exemption from liability. Current law does not provide for that, nor does the EPA rule, nor is that being advocated here. The legislative proposals on this subject such as those of Senator D'Amato, Congressman LaFalce and Congressman Cox impose liability on those secured parties who cross the line and make hazardous waste decisions. All seek, however, to clarify what "the line" is for the benefit of secured parties, fiduciaries and most importantly those who use their services, notably small businesses, estates, bankruptcy courts, home builders and many, many others.

There are clear benefits of legislation. Lending will be improved and costs reduced for many small businesses that employ property as security for their borrowings. Lenders will have a clear line, which if they cross, they will find liability for environmental harm awaiting them. Legislation can encourage lenders, as did the EPA rule, to engage in remedial actions if they wish on property in post-foreclosure situations.

Of greatest interest to the subcommittee and the taxpayer, clarification of liability will enhance credit for private clean up of property. Every dollar lent for private clean up of property reduces the threat of further contamination and saves the Superfund from additional burden; this should be the single greatest impetus to legislation.

The proposal before the committee is the first recognition by the administration of the need to provide a clarification of the existing secured party exemption and a guide for fiduciary obligations under the environmental laws. There are important ideas in the proposal and, no doubt, areas for improvement. The working group with which I am associated supports early consideration of legislation and commits to working with the administration and the subcommittee to insure that legislation is the most effective possible.

Appendix 1

LEGISLATION NEEDED TO RESTORE SECURED PARTY EXCLUSION
UNDER FEDERAL ENVIRONMENTAL LAWS

In 1980, Congress passed the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund). The law provides remedies for a facility or property contaminated with hazardous substances, and it makes broad categories of persons strictly liable for cleanup costs.

The Superfund law specifically excluded from liability secured parties which hold collateral rights to land, homes, facilities or equipment and who do not take part in the operation of a facility. The Resource Conservation and Recovery Act (RCRA), which deals with solid waste and underground storage tanks, provided exclusions as well.

Contrary to congressional intent, court rulings weakened key definitions and either denied protection or created unacceptable uncertainty for secured parties, placing them at risk of falling outside the exemption. For example, one court indicated that liability could be found if an inference could be made that a lender could have affected, through financial arrangements, borrower activities.

Lenders and others may be held retroactively liable for actions they had no ability to control and for sums vastly beyond the amount of their credit extension or collateral value. Similar liability may be imposed on trustees and fiduciaries with respect to properties administered for others; recent court cases have cast doubt on trustee liability, even where they play no part in the operation of a facility.

Businesses, particularly small businesses such as convenience stores, service stations, home builders and farmers, cannot obtain financing needed to survive or grow. In cases where loans are being made, costs have been driven up by uncertainty and open-ended risk, concerns of importance for secondary parties such as mortgage insurers and title companies as well.

The Environmental Protection Agency attempted to remedy the uncertainty, promulgating in April, 1992, a clarifying rule. The rule increased certainty, but did not remove the need for legislation. EPA's rule does not apply to RCRA, does not treat fiduciary situations and was overturned in a legal action. Ironically, Superfund costs could be reduced by legislative language restoring the secured party exemption and clarifying the treatment of fiduciaries as loans for private cleanup of hazardous sites have been stifled by lender liability fears.

Congress must act to restore the intent of Superfund and matching provisions of RCRA by clarifying that lenders, trustees, lessors, fiduciaries, government agencies, federal and private guarantors and others who make secured loans or act as fiduciaries are not liable, except where they directly cause environmental damage. Proposals implementing congressional intent and restoring the secured party exclusion should not remove liability for cleanup to the extent the otherwise exempt party actually caused a threat or actual discharge of hazardous substances.

February 1994

SECURED PARTY
ENVIRONMENTAL LIABILITY WORKING GROUP

The organizations listed here urge Congress to act to insure that adequate credit is available at a reasonable cost by restoring congressional intent on the treatment of secured parties and clarifying liability of fiduciaries under federal environmental statutes.

Associations

National Association of Home Builders
Independent Bankers Association of America
American Bankers Association
Savings & Community Bankers of America
Mortgage Bankers Association of America
Credit Union National Association
National Association of Federal Credit Unions
Coalition for Regional Banks
Conference of State Bank Supervisors
Consumer Bankers Association
National Association of Industrial & Office Parks
The National Association of Realtors
Institute of Real Estate Management
Building Owners and Managers Association
International Council of Shopping Centers
National Realty Committee
National Multi-Housing Council
California Bankers Association
National Apartment Association
American Financial Services Association
National Association of Truck Stop Operators
American Land Title Association
American Council of Life Insurance
Farm Credit Council
Associated Builders & Contractors
Bank Lessors Group
Association of Bank Holding Companies
National Federation of Independent Businesses
Commercial Finance Association
Petroleum Marketers Association of america
Society of Independent Gasoline Marketers of America
National Association of Convenience Stores
Mortgage Insurance Companies of America
Mortgage Bankers Association of New York
Equipment Leasing Association

Companies

Marine Midland Bank
Chemical Bank
Texas Commerce Bancshares, N.A.
Barclays Bank PLC
Bank of America
NBD Bank, N.A.
Chase Manhattan Bank

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Mellon Bank
Barnett Banks, Inc.
First Interstate Bank
Citibank
J.P. Morgan & Co.
NationsBank
Meridian Bancorp, Inc.
Continental Bank, N.A.
Firstar Corporation
Banc One Corporation
Springfield Farm Credit Banks
Crestar Financial Corp.
First Bank System
Bankers Trust Company
Capital Holding Corp.
Ford Financial Services Group
Bank of Boston
First Chicago
Travelers
John Hancock Mutual Life Insurance Company
Beneficial Mgmt. Corp.
Household International
Wells Fargo Bank
Fleet/Norstar Financial Group, Inc.
ITT Financial Corporation
The Prudential Insurance Company of America
Massachusetts Mutual Life Insurance Company
Farm Credit Bank of Baltimore
Liberty National Bank
Capital Guaranty Insurance Company
The Phoenix Home Life Mutual Insurance Co.
First Florida Bank, N.A.
Mutual Savings Bank, F.S.B.

Appendix 2

STATEMENTS ON PROBLEMS ASSOCIATED WITH THE SECURED PARTY EXEMPTION AND LIABILITY UNDER SUPERFUND

Uncertainty and Its Impact

American Bar Association

Judicial misinterpretation of the Secured Creditor Exemption to CERCLA has nearly nullified the original intent of Congress in enacting the exemption. It has done so at the cost of defeating CERCLA's central purpose of shifting the costs of cleaning up contaminated properties to the private sector by cutting off the financing essential to paying those costs.

[Senate Banking Committee testimony (June 12, 1991)]

Environmental Protection Agency

Recent judicial decisions have created uncertainty concerning the scope of the CERCLA security interest exemption.

[Senate Banking Committee testimony (June 12, 1991)]

Small Business Administration

This problem is of significance to SBA because it directly impacts our programs of financial assistance to small businesses. In addition, we believe that the uncertainty with respect to the scope of CERCLA liability is having a chilling effect on the willingness of private lending institutions to make loans to small business.

[Senate Small Business Committee testimony (June 18, 1991)]

Treasury Department

...we believe there has been a chilling effect on both commercial and industrial and real estate lending....many lenders are walking away from their secured collateral and not foreclosing on bad loans for fear of environmental liability, thereby incurring losses that weaken the banking system. Lenders are also refusing to extend additional credit to troubled borrowers, which can result in bankruptcy and layoffs.

[Senate Banking Committee testimony (June 12, 1991)]

Federal Reserve Board

Imposing affirmative liability for environmental cleanup costs on lenders due to the exercise of such covenants [contractual clauses relating to compliance by borrowers with financial and environmental obligations] is likely to do little to prevent the

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pollution of the environment, but is likely to interfere with the availability of credit to even prudent businesses that use hazardous substances..."

...data from the Federal Reserve Banks suggest that CERCLA liability is in fact affecting the availability of credit.

[Senate Banking Committee testimony (June 12, 1991)]

Petroleum Marketers Association of America

...[of those applying for financing for underground storage tank activity] fully one-third of these loan applications have been denied by the lender with lender concerns about environmental liability accounting for the vast majority of denials.

[Footnote 2.] Many respondents to the 1991 Survey indicated that they have not even applied for financing specifically because their banks have made clear that they will not lend for any UST-related activity.

[Senate Banking Committee testimony (June 12, 1991)]

Need for Clarification of RCRA

Treasury Department

Both bills would clarify the security interest exemption with respect to both CERCLA and the Resource Conservation and Recovery Act of 1976 (RCRA). Although the EPA rule only clarifies lender liability in the context of CERCLA, the Administration is aware that there may be a similar issue with respect to liability of lenders under the underground storage tank provisions of RCRA. The Administration believes that the secured creditor provisions of RCRA should be similarly interpreted and applied.

[Senate Banking Committee testimony (June 12, 1991)]

National Association of Convenience Stores

...convenience store marketers are having considerable difficulty in obtaining loans for tank replacements, upgrades, leak detection and corrective actions.

[Testimony before House Energy and Commerce Subcommittee on Transportation and Hazardous Materials (March 20, 1990)]

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Congressional Intent on Holding Title

"Owner"...does not include certain persons possessing indicia of ownership (such as a financial institution) who without participating in the management or operation of a vessel or facility, hold title either in order to secure a loan or in connection with a lease financing arrangement under the appropriate banking law, rules or regulations.

House Report on Superfund, H.R. Report No. 172, 96th Cong. 2d Sess., PL 96-510, 1980 U.S. Code Cong. & Admin. News 6181.

Congressional Intent on Day to Day Control/Participating in Management

The Committee intends that for liability to attach under this [liability] section, the plaintiff must demonstrate a causal or contributory nexus between the acts of the defendant and the conditions which necessitated response action...

House Report on Superfund, H.R. Report No. 96-1016, 96th Cong. 2d Sess., PL 96-510, 1980 U.S. Code Cong. & Admin. News 6136.

Congressional Intent on Lessors

Where the owner/lessor does not exercise control over the operation or maintenance of the vessel and is not affiliated with the lessee...the Committee considers it inappropriate to place liability and financial responsibility requirements on the owner/lessor.

House Report on Superfund, H.R. Report No. 96-172, 96th Cong. 2d Sess., PL 96-510, 1980 U.S. Code Cong. & Admin. News 6213.

Congressional Intent on Operators (such as post-foreclosure)

The Committee intends that for liability to attach under this section, the plaintiff must demonstrate a causal or contributory nexus between the acts of the defendant and the conditions which necessitated response action...

House Report on Superfund, H.R. Report No. 96-1016, 96th Cong. 2d Sess., PL 96-510, 1980 U.S. Code Cong. & Admin. News 6136.

Appendix 3

SECURED PARTY AND FIDUCIARY LIABILITY UNDER FEDERAL ENVIRONMENTAL STATUTES

Overview

During the 1980s, court cases undermined the exemption of secured parties under Superfund and other environmental laws. With uncertainty and open-ended liability, lenders and others face difficulty with their existing portfolios and going forward with new extensions of credit.

The Environmental Protection Agency recognized the problem, promulgating regulations in 1992.[1] While the EPA rule is a positive development, congressional action remains necessary to deal with a range of issues not addressed or beyond the scope of the rule. Legislation would add certainty to the content of the rule and cover areas not addressed by EPA.

Congressional action is necessary to clarify the intent of Superfund, which exempts from liability under the law those secured parties who have not contributed to a hazardous waste situation.

I. **Federal Law**

The Federal Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA" or "Superfund"),[2] provides a comprehensive federal scheme for cleanup of contaminated property and for allocating liability for the costs involved.

CERCLA creates strict, joint and several liability for the costs of responding to a release or threatened release of hazardous substances and for harm to natural resources caused by such release.[3] No showing of fault is required. One person may be made to pay for the entire cleanup even if other parties were involved who are also responsible, though CERCLA provides for a right to seek contribution by others.

II. **Liability under Superfund**

Liability is based on three elements:

a. a release has occurred or is threatened;

b. response costs were incurred (that is, costs to investigate, remove or otherwise remediate the hazardous substances);

c. the person involved falls into one or more of four categories of

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[1] 56 FR 18344 (April 29, 1992); 40 CFR 300.1100 et seq.

[2] 42 USC 9601 et seq.

[3] 42 USC 9607(a).

responsible parties outlined by the law (specifically, a current owner or operator of a facility, a former owner or operator of a facility at the time of disposal of a hazardous substance, a person who arranges for transport, treatment or disposal of hazardous substances or the transporter of hazardous substances).

III. **Defenses under Superfund**

The Superfund law specifies very limited defenses to liability.

First, a showing may be made that one was not an owner or operator of a facility.

Next, under 42 USC 9607(b)(3), a person is relieved from liability if a discharge were caused by an act of God, an act of war, or "an act or omission of a third party..." To qualify for the third party defense, the "third party" cannot be an "employee or agent of the defendant" or someone whose act or omission occurs in connection with a contractual arrangement. Under the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), a contractual relationship is defined to include "land contracts, deeds or other instruments transferring title or possession..."[4]

IV. **Defenses for Purchasers of Property/Innocent Landowners**

For those who seek to buy and own property, the Congress provided a defense from liability. Where a land contract is involved and a party intends to take title to the property, however, the defendant is entitled to assert an "innocent landowner" defense in certain narrowly-drawn circumstances. To prevail, a defendant must establish two elements-- (1) that the property was acquired after the hazardous substance was placed there and at "the time the defendant acquired the facility the defendant did not know and had no reason to know that any hazardous substance which is the subject of the release... was disposed of on, in, or at the facility;" and (2) that at the time of acquisition of the property, the defendant had undertaken "all appropriate inquiry into the previous ownership and use of the property consistent with good commercial or customary practice in an effort to minimize liability."[5]

To establish whether the owner undertook "all appropriate inquiry," CERCLA requires courts to "take into account any specialized knowledge or experience on the part of the defendant, the relationship of the purchase price to the value of the property if uncontaminated, commonly known or reasonably ascertainable information about the property, the obviousness of the presence or likely presence of contamination at the property, and the ability to detect such contamination by appropriate inspection." CERCLA also provides that an owner who "by any act or omission, caused or contributed to the release" is not eligible for a defense.

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[4] 42 USC 9601(35)(A).

[5] 42 USC 9601(35)(B).

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V. Exemption for Secured Parties under Superfund

Financial institutions and others are concerned with CERCLA as holders of security interests for loans or leases and as fiduciaries for trusts and estates. Because of the potential ownership interest of secured parties, guarantors and others, they could be viewed as having liability under Superfund as owners. Congress took this into account in 1980, rejecting such an interpretation.

Specifically, CERCLA provides an exemption from liability under the owner-operator definitions for those who lend, guarantee or otherwise are involved with extensions of credit in which property is involved. Typically, a lender might extend credit and take a 15 or 30 year security interest in property; also involved are title and mortgage insurers, subsequent lien holders, secondary market parties and others who may have a potential right against the underlying property.

Though often discussed in the same context, the innocent landowner "defense" described above is not the same as the secured party "exemption" and is not the central focus for secured parties.

The CERCLA definition of "owner or operator" specifically excludes one who "without participating in the management of facility...holds indicia of ownership primarily to protect his security interest in the vessel or facility."[6]

VI. Key Court Interpretations

1. Secured Parties

Courts in the mid 1980s began to look at secured party involvement with property both before and after foreclosure as well as in leasing situations. The courts focused on the activities of secured parties in relation to the property and its management.

a. Loan Management and Foreclosure.

Several court cases, including U.S. v. Mirabile,[7] U.S. v. Maryland Bank & Trust Company,[8] U.S. v. Fleet Factors,[9] and, Guidice v. BFG Electroplating

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[6]42 USC 9601(20)(A).

[7]15 Envt'l L. Rep. 20994 (E.D.Pa. 1985).

[8]632 F.Supp. 573 (D.Md. 1986).

[9]901 F.2d 1550 (11th Cir. 1990), cert. denied, 111 S.Ct. 752 (1991).

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and Manufacturing Co.,[10] explored the extent to which loan foreclosure and loan management activities short of foreclosure can make lenders subject to Superfund liability despite this exemption.

i. Foreclosure. The courts have addressed the applicability of the security interest exclusion when a bank holds title to the secured property upon foreclosure. In Mirabile, the court found that a lender who held title for a brief period after foreclosure without participating in the management of the property was not an "owner or operator."

Maryland Bank & Trust Co. and Guidice decided that secured parties who foreclose and hold title to property may lose the security interest exemption in certain circumstances such as holding title for four years following foreclosure.

ii. Loan Management Activities. The courts also have found that certain loan management activities short of foreclosure may be considered "participating in the management" of the facility, making the lender an "operator" not protected by the security interest exclusion. Mirabile and Guidice generally found that participation in day-to-day operational and management decisions could subject a lender to Superfund liability, but mere financial oversight, collection activity, and advice would not. The case of In re Bergsoe Metal Corporation,[11] likewise held that lessors sued by third parties must have some "actual" involvement with property to trigger liability.

b. Capacity to Act.

Perhaps the most disturbing case was that of U.S. v. Fleet Factors Corporation.[12] There the court indicated that liability could be found without actual day-to-day operational involvement. Specifically, the court noted that a

> ...a secured creditor may incur [owner] liability, without being an operator, by participating in the financial management of a facility to a degree indicating a capacity to influence the corporation's treatment of hazardous waste. It is not necessary for the secured creditor actually to involve itself in the day-to-day operations of the facility in order to be liable...Nor is it necessary for the secured creditor to participate in management decisions relating to hazardous waste. Rather, a secured creditor will be liable if its involvement with the management of a facility is sufficiently broad to

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[10]732 F.Supp. 556 (W.D.Pa. 1989).

[11]910 F.2d 1668 (9th Cir. 1990).

[12]901 F.2d 1550 (11th Cir. 1990), reh. den. 911 F.2d 742, cert. denied, 111 S.Ct. 752 (1991)[further proceedings at 819 F.Supp. 1079 (S.D.Ga. 1993) and 821 F.Supp. 707 (S.D.Ga. 1993)].

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> support the inference that it could affect hazardous waste disposal decisions if it so chose. 901 F.2d at 1557-1558. [Emphasis added.]

This ruling created great uncertainty for lenders and threatened the ability to set loan terms. The court dictum was vague, unclear and appeared to indicate that mere financial arrangements, critical to a secured party, not just direct involvement with hazardous waste decisionmaking could create liability.

Ironically, Fleet Factors gave secured parties incentives not to know what was going on with property and to remove contract clauses that afford the lender a right to inspect or otherwise demand compliance with environmental laws. In short, Fleet Factors encouraged a lender to become less involved in environmental issues and meant that credit would be unavailable for environmental cleanups, lending that would reduce Superfund costs.

[See recent court cases since the EPA rule in Section VIII.]

2. Fiduciaries

Fiduciaries are placed in a difficult position under Superfund. Trustees range from passive executors of wills who simply receive property and administer it to holders of property who oversee operation of major business enterprises. Clearly, under most common law interpretations, the trust corpus is available in instances where liability arises. However, trustee liability-- that is, personal liability beyond trust assets-- is a different situation.

For some trustees, there may be no specific knowledge of a property which is subject to a trust. When becoming an executor to an estate, a manager of pension fund assets (which may include title to a building or property) or a bond indenturer (who represents the bondholders and may need to foreclose), a fiduciary may be placed in a perilous position. This is particularly difficult where a fiduciary's duty may mandate a foreclosure against the best judgment of the trustee in the face of Superfund. Other trustees exercise management control over facilities, with operational control in the hands of business managers.

In the 1993 case of City of Phoenix v. Garbage Services Company,[13] Valley National Bank was found liable as an "owner" of property under a trust agreement. Acting under trust terms, the Bank acquired a landfill and leased it to Garbage Services Company to administer. While not found responsible as an "operator," the bank's mere holding of record title to a landfill created ownership liability. EPA's rule had indicated that "innocent" trustees have little to fear from the agency; yet it is just this type of private party suit that creates problems for fiduciaries.

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[13]816 F.Supp. 564 (D.Ariz. 1993).

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In the second City of Phoenix case,[14] the court indicated those situations where a trustee may be personally liable. Specifically, the court found personal liability existed if the trustee controlled the property at the time of a contamination.

> Where a trustee had power to control the use of trust property, and knowingly allowed the property to be used for the disposal of hazardous wastes, the trustee is personally liable for response costs under CERCLA section 107(a)(2) regardless of the trust's ability to indemnify him. 827 F.Supp. at 607.

The court found that if a trustee owned property, but could not control disposal activities, or did not own the property at the time of contamination, only trust assets were liable.

This case creates the same uncertainty for fiduciaries that secured parties have faced. Be they voluntary or involuntary trustees, action should be taken to clarify the liability of trustees.

VII. Superfund, Business and Government

Collectively, the trends in the courts have created problems for financial institutions both as creditors and fiduciaries. Overall, lending has been adversely affected by the uncertainty of secured parties, title insurers, lessors, secondary parties and successors and others who are part of the process directly or indirectly of extending credit based on security in property.

The adverse impact of secured party liability on lending include:

> i. Potential liability discourages lenders from lending in geographic areas around hazardous waste contamination sites;
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> ii. Potential liability discourages lenders from lending to certain businesses where disposal issues may be a problem such as dry cleaners, petroleum marketers, farms and the like; and,
>
> iii. Potential liability discourages lenders from lending to private clean ups of hazardous waste sites; the uncertain liability is simply too great to foster such lending.

Secured party liability under Superfund, therefore, affects more than financial firms. Small businesses, home builders, farmers and others are confronted with unusual new rules, higher costs and uncertainty.

No sound public policy exists for holding secured parties liable for customer actions. Liability in recent court cases under Superfund is

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[14]827 F.Supp. 600 (D.Ariz. 1993).

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created after the fact and imposed on an innocent party; this has no deterrent effect on hazardous discharges. CERCLA operates as a trap, not as originally intended. Portions of the law need to be returned to their original intent-- to exempt secured parties who are not involved in the day-to-day hazardous waste operations of a facility.

Finally, government entities, including those vested with resolving failed depository institutions, have acknowledged a problem. The Resolution Trust Corporation, the Small Business Administration and every government body that extends credit or guarantees against property face liability.

VIII. The EPA Rule, Recent Cases and Legislation

1. EPA Guidance

The Environmental Protection Agency has promulgated a rule that provides a significant improvement in understanding the secured party exemption. Secured parties, under EPA's interpretation, are liable if they take direct action on hazardous waste that requires a response prior to foreclosure and liable if after foreclosure if they take non-mitigative actions regarding hazardous waste.[15]

The rule provides a "brighter line" than current court cases and would enhance lender, lessor, guarantor and other secured party certainty. It provides guidance and provides for liability where a party holding a security interest steps across a threshold. Incentives are provided for holders of security interests to do more than merely sit on property.

The EPA rule was successfully challenged in a recent court case on the grounds that it represented an improper exercise of regulatory authority; the agency did not have statutory grounds for the rule. The case may be appealed and EPA may continue to follow the rule for enforcement policy.

2. Recent Court Decisions

Following the EPA rule, several courts have ruled on suits against secured parties in both pre- and post-foreclosure situations as well as lease arrangements. Many ruled in favor of secured parties based on interpretation of the CERCLA statute as well as citing the EPA rule favorably.

In Ashland Oil Inc. v. Sonford Products Corp.,[16] the court cited the EPA rule and the language of CERCLA and found no liability for a lender's periodic reviews of a borrower's status or for simple holding of personal property or leased real property after foreclosure.

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[15]57 FR 18344 (April 29, 1992); 40 CFR 300.

[16]810 F.Supp. 1057 (D.Minn. 1993).

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In Northeast Doran, Inc. v. Key Bank of Maine,[17] a Superfund claim was dismissed where a bank learned of contamination upon foreclosure, but did not disclose this to the buyer. Under CERCLA, the court found the bank to be a "holder" not an "owner" of property.

In Kelley v. Tiscornia,[18] the court ruled that holding a first mortgage and assisting a borrower in attempting to avoid bankruptcy did not violate the lender's exemption. The court reviewed many acts that would not move a secured party to a position of participation in management of a facility. The court cited the EPA rule favorably.

In Grantors to the Silresim Site Trust v. State Street Bank & Trust Co.,[19] the court found no liability where lenders failed to seek Small Business Administration foreclosure on loans. This failure did not constitute "participating in management"; the court here acted without reliance on the EPA rule.

In Waterville Industries, Inc. v. Finance Authority of Maine,[20] the court ruled that secured party exemption of CERCLA applies to lease financing arrangements. Here a taking of title to property, pursuant to a deed in lieu of foreclosure, was a security interest qualifying for the secured party exemption. Likewise, guarantors of credit were considered to fall within the exemption. The case cited CERCLA, not the EPA rule.

Finally, in U.S. v. McLamb,[21] the court ruled that a secured party upon foreclosure did in fact become the owner of property, but could avail itself of the exemption, as it acted primarily to protect its security interest. The court found that the bank in the case had not undertaken any action inconsistent with a secured party's interests and did not attempt to adversely impact the foreclosure sale, did not use or manage the property during the more than six month period it held title and attempted to sell the property promptly following the foreclosure.

Failure to disclose contamination on the property was not a disqualifying event because no such obligation exists under Superfund; see related ruling in Northeast Doran above.

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[17]No. 92-0247-B (D.Maine June 4, 1993).

[18]810 F.Supp. 901 (W.D.Mich. 1993).

[19]No. 88-1324-K (D.Mass. November 24, 1992).

[20]984 F.2d 549 (1st Cir. 1993).

[21]No. 93-1184 (4th Cir. September 17, 1993).

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3. Need for Further Regulation and Legislation

i. EPA Regulation. The EPA regulation is a strong start, but further EPA action and legislation are still required.

EPA could take a major step in improving secured party certainty by promulgating a companion rule to the Superfund rule for the Resource Conservation and Recovery Act ("RCRA" or "Solid Waste Law"). The EPA rule noted that action on the underground storage tank section (USTs) of RCRA would follow. Such a new rule should deal with all of RCRA, not just USTs. The problem for secured parties is no different under Superfund or RCRA. Nearly two years have passed since EPA promised a RCRA rule. [The Kelley case cited below calls into question EPA ability to propose such a rule.]

ii. Legislation. While EPA took a major step with its regulation, legislation is still required for a variety of reasons.

Congress should enact legislation to codify the EPA rule and to deal with matters untreated by the regulation.

- The rule does not apply to fiduciaries or trustees; Superfund and RCRA do not explicitly deal with fiduciaries.

- Language in the rule on lessors needs to be tightened to make clear the application of the secured party exemption to qualifying lessors. Likewise, improvements can be made to the references to guarantors and others who have a similar interest tied to property.

- The EPA rule is just that, a rule. Courts may and do overturn such rules and the EPA rule was been successfully challenged on the grounds of EPA authority, not the substance of the rule, in Kelley v. Environmental Protection Agency.[22] This again creates uncertainty for lenders, small businesses and many others. Legislative action would clarify the rule and its application to private parties.

Legislation will bring additional certainty and free additional credit for small business and private sector environmental clean up.

February 1994

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[22] Kelley v. Environmental Protection Agency, No. 92-1312, and Chemical Manufacturers Association v. Environmental Protection Agency, No. 92-1314 (February 4, 1994).

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ANALYSIS AND PERSPECTIVE

NEED REMAINS FOR LEGISLATION ON LENDER AND FIDUCIARY ENVIRONMENTAL LIABILITY

By Alfred M. Pollard*

This year has seen a new administration and a good deal of initial discussion on environmental issues, including potential reauthorization of the federal superfund law.

The uncertainty facing secured parties and fiduciaries under environmental laws remains very much a concern.

Congress should act, either as part of superfund reauthorization or in stand-alone legislation, to resolve this uncertainty, which adversely affects borrowers, lenders, fiduciaries, and the environment.

The 1980 Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, or "superfund") as amended in 1986, set forth a scheme for joint and several, strict liability for owners or operators of properties where an indivisible release or threatened release of hazardous substances exists. [42 USC 9601 et seq.]

Since secured parties may take title to property under loan terms or have other dealings with the actual owners, they could be viewed as "owners or operators."

The 1980 law specifically excluded secured parties from such liability. The superfund exemption provides that " 'owner or operator' does not include a person who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his or her security interest in the vessel or facility." [42 USC 9601(20)(a)]

Court decisions during the late 1980s eroded much of the certainty of this exemption. Ironically, the most notorious, though not the only, case of significance still remains in litigation [*United States v. Fleet Factors Corp.*, No. CV687-070 (DC SGa, 1993)] at a time when many courts have begun to take a more traditional view of the language of superfund to construe an exemption reasonably.

Market Impact

Lenders responded in a variety of ways to the adverse decisions.

Community lending was cut off in geographic areas where hazardous wastes had been detected.

Certain categories of businesses seen as posing a higher risk of environmental liability, such as dry cleaners, convenience stores, and petroleum marketers, had trouble getting loans.

For others, lending costs were increased by requirements of often unnecessary environmental inspections and assessments.

Additionally, secondary parties, such as mortgage insurers and title companies, began to question lending in certain areas and to certain borrowers.

Even appraisers were concerned about their role in environmental issues.

EPA Rule: Strengths and Weaknesses

In response to congressional oversight and lending industry expressions of concern, the Environmental Protection Agency promulgated a rule under CERCLA to govern interpretation of the secured party exemption. [57 FR 18344 (April 29, 1992)]

Amending its National Contingency Plan, and, thereby arguably covering private-party actions, EPA provided broad definitions of "participating in management," indicia of ownership, and acting "primarily to protect a security interest."

EPA took major steps to clarify that participating in management was restricted to actions that go directly to hazardous waste decisionmaking. [*See* Hathaway, "EPA Rule on Lender Liability Under the Federal Superfund Law," 58 BBR 789, 5/4/92.]

However, while recent court decisions have mainly followed the EPA rule, there remains concern about the need for legislation to fully resolve lender and fiduciary problems.

First, the EPA rule is only a rule. It already is under direct challenge, with arguments expected some time this fall. [*Michigan v. Environmental Protection Agency*, No. 92-1312 (CA DC, 1993).]

Moreover, the current EPA rule does not cover liability under the Resource Conservation and Recovery Act (RCRA, or the Solid Waste Act), the law governing solid waste regulation and underground storage tanks. EPA has committed to action on RCRA by a rule some time this fall, but so far has focused only on the subsection of RCRA dealing with underground tanks.

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The EPA superfund rule does not cover fiduciaries, a problem that has been highlighted by a recent superfund case in Arizona where a trust executor was held liable for actions of a waste site held as property in a trust. [*City of Phoenix v. Garbage Services Company*, No. C 89-1709SC (DC Ariz, 1993).]

The existing superfund law does not explicitly cover fiduciaries. For bank trust departments, for executors of estates, for trustees in bankruptcy and other fiduciaries, the problem of liability in a situation generally analogous to secured parties has increased costs and risks.

While a trust corpus has always been liable for damages, superfund poses direct, personal liability for trustees much the same as for secured parties. Thus, some reform is needed in this area, as well.

In the pending *Phoenix* case, a bank acting as executor was found to have "owner" liability for possessing the capacity to oversee the disposal of waste at a landfill though not actively making hazardous waste decisions. The court decided that a fiduciary can be held liable as an "owner" whenever it has some ability to decide, through a trust document or estate, about waste disposal on property in the trust corpus.

Bills Introduced in the 103rd Congress

Two significant bills have been introduced in this Congress dealing with environmental liability of secured parties and fiduciaries.

1. Rep. John LaFalce's (D-NY) Bill

In the House of Representatives, Small Business Committee Chairman John LaFalce (D-NY) has introduced HR 2462, a bill to clarify secured party and trustee liability under CERCLA and RCRA.

Expanding on legislation introduced in the 102nd Congress to include concepts in the EPA rule, the new bill has three major sections.

Secured Party Liability. Section 1 clarifies CERCLA's existing secured party exemption from "owner or operator" liability to define each term of the exemption with greater specificity. Mainly, these would adopt key provisions of and codify the existing EPA rule.

The bill proceeds to define a variety of terms of the exemption. "Indicia of ownership" is defined in three key areas—securing payment of a loan or indebtedness or subrogation of a guaranty or performance of another obligation, evidencing ownership under a lease financing transaction where the lessor does not initially select or ordinarily control daily operation or maintenance of property, or guaranty situations. Examples are provided.

Next, HR 2462 defines a "holder of a security interest" as one who holds indicia of ownership, including the initial holder or any subsequent holder, a guarantor, a lease financier, or a receiver. "Security interest" is defined as an interest in property created to secure a loan or subrogation under a guaranty or a lease financing transaction. This may also arise from sales and leasebacks and other examples, which are provided.

The core of the exemption, the definition of "participating in management of property," tracks the EPA rule and looks to the actual participation in the management or operational affairs of a borrower and not a mere capacity to influence or any unexercised right to control operations. Actions that constitute participating in management, based on the EPA rule, are making environmental compliance decisions for the borrower or exercising control at such a level as to encompass decisionmaking regarding environmental compliance or all of the aspects of business operations, excluding financial matters.

In looking to actions that fit within the definition and enhancing the concept of not participating in management, the bill defines "primarily to protect a security interest" as actions relating to the security interest, including taking possession of property within the context of moving diligently to sell the property on a reasonable commercial basis. So long as the action is to protect the security interest, there is no movement to an "owner or operator" position. Other defined terms include "property," "guarantor," and "borrower, debtor and obligor."

Secured Party Actions and Liabilities. In further defining actions permissible beyond those that evidence participating in management or those permissible to protect a security interest, the bill goes on to note that actions to foreclose, sell, or cause the transfer of property or to preserve and protect the property or otherwise exercise rights in the property do not constitute participating in management.

An environmental inspection or evaluation in line with commercial practice is evidence of acting to preserve and protect property, but is not mandated to qualify for the exemption.

If, in undertaking to preserve and protect property, a release is caused or exacerbated for which federal or state government determines that a response is necessary, then the secured party is liable for the cost of the response action directly attributable to the holder's actions, except for contamination that began before the holder's activities.

Simply put, liability is established for holders of security interests who directly cause or exacerbate a release to the extent of their contribution based on a federal or state response action.

Fiduciary Liability. Section 1 also contains a definition of fiduciary liability, based in part on common law liability standards and the EPA's policy as stated in the preamble to the lender liability rule.

Under HR 2462, "fiduciary" is defined as any entity considered a fiduciary under the Employee Retirement Income Security Act or who acts as a trustee, executor, personal representative, agent, *etc.*

No "owner or operator" liability applies to a fiduciary who did not control or participate in

the management of property prior to assuming control, other than control for the benefit of a holder of a security interest.

While the assets of an estate held by a fiduciary are liable under the bill for environmental harm, personal fiduciary liability arises only where there is willful, knowing, or reckless causation in a direct and active manner of a release for which federal or state authorities determine a response is necessary and to the extent directly attributable to the fiduciary's actions.

As with secured interest holders, the fiduciary would not be liable for a pre-existing and continuing release.

Liability Under RCRA. Section 2 of the bill treats secured party and fiduciary liability under RCRA, applying to both the broad RCRA statute as well as sections dealing with underground storage tanks (USTs).

Section 2 makes applicable to RCRA the definitions just elaborated under Section 1 and contains language referencing enforcement by the states that administer the RCRA program.

Prospective Application. Section 3 makes clear that the protections in HR 2462 apply to indicia of ownership acquired prior to enactment and well as to fiduciary property acquired prior to enactment.

The LaFalce bill does not address directly potential liability of the federal government when it takes over or regulates a private financial institution.

2. Sen. Alfonse D'Amato's (R-NY) Bill

In the Senate, Sen. Alfonse D'Amato (R-NY), ranking Republican on the Banking Committee, has taken up the lender liability legislation developed by former Sen. Jake Garn (R-Utah).

Title II of S 1124, the Depository Institutions Regulatory Improvements Act of 1993, would add a new Section 127 to CERCLA.

The proposed Section 127 creates a new liability scheme under CERCLA and Subtitle I of RCRA for private-sector depository institutions and lenders.

Definitions. Section 127 provides a list of key definitions. "Depository institutions" are defined under Section 3(c) of the Federal Deposit Insurance Act as well as credit unions, Farm Credit Banks, and leasing or trust companies affiliated with an insured depository.

"Lender" is defined as a party making a "bona fide extension of credit to a non-affiliated party; and ... substantially and materially complies with the environmental assessment requirements ..." created under the section as well as the "successors and assigns" of such lenders. The definition also includes secondary market parties who buy and sell loans that comply with environmental assessment procedures. Finally, lenders are defined to include persons who insure or guarantee against default in the repayment of an extension of credit or act as surety with non-affiliated parties.

Fiduciaries are referenced under the definition of "fiduciary capacity" as non-affiliated persons—a bona fide trustee, executor, administrator, custodian, guardian of estates, receiver, conservator, committee of estates of lunatics, or any similar capacity.

Lessors are referenced as part of the definition of "extension of credit," as those lessors that do not initially select leased property and do not control daily operation or maintenance of property or those lessors whose leases conform with the applicable federal or state banking laws.

The first part of this definition is similar to the LaFalce bill.

Liability. In general, liability for a depository institution "or other lender" is limited for certain situations—for property acquired through foreclosure, held in a fiduciary capacity, held by a lessor "pursuant to the terms of an extension of credit," or otherwise subject to financial control under the terms of an extension of credit.

In these instances, liability is limited to the "actual benefit" by remedial actions "undertaken by another party." The term "actual benefit" is defined as "net gain" to an institution under a remedial action by another party, in no event to exceed the amount realized on the sale of property.

The liability of parties is also limited under a safe harbor provision in the bill.

A series of safe harbors from liability are set forth and may be used to avoid a finding of having participated in the management of a facility solely because of (A) holding or "abandoning" a security interest, (B) having an "unexercised capacity" to influence operations on property, (C) having environmental covenants in contracts, (D) enforcing contract terms, (E) undertaking property inspections, (F) requiring property cleanup, (G) providing advice on actions to avoid default or diminution in property value, (H) restructuring contract terms, (I) exercising remedies for breach of contract, or (J) declining to take actions under items (A)-(I).

[Note: the preceding liability sections of S 1124 appear to contemplate that one must first be liable under CERCLA or RCRA prior to reaching the "safe harbor" or liability limitation.]

S 1124 also would exclude from the protection of the law an institution that "causes or significantly and materially contributes to the release of petroleum or a hazardous substance ..." Liability may include "removal, remedial, or other response action pertaining to that release."

Environmental Assessments. It is in the area of environmental assessments that the D'Amato approach differs from the current EPA rule and HR 2462.

The Federal Deposit Insurance Corp., in consultation with the EPA, is directed under the Senate bill to create regulations for depository institutions to develop "procedures" to evaluate environmental risk 180 days after enactment.

Assessments may vary by the level of risk. Liability here is limited to penalties for violation of an FDIC regulation, and similar rules for other defined lenders are to be crafted by the FDIC. This requirement would appear to impose FDIC sanctions on unregulated, non-depository institutions.

Other Items. Other significant definitions appear in S 1124 that are of interest. The bill defines "property acquired through foreclosure" as acquiring property from non-affiliated parties through routine foreclosure sales, conveyance under a credit extension including a lease, or through any other formal or informal manner where acquired for subsequent disposition if done so within a commercially reasonable time.

A "release" is defined by reference to Section 101(22) of CERCLA and liability for threatened releases, storage, and transportation of hazardous substances, and "hazardous substance" is defined by reference to Section 101(14) of CERCLA.

Finally, a "security interest" is referenced as "rights" under a mortgage, deed, assignment, judgment, factoring agreement, lease, or any other right accruing to a person to secure repayment of money, the performance of a duty, or other obligation.

Savings Clause. The bill provides a savings clause that protects all rights or immunities and defenses under CERCLA or other applicable laws. Also, no liability is to be created for any party under the bill, and no private right of action is permitted.

S 1124 creates a new section under superfund, unlike the House proposal, and does not provide separate treatment for fiduciaries in favor of creating similar obligations and responsibilities to lenders. And, as noted above, the bill mandates environmental assessment regulations not required in the LaFalce bill or by current law.

Need for Legislation

Given the current lawsuits against the EPA rule and litigation against secured parties and fiduciaries, legislation is needed if it builds on and enhances, but does not undermine, the existing EPA rule.

The EPA rule does not cover fiduciaries, and may not afford secured parties protection if it is not upheld or enforced by the courts.

A codification of key parts of the rule and extension of CERCLA to address fiduciary liability is in order to provide stability and certainty, which has been at the core of congressional and industry concerns.

The two bills currently before the Congress merit major discussion, review, and prompt action either as part of superfund reauthorization legislation or as stand-alone efforts.

The beneficiaries could be many. The environment will benefit, where greater support will be generated for private cleanups, and lenders will be more confident that requiring environmental compliance by borrowers will not trigger liability for them.

Private cleanups benefit not only superfund, but also clean air and water statutes. Lending for compliance with other environmental statutes may be inhibited by superfund liability; small businesses, in particular, borrow for cleanups using property as collateral.

Small businesses will see an easing of credit and a reduced cost, in many instances.

Lenders will have a "brighter line" with which to evaluate their contracts, pre- and post-foreclosure activities, and their overall lending policies.

And, finally, the costs of litigation by potentially responsible parties should be reduced by greater clarity in the law, a major savings to a program often criticized for excessive administrative expenses in the face of the nation's extensive need for environmental cleanup.

Mr. SWIFT. Thank you, very much. I would recognize Mike McGavick.

STATEMENT OF MICHAEL S. McGAVICK

Mr. MCGAVICK. My name is Mike McGavick, director of the Superfund Improvement Project of the American Insurance Association. The AIA is a Washington, DC. based trade association comprised of 254 insurance companies which write a large percentage of the commercial property and liability insurance in the United States.

Chairman Swift and I both come from Washington State, and have worked on many issues together. One of the issues that we worked on was the spotted owl crisis. The central argument for the bird's protection is that the owl is an indicator species. That is to argue that, when there is something wrong with the owl something is wrong with the ecosystem within which it lives.

If the current Superfund were an ecosystem the insurance industry would be the endangered indicator species. This is true for several reasons. First, our involvement is proof that the polluter pays principle is a fiction, masking what is truly a deep pocket pays system. What other justification can there be for a non-polluting industry like the insurance industry, to be dragged into this fight.

Second, the fact that our industry with all of its resources faces potential financial peril, is further proof that for many of the businesses caught up in Superfund the sums required are simply unbearable. Given that under any realistic scenario insurance will pay only a fraction of the overall costs, our potential financial crisis only indicates larger economic upheaval.

Third, we see first hand as President Clinton and others have noted, the costly and counterproductive litigation Superfund breeds. We see it because we pay for so much it. Hundreds of millions if not billions of dollars in legal costs are consumed each year. This is simply too much. In our view the simple fault is retroactive liability. Nothing can be more maddening nor is more unfair, than to make people pay enormous sums today for the legal and often government directed handling of waste years ago.

While people rightly fight this unfairness, clean up is delayed and money is wasted. For some years now we in the insurance industry, working with leaders from the PRP community and others, have argued that the best way to end this madness and move forward with clean up would be to repeal retroactive liability. Moneys could then be raised from among those sectors of society shown to be caught up in Superfund, ourselves included, and applied directly to clean up.

We were heartened when the Treasury Department took up this cause, realistic about the fact that these arguments did not hold sway within the administration as a whole. The result is the bill upon which this hearing is focused. We have said publicly and I reiterate here, we stand willing at least for the short term, to work aggressively and openly to see if the administration's proposal can be made to work.

In seeking improvements we will be focused on several crucial inquiries, and we encourage the same focus by the committee. I will abbreviate it here. They are the same three that you have been

hearing all about, the way in which discretion by EPA could undermine the system, the way in which non-binding allocations could be an opening through which everybody will drive a truck, and the way in which ALJ's would have more powers to try and constrict this process and make it work.

Our experience with the litigation is pretty simple. The looser it is, the more crevices people are going to fill with lawsuits. We would encourage you to make it at tight as possible as you work through the compromising balance between those different approaches.

As you can tell by the way that we approach it, we fear this system will be just as subject to litigation as is the current system, and we pay for the other litigation system. Today, we have directed our comments to the overall liability system. This is appropriate, since fundamental reform along with meaningful remediation reform, must happen if we are going to make Superfund work.

I would be remiss, however, if I did not use this opportunity to indicate also, that the current formulation for resolving the insurance litigation does not work. While we greatly appreciate the administration's brief but intense efforts to get this issue on the table as first start, much improvement is needed, as with the underlying liability sections we have discussed today, before anyone can say that the Superfund ecosystem no longer threatens those of us who must live within it.

Since, it's been a long day, I will visually close by summarizing our problem. In deference to the many dairy farms in the chairman's district, picture a cow. For our purposes today her name is Superfund. At the ears pulling in one direction stands the EPA. At the tail pulling in the other direction just as fiercely are the PRP's. In the middle sits the lawyer.

The fear of the insurance industry—we have so often paid for the milker—without significant improvements this bill will be remembered for substituting a fresh cow. We thank you for your time today. We look forward to discussing the substantial defects of the insurance specific provisions in greater detail at your future hearing.

We pledge ourselves and our resources to constructive, intense efforts, to see if this legislation can be made to work.

[Testimony resumes on p. 550.]

[The prepared statement and attachment of Mr. McGavick follow:]

U.S. House of Representatives
Committee on Energy and Commerce
Subcommittee on Transportation and Hazardous Materials

Testimony
of
Michael S. McGavick
on behalf of the
Superfund Improvement Project
of the
American Insurance Association

February 10, 1994

The American Insurance Association ("AIA") is a trade association comprised of 254 insurance companies which write a large percentage of the commercial property and liability insurance sold in the United States. AIA is vitally concerned about the efficiency and effectiveness of the current Superfund law, as well as its financial implications for property/casualty insurers, other affected industries, and the American economy as a whole. We appreciate the opportunity to testify before this Subcommittee as it considers the very crucial issue of the Superfund liability system and the Administration's reform proposal.

Our testimony sets forth a brief history of Superfund, describes how the current liability system works, and compares its practical application to the goals of the Superfund statute. We then describe how the insurance industry came to be involved in Superfund and why liability reform is so important. Finally, we discuss proposed liability reforms, including broad liability reform which could benefit all Superfund stakeholders, and a brief analysis of the Administration's liability proposal.

Background

Near the end of a lame-duck session in 1980, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act, commonly referred to as "Superfund." The main purpose of Superfund was to address a growing public concern: the cleanup of old hazardous waste sites, many of them inactive or abandoned years before.

Superfund was originally created as a five-year, crash program and was given $1.6 billion to clean up Superfund sites around the country. Now, thirteen years after Superfund's enactment, the Nation has suffered a vast waste of its resources for stunningly little progress: over $11 billion in federal funds, combined with still more billions from the private sector, have been spent trying to implement the program, yet by the start of FY 1993, only 3 percent of the 1,250 sites on the National Priorities List had been cleaned up. Approximately 97 percent were still somewhere in the cleanup process. At the same time, 149 sites were listed as "construction complete" (12 percent).

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Superfund: An Unprecedented Liability System

The most controversial issue in Superfund is the statute's retroactive, strict joint and several liability system. This liability system is unprecedented in breadth and scope. Simply put, it is a "deep pockets" theory of liability, intended to maximize the chances that *someone,* regardless of fault, can be forced to pay for the cleanup of each waste site. This is the most Draconian standard of liability ever enacted into American law.

The extraordinary reach of the Superfund liability system can be seen by examining each of its parts:

-- *Retroactive liability* means that parties can be held liable for cleanup of waste that was disposed of decades before the 1980 enactment of Superfund.

-- *Strict liability* means that no negligence or fault must be shown for a party to be held liable, but rather only that the party generated, transported, or disposed waste at the site, arranged for the transportation or disposal of the waste, or owned or operated the site at any time. In addition, no proof is required to show that the pollution at the site was caused by the waste disposed of by any particular party at the site.

-- *Joint and several liability* means that all parties who contributed waste to a site, or have owned or operated the site, can be held liable for 100 percent of the cleanup cost for the entire site. In other words, EPA

can (and often does) declare one or two parties responsible for the cleanup cost of an entire site, even if hundreds of other parties contributed waste. Moreover, it is irrelevant that the parties held responsible by EPA may have contributed only a very small part of the overall volume of waste.

In summary, virtually anyone who in any way was connected with a Superfund site or its contents can be held liable. Liability attaches regardless of how much waste was generated, transported or disposed; when it was generated, transported, or disposed; how much care was taken; or whether the generation, transportation, or disposal complied with all laws in existence at the time.

Not only large companies have been found liable for cleanup, but also medium and small businesses, schools, hospitals, nursing homes, cities, towns, and civic organizations. Even state and federal agencies are frequently found liable. The ensuing litigation over who will be a "potentially responsible party" ("PRP") and how cleanup costs will be allocated among PRPs, greatly slows the cleanup process while incurring enormous costs -- known as transaction costs -- unrelated to cleanup.

Goals Versus Practical Application of the Liability System

In theory, the Superfund liability standard was intended to accomplish several objectives, including the following: (1) to minimize government expenditures for site cleanups; (2) to assure that "the polluter pays" for pollution caused; (3) to encourage

voluntary cleanup of hazardous waste sites; and (4) to provide incentives for environmentally correct waste disposal practices in the future.

All of these are commendable objectives and should be included in any comprehensive environmental policy program. We question, however, whether all or any of these objectives are being adequately met under the current Superfund law.

Minimization of Government Expenditures: The Superfund liability system was intended, in part, to provide a mechanism through which responsible parties would pay the full costs of investigation and cleanup on a site-specific basis. The Hazardous Substances Trust Fund was intended to operate as a revolving fund, which would continually be replenished by cost recoveries and, when necessary, by taxes on business.

In practice, however, government funds continue to constitute a major portion of Superfund expenditures. According to EPA's budget office, appropriations to the Trust Fund from 1981 through 1993 totalled $11.3 billion dollars.

While there are no definitive measures of PRP spending during the same period, the estimated value of all settlements reached by EPA at enforcement lead sites, plus recoveries received at fund lead sites, totals approximately $5.3 billion.

Although the proportional share of settlements and recoveries has been increasing, federal expenditures continue to outpace private party outlays, and there is often a substantial delay between the time EPA expends funds and recovers them from

PRPs. A huge percentage of these federal and private costs are incurred by operation of the Superfund retroactive, strict joint and several liability system, in the effort to determine "who shot John," years or even decades ago. The system doesn't have to work this way.

"Polluter Pays": Superfund's sweeping liability system also was intended to punish "polluters," by requiring them to pay all costs associated with cleaning up hazardous waste sites. In practice, however, there are significant discrepancies between the theory of the "polluter pays" principle, and the application of retroactive, strict, joint and several liability. Indeed, the Superfund terminology does not assign liability to "polluters," but rather, to "responsible parties" who may have had limited involvement with a Superfund site or its hazardous wastes.

Under the doctrine of retroactive liability, there is no point in the past beyond which liability will not attach. There is liability for activities which occurred years or even decades ago, and which were consistent with then existing legal requirements and scientific knowledge. It stretches the imagination to call many such parties "polluters," and yet they must pay under the current law.

Moreover, joint and several liability under Superfund means that parties which sent an extremely small quantity of waste to a site can be held liable for all, or a substantial portion, of cleanup at the site. There is no threshold requirement for determining liability.

Although EPA legally has the discretion to alleviate the effects of joint and several liability through the *de minimis* settlement, mixed funding, and non-binding allocation of responsibility ("NBAR") provisions of the SARA amendments, these tools have been used infrequently.

The combined effects of retroactive, strict, and joint and several liability in the Superfund context suggest that it is no longer necessary to prove that those found liable for cleanup costs did anything wrong, or were substantially responsible for the hazards present at a site. While this sweeping scope of liability might increase the chance that the government will recover its costs, it is inconsistent with the notion of corrective justice which purportedly underlies the "polluter pays" principle.

Incentives for voluntary cleanup: The liability system also was seen as a means to encourage voluntary site cleanups by those who wish to avoid the substantive and procedural hurdles of the Superfund cleanup process. While one occasionally does hear about "midnight cleanups," these appear to be few and far between, and are most likely to involve single party sites which do not present cost allocation issues.

Although failing to provide incentives for voluntary cleanup, the liability system does encourage environmental audits in conjunction with real estate transactions. Unfortunately, such audits may be less likely to result in voluntary site cleanup than abandonment of a site in favor of undeveloped land.

While environmental audits are useful informational tools, the real goals of the statute -- the cleanup of hazardous waste sites -- are not necessarily being met by the liability system.

Moreover, it is often areas which could best benefit from redevelopment which suffer from the disincentives provided by the retroactive liability system. Businesses now avoid old industrial sites, fearing that they may be purchasing Superfund liability.

Improved waste management practices: Another goal of the Superfund liability system was to encourage sound waste management practices among firms which wish to avoid liability in the future. Indeed, the threat of prospective Superfund liability has caused large businesses to practice better waste management.

However, the *retroactive* application of Superfund liability does nothing to achieve the objective of influencing future waste disposal practices. Regardless of the statute's goals with respect to future behavior, it cannot create any change in behavior which occurred more than a decade ago. Even if the prospective application of strict, joint and several liability can be said to have a positive effect on future waste disposal practices, such an effect is completely absent when the liability system is applied retroactively.

Direct and Indirect Costs

Unfortunately, there are no comprehensive studies which measure the direct and indirect costs of the Superfund liability

system. Practical experience, however, suggests that the following direct and indirect costs are linked to Superfund liability: high transaction costs; economic uncertainty; the use of "green" sites, as opposed to existing industrial sites, for future development; adverse effects on small business; and an increase in bankruptcy filings by responsible parties, with consequent job loss by employees.

Transaction Costs: The liability provisions of Superfund inevitably create a situation where PRPs spend inordinate time and money determining who will pay for cleanup costs, rather than putting their efforts into cleaning up. And where the Trust Fund is used to pay for cleanup, there is little incentive for government contractors to be efficient.

The threat of retroactive, strict joint and several liability has led to extensive litigation at virtually every stage in the process. Before a site can be cleaned up, there is controversy about whether to include the site on the National Priorities List; an extensive search for PRPs; the conduct of a remedial investigation and feasibility study ("RI/FS")(and often more than one); and the selection of appropriate remedies. In addition, more time and money is expended in disputes among responsible parties with respect to final allocation of shares, and between responsible parties and their insurers regarding the applicability and scope of insurance coverage. At the most complex sites, litigation can last for years and involve millions of transaction cost dollars.

How much has actually been spent on transaction costs? The General Accounting Office reported last year in testimony before this Subcommittee that 45 percent of the federal Superfund through FY 1992, some $4.7 billion, went to "support activities" (44 percent went for actual cleanup; 11 percent for enforcement). According to GAO, EPA claims that 70 percent of Superfund outlays have been made for remedial activities, but this figure includes research and development, and community relations.

Transaction cost information for the private sector has been difficult to assemble, largely because of the diverse number of parties, and the lack of site-specific accounting. In the most authoritative study so far, a 1992 study by Rand, it was reported that average transaction costs associated with insurance claims paid under Superfund were 88 percent of total costs. Even on closed claims, transaction costs averaged 69 percent, more than double the average for other general liability claims. Rand found that insurer transaction costs were running at $400 million per year for all waste cleanup claims. Transaction cost expenditures for PRPs must be at least equal to that figure.

It is important to recognize that transaction costs, while representing money that is diverted from site cleanup, are a legitimate expenditure by the parties which are incurring them. Indeed, given the enormity of cleanup costs and the potential consequences of the liability system, PRPs and insurers have a responsibility to their employees, customers, shareholders, and communities to exercise available legal remedies and defenses.

Nonetheless, when looking at the system as a whole, one would think that an alternative to the current liability system could reduce transaction costs and attendant delays. If one were redesigning the present system, an alternative that channels money directly to cleanup, rather than to litigation, would provide substantial efficiency gains.

Economic Uncertainty: The current liability system maximizes uncertainty about how the costs of cleanup will be allocated and paid. This uncertainty has negative economic consequences, making it more difficult for PRPs and insurers to raise money in capital markets to conduct their businesses. The smaller the PRP enmeshed in Superfund liability, the greater this problem becomes. (The same effect is felt by municipalities which seek to borrow.) By deferring capital investments, inhibiting or preventing job creation, delaying the return of property to productive use, and increasing the uncertainty of business transactions, the current liability system helps to impede economic revitalization of our country as a whole.

Use of "Green Sites": Under the Superfund liability standard, current site owners can be held responsible for cleaning up waste which was deposited by or under the direction of a prior owner. While some proponents of the liability system maintain that it encourages purchasers to require sellers to clean up their land prior to a real estate transfer, it also promotes the development of "green" sites -- those which are in pristine condition -- rather than the redevelopment of land which

has already been used for industrial purposes. By using "green" sites, purchasers can be sure that there are no hidden environmental problems which could result in significant cleanup costs.

However, from a land-use perspective, this strategy reduces the number of "green" sites, an environmental resource that may never be fully recoverable. This result might be avoided if the liability system were changed to soften its impact on subsequent owners with no direct relationship to hazardous wastes found at a site.

Adverse Effects on Small Business: As reflected in recent Congressional hearings on this issue, small businesses are especially vulnerable under the current liability system. Unlike the large PRPs, they do not have experienced in-house resources to address the technical and legal issues confronting them. Nor do they have the financial resources to pay large cleanup costs or litigation expenses. Private owners may find themselves subject to substantial unforeseen liabilities when they acquire a small business or property. EPA *de minimis* settlements do not preclude state enforcement or third party actions, and prolonged uncertainties preclude borrowing, deter capital investment, and, in the worst case, drive businesses with small margins and low financial resources into bankruptcy.

Bankruptcy: The high costs of Superfund cleanup, and the potentially disproportionate impact of the liability system, can force an otherwise healthy company into bankruptcy. A recent

ruling by the Second Circuit Court of Appeals that Superfund claims are dischargeable in bankruptcy could increase the number of firms which file for bankruptcy as a result of their Superfund liabilities. Such bankruptcy filings can have several negative consequences. Bankruptcy (at least in the case of liquidation under Chapter 7) results in greater concentration among a firm's competitors, job losses for its employees, and economic dislocations throughout the local economy. Moreover, a bankruptcy filing stays all claims against the bankrupt party, thus possibly delaying the cleanup of any Superfund sites with which the bankrupt party is involved. Bankruptcy increases the proportionate share of other responsible parties, regardless of their actual involvement at a site. Some of those might also choose the bankruptcy alternative. All of these consequences could be avoided for old waste sites if the retroactive liability system were eliminated.

Insurance Industry Involvement in Superfund

The insurance industry was brought into the Superfund liability quagmire by PRPs facing liability for cleanup of old waste sites. Insurers are involved in two different ways.

First, as PRPs are notified of their potential liability or are assessed their share of cleanup costs, many have claimed that liability for their past hazardous waste management practices is covered under old insurance policies in effect at the time the waste was disposed of at the site. Insurers argue that these old policies do not cover Superfund cleanup. These PRP law suits,

however, threaten to expose the industry to multi-million dollar claims. The result is time-consuming, expensive insurance coverage litigation that forces both PRPs and insurers to spend additional money on more lawyers and consultants.

The second way insurers are involved in Superfund disputes is in the defense of PRPs. While reserving the right to later have the coverage issue resolved, insurance companies often defend the policyholder against claims the policyholder contends are covered by the policy. Thus, insurers frequently wind up doubly involved in Superfund litigation. This fuels the litigation fires: the lawsuits are "free" to the PRP -- paid for by the insurers -- as they try to reduce their own exposure.

All levels of the state and federal judicial system are currently occupied in the interpretation of insurance policies, often written years or even decades before the enactment of Superfund. There are a number of specific issues of contention which make this litigation extremely complex. Our purpose in mentioning the coverage litigation is not to delve into these issues, or to give the insurance industry's perspective on them, but simply to underscore the unsettled nature of the law with respect to insurance coverage, and the concomitant uncertainty about the potential effects of Superfund on property/casualty insurers. Most legal experts believe it will take many years for all of the issues involved in the coverage litigation to be resolved.

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Financial Implications For Property/Casualty Insurers

No one knows the ultimate financial implications of Superfund costs for the property/casualty insurance industry. Much will depend on the total number of sites which need to be cleaned up; the cleanup standards which are applied; the cost and availability of the chosen technology, as well as its permanence; and the percentage of costs allocated to insurers as a result of coverage litigation which is pending in courts throughout the country.

Robert Litan, formerly of the Brookings Institution and now with the Justice Department's Antitrust Division, has examined the implications of potential Superfund liability for the insurance industry [Robert E. Litan, "Superfund: Assessing the Program and Options for Reform" (1993)]. Litan asserts that it could have significant adverse effects throughout the entire economy. He says that losses of $30 to 50 billion could fall on insurance companies whose total capital reserves total about $70 billion. Losses of this magnitude would be more than double payments for the most economically devastating natural disaster to date, Hurricane Andrew. Litan argues that they would devastate the industry: some insurers would become insolvent; others would have to curtail their activities. The unavailability of commercial casualty insurance would ripple through the entire economy, as the Savings & Loan crisis did, making it more difficult to raise capital as well as putting many people out of jobs.

To whatever extent insurance companies are required to pay Superfund-related costs, funding for such payments would have to come out of their surplus, or net worth. Surplus, in turn, is a factor used by state regulators (through application of premium/surplus ratios) in determining how much business an insurer can write, while remaining on a sound financial footing. If there is a reduction in surplus because of Superfund, there would be a corresponding regulatory limitation on the extent to which insurers can serve all of society's insurance needs, in lines such as automobile, homeowners, and workers' compensation.

In addition, Superfund is likely to have a disparate impact on individual companies, depending on the amount of commercial liability coverage they have written, when it was written, the specific language of applicable contracts, and how those contracts have been or will be interpreted by the courts. Individual insurers which are the most adversely affected could suffer serious financial problems, or even insolvency, while others may face few direct losses. However, individual company insolvencies would affect the entire industry because industry-wide guaranty funds would be used to pay claims against an insolvent insurer.

Frankly, we believe that there are simply too many unknowns to predict the ultimate costs of Superfund for the insurance industry at large or for individual companies. But, it is clear that these costs have the potential to be enormous.

Liability Reform

The Treasury Proposal:

Over the last six months, a vigorous debate took place among Clinton Administration cabinet departments over the future of the Superfund program. Central to this debate was the Superfund retroactive, strict, joint and several liability system.

In a position paper dated August 24, 1993 (see Appendix A) the Treasury Department proposed broad reform of the Superfund liability system. Specifically, Treasury proposed:

(1) to eliminate retroactive liability prior to December 11, 1980 (the date Superfund was enacted) for parties whose actions at a waste site were in compliance with applicable law;

(2) to replace strict joint and several liability with strict, proportional liability for waste disposed of after December 11, 1980; and

(3) to have Superfund pay for cleanup of any "orphan" shares created.

AIA has carefully reviewed the Treasury proposal. We realize that many details were not fully developed. Nonetheless, we have concluded that the Treasury proposal is the simplest and most direct way to address the most serious flaws in the current Superfund liability system while benefiting all Superfund stakeholders.

The Treasury proposal would result in significant public policy benefits. It would save billions of dollars by

substantially reducing or eliminating most of the enormous transaction costs caused by litigation over PRP liability and insurance coverage. It would leave the "polluter pays" principle unchanged, by simply increasing the portion of cleanup costs recovered through the Superfund taxes businesses pay, while decreasing the portion collected through litigation. It would encourage pollution prevention by retaining strict liability, thus retaining incentives for proper future behavior. It would encourage economic redevelopment, especially in urban areas, by allowing businesses to acquire and redevelop old plant sites without the present fear of "purchasing" Superfund liability if they buy "old" land. And it would save jobs, especially in the case of small and medium businesses.

Elimination of retroactive liability can be accomplished without substituting a new public works program. Cleanups could be managed by the private sector (just as they are now at many Superfund sites), with cleanup costs reimbursed from the Hazardous Substance Superfund as the various stages of cleanup are completed. How much additional funding would be required and what would be the source of that funding? In a memorandum dated September 30, 1993, EPA estimated that the Treasury proposal would cost an additional $880 to $926 million per year to pay for the cleanup of pre-Superfund waste. (See Appendix B, EPA Cost Analysis dated Sept. 30, 1993).

We would like to make it clear to this Subcommittee that AIA is willing to step forward and participate in the funding of the

liability reform proposed by the Treasury Department. Others in the private sector have also indicated a willingness to do so. It is our solid belief that the savings that would be realized by this liability reform would substantially outweigh the cost of implementing the Treasury proposal.

The Administration Proposal

The Administration's liability reform proposal, introduced as H.R. 3800, leaves the current retroactive, strict, joint and several liability system unchanged. However, this proposal would superimpose two kinds of liability-related reforms on the current liability system.

First, under the proposal, Superfund cleanup costs would be allocated among PRPs using a new, improved allocation system purported to be faster and more fair.

Second, in an attempt to eliminate a large part of the current insurance litigation, the proposal would establish an "Environmental Insurance Resolution Fund", financed by a "fee" paid by the insurance industry, which would reimburse PRP claims for insurance coverage for waste disposed of prior to 1986. (For waste disposed of in 1986 or later, this insurance claim process would not apply.)

We understand that a future hearing will be devoted to a review of the Administration's Environmental Insurance Resolution Fund, so we will not comment on it in detail at this time. However, we believe it is essential to provide some context for that part of the Administration's proposal.

We at AIA are greatly encouraged by the fact that the Administration has recognized the importance of the insurance industry's Superfund problem and has attempted to solve that problem. However, in our view, the proposal put forward in Titles VIII and IX of H.R. 3800 is simply unworkable in its present form. As we informed the President last week, we believe that this proposal, while a needed first step to initiate further debate, does not yet come close to achieving the two most important objectives agreed to by the Superfund working group led by the Administration: resolving 80 to 95 percent of CERCLA-based claims and doing so at a cost which is fair and affordable to the insurance industry.

The Administration proposal represents a very different way to approach reform than by simply eliminating retroactive liability. It is a much more complex and a much more difficult task to assess whether this proposal will accomplish as much or more. However, we are willing and eager to work with all stakeholders to further develop this unique idea and to do everything possible to make it a practical solution to the Superfund problem.

With regard to the new cleanup cost allocation process proposed in Title IV, we have the following observations. As a preliminary matter, it should be noted that the insurance industry has a very substantial interest in seeing that there is a fair and efficient cost allocation system at Superfund sites, one which provides certainty and keeps litigation to a minimum.

The Administration's proposal takes a big step forward by adopting a modified proportional liability scheme, along the lines of the Fair Share concept put forward by the Chemical Manufacturers Association, in which at least part of the "orphan" share is paid for by the Hazardous Substance Superfund. However, the proposal falls short in several important respects.

First, and foremost, the structure proposed for allocating costs gives the EPA Administrator complete discretion at every decision point in the process. This can only result in delay and more litigation.

Second, the Administration proposes to make the cost allocation non-binding. This means that after all the evidence has been heard and 18 months have passed, the parties can start all over again in an appeal.

Third, the Administration proposes to use a private sector allocator at all Superfund sites to hear evidence and make the cost allocations. This is the most expensive and most time consuming method that can be used, for the following reasons:

- The allocator cannot be given the power to compel discovery or to otherwise enforce procedural rules against the parties. Thus, the allocation proceeding will be essentially uncontrolled.
- The allocator cannot issue a binding allocation. Thus, the decision of the allocator will always be appealed.
- Private sector mediators are extremely expensive, much more expensive than Administrative Law Judges.

The foregoing problems could be simply, quickly, and effectively cured by requiring that Administrative Law Judges experienced in cost allocation (whether Superfund or some other regulated industry), act as the allocators and that the decisions of the ALJs be non-reviewable. (Making the decisions of private mediators non-reviewable would be unconstitutional; doing the same thing with ALJs is not.)

One final observation with respect to Title IV of the Administration proposal: We could not help but notice that there are several provisions providing special treatment for Federal activities and Federal facilities. While we have not yet studied these provisions in detail, we believe that a fair and efficient Superfund statute should not confer special protection on the Federal government as a PRP. To put it another way, the Federal government should be subject to the same Superfund liability and enforcement provisions which apply to all other PRPs, including state governments.

Conclusion

We appreciate the opportunity to share our views on the current Superfund liability system, as well as the Administration's proposal to improve it. We look forward to continuing to work with the Chairman, the members of the Subcommittee, and others in Congress and the private sector to develop creative and mutually acceptable approaches to better enable the law to meet its underlying objectives while minimizing unfairness and economic disruption.

To expand on that, I would like to emphasize that we are not ideologically attached to eliminating retroactive liability. While it is the best answer we have seen for America and for our industry, we continue to search for any alternative which solves the difficult problems created by retroactive liability and we are certainly willing to work with this subcommittee to find such a solution. We will only support approaches which provide faster cleanup at fairer cost for all Americans and which would impose on insurers only those costs which are fair, affordable, and predictable.

APPENDIX A

DEPARTMENT OF THE TREASURY
WASHINGTON

VIEWS OF THE DEPARTMENT OF THE TREASURY
SUPERFUND LIABILITY ISSUES

SUMMARY

The Department of the Treasury believes that Superfund liability should (1) be based on strict liability predicated on behavior, and not on status; (2) be apportioned to reflect a liable party's contribution to contamination at a site; and (3) not be applied retroactively to actions that were not unlawful at the time they took place. These principles should also be reflected in the Solid Waste Disposal Act, and should pre-empt State law. We believe the principles are fully consistent with a proper interpretation of the "polluter-pays" principle and would be an effective means to expedite cleanups, would improve incentives for environmentally sound behavior by hazardous-waste generators and transporters, and would reduce transaction costs as well as the enormous economic costs of the manifold uncertainties created by current law. We also believe that this approach to Superfund liability would encourage insurers to again underwrite environmental damages.

Superfund liability should be revised to eliminate (1) strict liability based on status, (2) joint-and-several liability, and (3) retroactive liability prior to December 11, 1980 (or other appropriate date), with respect to parties whose actions at a site were in compliance with applicable law. In its place would be a strict-and-apportioned liability-scheme based on behavior that is partially retroactive. "Orphan shares" should be paid by Superfund, as the basic logic of the Superfund contemplates.

Expressed by reference to the liability options outlined in materials made available by EPA to the Interagency CERCLA Reauthorization Policy Committee and the General Superfund Work Group, Treasury supports liability option 2 (strict and apportioned liability) and options 5 (public funding for orphan shares), together with such aspects of option 4 (special treatment for certain parties) as may be necessary to clarify the liability of those parties.

DISCUSSION

Principles of Liability

In General. The Treasury Department endorses EPA's basic principle that liability is predicated on behavior: The "polluter pays" for the costs of cleaning up sites contaminated by hazardous wastes, and that behavioral liability should be strict, and not based on negligence. Consistent with this principle, a polluter should only be liable for the costs of cleaning up a site in reasonable proportion to the contribution of its actions to the problem. Also consistent with this principle, we reject any scheme that attaches liability merely on the basis of a relationship to a site (e.g., as a current owner or operator) or status as a lender or fiduciary.

Joint-and-Several Liability. The problems with joint-and-several liability are twofold: (1) liability for the costs of cleaning up hazardous wastes for which a person was in no way responsible is a patently unfair and unreasonable interpretation of the "polluter-pays" principle; and (2) the application of the joint-and-several concept creates enormous economic uncertainty by imposing potentially ruinous costs in a capricious manner that occasions large transaction costs.

Treasury recognizes the convenience of joint-and-several liability in pressuring potentially responsible parties to reach settlements with the Federal Government, but we believe that the price paid for this convenience in economic uncertainty, perversion of a properly interpreted "polluter-pays" principle, and inflated transaction costs is disproportionate to the value of the convenience.

Retroactive Liability. Retroactivity raises similar issues. While it is no doubt convenient for the Government to assign liability to all parties that have contributed to a Superfund site irrespective of whether they were in compliance with existing laws, doing so violates common standards of fairness while doing nothing to deter future undesirable behavior. In some cases, parties held liable were not only in compliance with laws existing at the time of their action, but were in fact following the State government's explicit directive to deposit the wastes at the site. If the government, representing the interests of society, decides to change a standard of behavior, fairness requires that it should not apply the new line to past actions.

Apportionment of Liability

The liability regime Treasury supports would require some method of apportioning clean-up costs among all responsible parties. The financial obligations of all known and liable parties should be collected directly from those parties by EPA (or state governments, see below). Orphan shares and those of all other parties free of liability or exempt should be paid by Superfund, as the basic logic of the program contemplates. Clean-up costs attributable to these shares constitute a public good that should be financed by the public, as assessed by the revenue-raising procedures provided for the funding of Superfund.

We recognize that designing and implementing an effective apportionment process will be a challenge, particularly in view of the inadequate record-keeping practices of many firms. Nonetheless, we believe it is extremely important for the reality as well as the public perception of the evenhandedness and consistency of the Superfund program that the most rigorous possible apportionment process be established.

The process could be administered directly by EPA, by an administratively or judicially appointed master, or by State governments in prescribed circumstances. Any increase in the Federal cost should be regarded as an indirect cost of the cleanup of hazardous waste sites and should be financed directly by Superfund. We note that it is highly likely that administrative costs would be far less than the transaction costs of the current system, which relies heavily on private litigation to apportion clean-up costs.

The process should apportion 100 percent of cleanup costs among all "polluters," including parties that may no longer exist, whose identities are unknown or that are financially non-viable, municipalities, and other public entities. The definition of "polluter" should be circumscribed to include only parties directly or indirectly contributing to a release or threatened release at a site or benefiting from the reduced prosecution costs resulting from the failure to dispose of hazardous wastes in ways that do not occasion clean-up costs in the future. Current owners should not be considered "polluters" liable for passive releases for whose potential they did not have knowledge when the property was acquired, subject to a reasonable standard of inquiry. Similarly, current owners should not be liable for costs associated with threatened releases resulting from the actions of a prior owner of which they did not have knowledge, again subject to a reasonable standard of inquiry.

The system should prescribe a hierarchy of criteria for defining the variables to be used for the apportionment. For example, the volume and toxicity of hazardous wastes deposited might be the preferred measure of relative liability, with other measures specified for use where volumetric and toxicity data are not available. Carefully selected procedures should be prescribed for use when adequate data are not available, such as a good-faith apportionment based on known facts and circumstances and the assignment of equal shares (including orphan shares) when the available information is truly limited, with the burden of proof on identified parties to demonstrate lesser liability either administratively or judicially.

Post-Cleanup Releases

A problem of frequency and dimension unknown to Treasury is the costs of dealing with releases or threatened releases of hazardous wastes after a cleanup is completed. When such events occur because of conditions truly unknown (and that could not have been ascertained under a reasonable standard of inquiry) at the time of settlement, the cleanup costs should be paid by Superfund. The rationale is simply the desirability of eliminating the uncertainty to responsible parties associated with the current practice of leaving liability open in perpetuity on the chance that additional clean-up costs will be incurred after a cleanup is completed. The additional cost to Superfund could be financed by a statutorily prescribed surcharge on all settlements (in the nature of an insurance premium) that would be deposited into the Superfund and invested to cover the cost of additional cleanups that may become necessary.

Additional Special Provisions

As a general strategy for the design of public policy, Treasury does not believe that exemptions, immunities, "carve-outs," and other types of special provisions for particular classes of individuals, firms, or other entities are as effective in promoting equity and economic efficiency as are appropriately designed general rules and provisions that constitute a level playing field for all parties. We believe that a liability regime incorporating the principles and broad policy characteristics outlined above could be implemented in a manner that would satisfy Treasury's concerns about the liability of lenders, fiduciaries, Government entities that hold non-proprietary property, government-appointed conservators and receiv-

ers, and certain first-subsequent purchasers that are not polluters (e.g., passive releases). However, to the extent that the approach described above does not fully resolve liability issues in these cases, Treasury believes that special provisions would have to be included in the Administration's legislative proposal to achieve the results anticipated from the preferred liability scheme. As in the past, Treasury staff are prepared to work with EPA staff to develop the necessary language should the need materialize.

De Minimis and *de Micromis* Polluters. Under a regime of apportioned strict liability, we believe that exemptions for *de minimis* and *de micromis* polluters would not be necessary, and that EPA should be vested with administrative authority to resolve the liability of these parties.

Municipalities. We have serious reservations about a general limitation on the liability of municipalities on grounds of equity and economic efficiency. The termination of joint-and-several liability should substantially reduce the anxieties of municipal authorities, and the special circumstances of municipal involvement should be taken into account in the design of apportionment standards. For example, a municipality may have deposited non-toxic waste at a site where hazardous wastes were also deposited; its deposits increased the volume of wastes to be processed and hence the total cost of the cleanup, although its wastes were on average low in toxicity. Once such special circumstances are accounted for, the rules should apply uniformly to all parties meeting the conditions.

Generators. Considerations of fairness, coupled with the "polluter-pays" principle and the problems of retroactive liability, require that the liability of generators of hazardous wastes be revised. Accordingly, a generator whose hazardous waste is accepted for disposal by a site operating under a Resource Conservation and Recovery Act (RCRA) permit should be relieved of liability with respect to that hazardous waste. Such an approach would provide a strong disincentive for generators to dispose of hazardous waste illegally, and should further encourage insurers to underwrite generators for environmental damages. Serious consideration should also be given to adopting this approach with respect to deliveries to and by hazardous-waste transporters and treatment facilities that meet specified standards.

Current Owners. Our approach would eliminate the need for special provisions with respect to innocent current owners. We believe, however, that the principle of unjust enrichment should apply to any current owner (including a foreclosing lender) who benefits from a cleanup financed by the Superfund. Such persons should be required to reimburse the Superfund in an amount equal to (or some defined fraction of) the estimated increase in the market value of the property directly attributable to the cleanup.

Fiduciaries. Any limitation on the liability of fiduciaries, whether by virtue of the approach described above or through special provisions, should extend only to the personal liability of the fiduciary, and should not provide any additional limitation on the potential liability of the beneficial owner of the property or a lien against the property held by the fiduciary.

APPENDIX B

TREASURY PROPOSAL
PROGRAM IMPACT AND COST ANALYSIS

EPA's Office of Solid Waste and Emergency Response

September 30, 1993

The Department of the Treasury has circulated a proposal with its view of how Superfund liability should be changed in reauthorization. Treasury's proposal has three components: a liability cut-off for disposal activities that occurred prior to December 11, 1980; a strict-and-apportioned liability echeme for disposal activities occurring after December 11, 1980; and public funding for orphan shares. This analysis contains a ten-year cost projection which presents both program impact and cost from FY94 through FY03.

The analysis contains two cost projections. One cost projection is based on settlement information and uses historical data on commitments by potentiall responsible parties (PRPs) to undertake cleanup actions (i.e, the dollar value of consent agreements and unilateral administrative orders) to estimate the loss in enforcement that would result from implementation of Treasury's proposal between FY94 and FY03. The loss in enforcement during this period is equal to the amount of additional money the Agency would have to spend in order to clean-up sites under Treasury's proposal. The second projection is based on the cost of cleaning up an National Priority List (NPL) site and uses information on current and future NPL sites. The Agency believes that the funding required to implement the Treasury proposal lies somewhere between these two cost projections.

Central to both projections is the Fund/enforcement split. The Fund/enforcement split represents the percentage of cleanup work that can be attributed to the Fund and enforcement elements of the Superfund program in a fiscal year. Under CERCLA's existing joint and several liability scheme, the Fund/enforcement split is 30% Fund/70% enforcement. This means that the Superfund is paying for 30% of design and construction work and potentially responsible parties (PRPs) are paying for 70% of design and construction work under a consent agreement or unilateral administrative order. In FY92 the total value of Fund obligations and PRP commitments for design and construction was $ 1.915 billion. Of this amount, the Fund share was $ 0.582 billion (30%) and the enforcement share was $ 1.333 billion (70%).

I. RESULTS OF THE ANALYSIS

- Under the Treasury proposal, EPA would pay for 75.78% of the response costs and PRPs would pay for 24.22% of the costs. This represents a fundamental shift from the current 30% Fund/70% enforcement split in the current Superfund program.

- Over a ten-year period (FY94-FY03), the Treasury proposal would require that EPA spend at least an additional $ 8.798 billion to $ 9.260 billion for site clean-up. (This includes the cost of assuming all pre-1980 waste disposal and the orphan shares at enforcement sites.)

  These figures translate to an additional $ 880. million to $ 926 million per year.

- Reimbursing PRPs for work being performed by them under prior and existing commitments will require an additional $ 5.642 billion.

- If funds required for reimbursement are added to clean-up costs, over the next ten years Treasury's proposed modifications to the liability scheme would require that EPA spend between $ 14.440 and $ 14.902 billion, in addition to the $ 4.740 billion EPA would spend under the current Superfund program.

II. ASSUMPTIONS/LIMITATIONS

1. OPERATING HISTORY USED. Operating history information (beginning of operation and cessation of operation) was used instead of disposal dates. Actual disposal dates at NPL sites are not yet available. The use of operational history information may underestimate the share of costs to be paid by PRPs because some sites probably stopped accepting wastes for disposal prior to ceasing operations. Operating history information was obtained from the state NPL books and the RFF/GAO/CBO survey.

2. CONSTANT WASTE DISPOSAL RATIO. The proportion of wastes disposed of before and disposed of after the cut-off date of December 11, 1980 was assumed to remain

constant throughout the analysis. Because new sites not yet included on the NPL may have received wastes until a later date than sites already on the NPL, this assumption may underestimate the share to be paid by PRPs.

3. UNLAWFUL DISPOSAL NOT INCLUDED. A proportion of wastes disposed at sites due to unlawful activities was not calculated. Because of the difficulties in proving the illegality of disposal actions and the probability that the parties liable for the illegal disposal are financially incapable of paying for the cleanup of their wastes, it is the Agency's opinion that the Trust Fund would have to assume most or all of the costs apportioned to these parties. An insignificant amount of money would come into the Superfund because of liability for unlawful disposal activities conducted before December 11, 1980.

4. CURRENT AND FUTURE NPL SITES INCLUDED. The analysis includes sites currently on the NPL which have not yet reached the remedial action (RA) phase and sites that are likely to be included on the NPL in the next five years (FY94--98). Conservatively assuming that remedial construction at sites included on the NPL in FY98 would be completed in 6 years (by FY03), the analysis covers costs for current and future NPL sites through FY03.

5. ORPHAN SHARES INCLUDED. The orphan shares for which the Superfund would assume the liability is included in the analysis.

6. RCRA FACILITY SITES NOT TAKEN INTO ACCOUNT. The analysis did not take into account NPL sites that are Resource Conservation and Recovery Act (RCRA) facilities. Because of the small percentage of NPL sites that are RCRA facilities, this does not seriously affect the analysis.

7. CONSTANT LEVEL OF PRP COMMITMENTS. For the projection based upon the historical level of settlement data, it is assumed that the historical level of PRP commitments to undertake response work would remain constant. It is assumed that PRP commitments will continue to average $1.161 billion per fiscal year, the average of commitments for the last four fiscal years.

III. TREASURY PROPOSAL FUND/ENFORCEMENT SPLIT

Step One: Sites Completely Exempted from Liability Based Solely on Treasury's Proposed Cut-off[1]

- The proposed liability cut-off would completely exempt from liability 44% (n=176) of all pre-RD/RA NPL sites; 56% (n=223) of pre-RD/RA NPL sites straddle the cut-off date and would include an exempted-from-liability volume and a strict-and-apportioned liability volume.

Step Two: Exempted Volume for Sites Straddling Treasury's Proposed Cut-off[2]

- For those pre-RD/RA NPL sites (n=223) straddling the cut-off date, 41% of the wastes were disposed prior to December 11, 1980, and would be exempted from liability. The remaining 59% of the waste volume at these sites would be subject to strict-and-apportioned liability.

Step Three: Wastes Exempted at Fund/enforcement Sites Based on Disposal Date

- The share of wastes exempted from liability at Fund/enforcement sites was determined by multiplying the percentage of sites straddling the cut-off date (56%) by the percentage of waste volume exempted from liability (41%), and adding this number to the percentage of sites completely exempted from liability (44%):

  Fund Share (56% x 41%) + 44% = 22.96% + 44% = 66.96%

  Pre-RD/RA Fund/Enf. Split: 66.96% Fund/33.04% Enforcement

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[1]This analysis was based on operating history data from the state NPL books and the RFF/GAO/CBO survey. A proportional sample of 699 sites was used in the analysis.

[2]This analysis is based on transactional database information for sites that straddle the proposed Treasury cut-off. Transaction information for 207,00 waste shipments was analyzed.

Step Four: Determining the Orphan Share

- The Agency recently completed a study on the potential cost of orphan shares.[3] Our analysis concluded that the average orphan share at enforcement sites was 26.7%. To calculate the enforcement orphan share that would have to be picked-up by the Fund under the Treasury proposal, the average enforcement-lead orphan share was multiplied by the enforcement component for pre-RD/RA sites.

Orphan Share	26.7% x 33.04% = 8.82%

Step Five: Treasury Proposal Fund/Enforcement Split

- The Treasury proposal Fund share has three components: total liability for waste volumes at sites completely exempted from liability; waste volumes exempted from liability at sites which straddle the Treasury cut-off, and the orphan share waste volumes at enforcement sites.

Sites Completely Exempted	44.00%
Waste Exempted at Fund/Enforcement Sites	22.96%
Orphan Shares	8.82%
Treasury Proposal Fund Share	75.78%

Treasury Proposal Fund/Enf. Split: 75.78% Fund/24.22% Enf.

[3]Mixed Funding Evaluation Report: The Potential Costs of Orphan Shares, EPA's Office of Waste Programs Enforcement, September 1993.

IV. ESTIMATED COST - SETTLEMENT DATA PROJECTION

- The average amount of PRP commitments[4] for the past four fiscal years (FY89--FY92) is $1.161 billion.[5] For purposes of this analysis, it is assumed that PRP commitments will continue to average $1.161 billion per fiscal year.

- The expected settlement value for the next ten fiscal years (FY94-FY03), is determined by multiplying the number of fiscal years by the average amount of PRP commitments.

  $ 1.161 billion/year x 10 years = $ 11.610 billion

- Under the Treasury proposal, the cost to the Fund is determined by multiplying the expected settlement value by the Treasury proposal Fund share.

  $11.610 billion x 75.78% = $ 8.798 billion

  $ 8.798 billion represents the loss in PRP work that will have to be absorbed by the Fund over the next ten years as a result of Treasury's proposal.

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[4]PRP commitments primarily include consent decrees and unilateral administrative orders for design and construction work (RD/RA).

[5]Source: Summary of Settlement Data Prepared for the General Accounting Office (GAO).

V. ESTIMATED COST - NPL SITE PROJECTION

a) Sites Remaining on the Current NPL

- o There are currently 399 sites on the NPL that have not entered the clean-up portion of the pipeline (RD/RA).
- o Under the Treasury proposal, the Fund share for these sites is 75.78%.
- o Average site clean-up costs are currently $ 25 million per site.[6]
- o The Fund share is determined by multiplying the number of sites (399) by the Fund share percentage (75.78%), which yields the number of Fund-lead sites (sites for which the Superfund must pay to clean up). The number of Fund-lead sites is then multiplied by the average site cost ($ 25 million) to arrive at the total Fund cost for the current NPL.

(399 sites x 75.78%) x $ 25 million/site = $ 7.559 billion

b) Future NPL Listings (FY94 - FY98)

- o The Agency projects that 340 sites will be listed on the NPL from FY94 through FY98.[7]
- o Under the Treasury proposal, the Fund share for these sites is 75.78%.
- o Average site clean-up costs are currently $ 25 million per site.

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[6]This number is based on EPA's Office of Emergency and Remedial Response workload model. Some commentators have stated that the average cost to cleanup an NPL site may be significantly higher than EPA's $ 25 million figure.

[7]Analysis of Regional survey data by EPA's Hazardous Site Evaluation Division revealed that 60 to 75 sites per year will be listed on the NPL during this period. For purposes of this analysis, it was assumed that 68 sites per year would be listed on the NPL.

- The Fund share is determined by multiplying the number of sites (340) by the Fund share percentage (75.78%), which yields the number of Fund-lead sites. The number of Fund-lead sites is then multiplied by the average site cost ($ 25 million) to arrive at the total cost to the Superfund for the future NPL sites.

(340 sites x 75.78%) x $ 25 million/site = $ 6.441 billion

c) Total Gross Fund Cost for Current and Future NPL Sites

Current NPL	$ 7.559 billion
Future NPL	$ 6.441 billion
Total	$14.000 billion

d) Net Increase Over Current Expected Fund Expenditures

- In order to determine the net increase over current expected Fund expenditures, estimated obligations for FY94 through FY03 must be determined and subtracted from the total gross cost to the Fund.

- The average annual obligation for Fund-lead RD/RA from FY89 through FY92 was $ 474 million.[8] For purposes of this analysis, it is assumed that the annual obligation for Fund-lead RD/RA will continue to average $ 474 million per fiscal year.[9]

- The total current expected RD/RA obligation for the period between FY94 and FY03 is determined by multiplying the average annual obligation ($ 474 million) by the number of fiscal years.

  $ 474 million/year x 10 years = $ 4.740 billion

- The net increase is determined by subtracting expected obligations from total gross cost.

  $ 14.000 billion - $ 4.740 billion = $ 9.260 billion

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[8]This figure was obtained from the EPA Comptroller's Office.

[9]It should be noted that this is less than obligation per site. At the time of this writing, a per site obligation number was not available from the EPA Comptroller's Office. The use of a per site obligation number would result in a lower cost for the Treasury Department proposal.

VI. REIMBURSEMENT OF PRIOR AND EXISTING PRP COMMITMENTS

The Treasury Department's proposal does not consider how its proposal would affect the liability of PRPs which have previously committed to undertake response actions at Superfund sites. In order to treat all PRPs equally under the proposal, EPA analyzed the proposal's impact on prior and existing PRP commitments for response work. This included an evaluation of the costs to the Superfund of either reimbursing (or assuming the liability of) those PRPs who have committed to do response work but that would not be liable under the Treasury Department's proposal.

- Total PRP commitments through FY92 are $ 7.445 billion.

- For purposes of this analysis, it is assumed that EPA would either reimburse PRPs or assume the liability for 75.78% of work being performed under prior and existing PRP commitments.

- The total amount of reimbursement is determined by multiplying the amount of existing PRP commitments by the Fund share of 75.78%.

$ 7.445 billion x 75.78% = $ 5.642 billion

Mr. SWIFT. He started with spotted owls and ended with cows. Very good. I recognize next, Timothy Harker.

STATEMENT OF TIMOTHY HARKER

Mr. HARKER. Mr. Chairman, I just want to say I am a practitioner. I would rather be practitioning than sitting next to this gentleman. I am here today based on a lot of years of environmental law experience, 23 to be exact. I am testifying on behalf of the National Paint and Coating Association. My client, NPCA, has spent a lot of years trying to improve the settlement system of the Superfund Law.

This morning, you gave out a gold star to the first witness. I thought that would look very nice on my refrigerator. For the chance to get a gold star, I would like to say that I agree with the chairman in two regards. I suppose I have to tell you in what two.

You made a comment about joint and several liability having a role in the system. I would like to say personally, that I would hate to see the opportunity to make real improvement in the Superfund law, the first real improvement, be jettisoned in a fight over what could be based on all of the approaches that I have seen discussed, a moot point. Superfund has become a joint and several battle cry for industry. The joint and several system has misadministered by EPA in abusive ways.

I think industry for the most part can accept the joint and several system if it's utilized properly against recalcitrant PRP's for example, as you suggested, so long as the good corporate citizen has the ability to settle out for his fair share and avoid the liability and the transaction costs.

What I think is common among all of the proposals you have heard here today, including the National Commission, is that objective, how to establish a system that enables the development of an adequate information base to develop consensus for parties to settle out for their fair share, and enable them to do so. On the other hand, how to enable those PRP's who do have significant factual disputes, to engage in a fair adjudication of those disputes. After all, there can be millions of dollars at stake. There can be serious factual disputes, and there is need for a good adjudicatory forum to resolve those few issues.

Most PRP's will settle out for their fair share. This nuclear arsenal of joint and several liability need not be a central debate point, it can almost be mooted in discussion if we come up with a proper system to allocate responsibility and force the government to accept settlements based on that allocation of responsibility.

In a nutshell, let me suggest that the NPCA has proposed an alternative scheme that addresses the second point that you said, Mr. Chairman that we agree with. That is to say that there is a need to blend the best of the two allocation proposals that the committee has before it.

The NPCA proposal in effect disagrees with the administration in the sense—and with the Administrative Law Judge concept—in that both would jettison the obligation of the Federal Government, the EPA, the technical agency that has the expertise and resources to investigate adequately site allocation issues and come up with good indication analysis.

Both proposals would jettison that and pass that obligation on the one hand to private arbitrators on a case by case basis, which is much too fortuitous to accomplish the kind of systematic analysis that is necessary and on the other hand to administrative law judges who serve a purpose in the Superfund system, but not the purpose of allocating every Superfund PRP share at every site.

ALJ's do adjudicate cases that slow and costly, and if every PRP has to go through the ALJ door to get a share then the transaction costs are going to go way up. I believe the voluntary response effort will go way down.

Having said that as a background, let me just say that we do believe that if Congress charges EPA very forcefully with the task of making fundamental and complete fact finding analysis as a basis for PRP's to offer settlements and to settle out or to resolve disputes in good faith disputes in a proper ALJ forum that is truly adjudicatory, that EPA's wayward Superfund settlement program can right itself and we can have a settlement system that works.

Business can settle these cases and get out, and the few parties that wish to litigate can litigate and have a fair hearing. In that situation if joint and several is appropriately applied to recalcitrant PRP's we would have no problem.

In anticipation of Congressional deliberations we have developed what we think is a good proposed marriage of the best two ideas for improving the Superfund settlement system. Simply, our proposal filters settlements. Through notice and comment rulemaking, EPA would be charged with developing a well rounded final allocation of responsibility, FAR. Specific requirements would be imposed on the agency to ensure high quality, credible results. After all, PRP's will not settle if the final allocation report—the analysis that goes into it—is not adequate.

The Agency needs to have that obligation charged to them by Congress specifically. Congress would replace the discretionary process under the current law with a requirement for the agency to issue a final allocation report at the time the agency issues a record of decision.

As an aside I want to comment on the cases that are prospective. There is a need for EPA to do this analysis rather than private arbitrators or rather than ALJ's with a broad base of PRP's—thousands of PRP's at potentially thousands of sites—because not just of its ability to gather the information through compulsory process, write a 104(e) request for example—trial lawyers in the Justice Department know how to write good 104(e) requests—that PRP's can't drive a truck through to get away from answering.

Also, because of the Agency's control over the RIFS, remedial investigation feasibility study, at many sites the basic allocation disputes hinge on what are called divisibility of harm issues, remedy causation. It is good practice for the agency to integrate into the RIFS analysis that it does, tell the consulting firm that does that study, to evaluate some of the technical issues that go into remedy causation, as they might bear on divisibility of harm and cost allocation.

When the Agency gets a final RIFS it has gotten some of the technical analysis that the agency needs to take into account in deciding just how to allocate this. After all, PRP's are a local problem

here, for example. Let's fine the guy who sent the PCP and see if that can be isolated. Technically, perhaps, the PRP's can't be isolated, and a remedy cost attributed to PRP's can't be separated.

That's a technical issue. An arbitrator can't really do that on a case by case basis.

Only those PRP's under our system, after the FAR is promulgated, every PRP would have a final allocation report. The agency would be obliged to settle. It would not be discretionary. We don't like this idea that the Agency has the right to walk away but the PRP doesn't. If the Agency is going to do good final allocation analysis as we think they should because they are a rulemaking agency - - EPA does best rulemaking. I spent a lot of years working at EPA on both sides of the aisle, for the government and against the government. They do good rulemaking at EPA. That's the one thing that they do best.

If the Agency does good rulemaking analysis to back up its final allocation reports, then they ought to be forced to live with it. If a PRP comes forward and says I will buy that, my share is 5 percent and I am out of here but another PRP says you socked me with 5 percent, I can't live with that. That is just factually wrong, and I have to have a hearing. Send him to an ALJ. If you don't settle with the EPA under the FAR approach, then you have to go to an Administrative Law Judge hearing that is truly adjudicatory, has all the bells and whistles of cross examination, subpoena power. The dean of my school said that cross examination is the best engine for the test of truth ever devised by man.

Parties and corporations who have millions of dollars at stake are not prepared to turn over to some do good arbitrator and say give us rough guesses here, when to swing on rough justice means 5 or 6 million dollars either way.

Every PRP under this system would then go to an adjudicatory hearing if he didn't settle with EPA. I can tell you with my experience that most PRP's, if there is a good credible database developed for a final allocation report and they are allowed to settle out for their share under that system, most PRP's will settle out. The Administrative Law Judge litigation will be the exception. There will be some. That's what we see has merit in the Chemical Manufacturers approach.

We think that there is a role for ALJ's in this system. We have to get these cases away from the district court judges. Unfortunately, I spend a lot of time in district court. District courts are overloaded with drug cases and other priorities. They don't want to hear Superfund cases.

The corporations who have legitimate Superfund gripes in court pay because of the delay, just like every other citizen. I don't want to wait in line now for the next five drug cases. I want to get my adjudicatory hearing out of the way. ALJ's at EPA—they have to expand the size of the ALJ basis—I don't think that's financially right. They already have expertise in fact finding. They already know trial law. I have spent time over there with those ALJ's and they are good.

Mr. SWIFT. I will just remind you, the gold star was for brevity.

Mr. HARKER. I will take a silver, and I will conclude. We think that there is room for a marriage of the two systems here and if our proposal which is part of our submission is looked at seriously, that the settlement approach can be developed fully and that litigation will be the exception. That litigation can be done effectively with an ALJ system.

[The prepared statement of Mr. Harker follows:]

STATEMENT OF MR. TIMOTHY L. HARKER, ESQ.

The Harker Firm

on behalf of the

NATIONAL PAINT AND COATINGS ASSOCIATION, INC.

I am Timothy L. Harker, founder of The Harker Firm, a law firm that specializes in environmental law and litigation. I am pleased to appear today on behalf of the National Paint and Coatings Association, a body that has worked since Superfund's inception to improve its liability and settlements scheme. I have practiced environmental law for over 23 years, with state government, with U.S. EPA here in Washington, D.C., and in private practice. A major part of our firm's practice is defending de minimis PRPs against the inevitable efforts of giant corporations under Superfund to offset their own Superfund liability. (At a time when EPA was denying that there were any problems, I wrote a book, Superfund Response: A Survival Manual, on industry's enormous difficulties in settling Superfund cases.) My law firm has represented dozens of clients at dozens of hazardous waste sites; we have litigated Superfund cases. We have also served as chairman or coordinator of PRP Steering Committees and as trustees of PRP Trust Funds set up to spend tens of millions of PRP dollars for voluntary site cleanups.

Under Superfund, EPA has spent a lot of years going down the wrong track. On settlements, this is because Congress has never required EPA to go down the right track. On settlements, Congress has failed to require EPA to allocate PRP responsibility for voluntary site cleanups. In 1986 Congress did enact a set of very good settlement ideas, including providing EPA the authority to enter into de minimis settlements and the authority to issue a Non-Binding Allocation of Responsibility, or "NBAR". Yet, in 1986 Congress slipped up by giving EPA the discretion not to employ these settlement provisions. Given the discretion not to do something, EPA has for the most part chosen not to do it and has routinely refused to settle cases on the basis of apportioned responsibility. As a result, for the entire history of the Superfund program, confrontation has been the norm because companies could not pay their share and get out. In 1994 Congress can readily fix that problem: Congress can simply tell EPA what it must do. What then should Congress tell EPA to do?

First, Congress should require EPA to settle with PRPs who are prepared to pay their fair share. At most sites, that is most of the PRPs. Almost all cases can be settled and almost all sites can be voluntarily cleaned up if EPA will only settle with PRPs who are willing to pay their fair share. Almost all PRPs are willing to pay their fair share.

Secondly, Congress should direct EPA at every site to develop the information base necessary to define each PRP's fair share and to allocate cost-sharing responsibility accordingly. Fair share settlements must be built on a solid foundation of factual data. That information foundation must be built at every site; the necessary allocation foundations can be built routinely if Congress will require EPA to develop NBARs and, more specifically, direct

them to develop good, high-quality NBARs. The Agency can do a good job on NBARs if it is assigned cost allocation responsibility as a clear mission. Congress was on the right track when it enacted the NBAR provision in 1986. Do not discard the substance of the NBAR process; rather, eliminate EPA's discretion not to perform proper allocations of responsibility; require EPA to routinely do this through notice and comment rulemaking; and require EPA to settle with PRPs based on their fair allocated shares.

THE ADMINISTRATION'S ALLOCATION/SETTLEMENTS PROPOSAL

NPCA has long and vocally promoted the use of practical arbitration to help parties determine their fair share of responsibility as a step towards expedited settlements with EPA. Thus, this Committee may find it strange that, today, we oppose the Administration's proposed scheme for universal arbitration of cost allocation. Unfortunately for the PRP community, EPA's proposal has a major flaw: the Agency is attempting to avoid the central obligation (that Congress in 1986 expressly delegated to EPA) of developing the information foundation necessary to allocate PRP responsibility. Rather, EPA now proposes at every site to delegate the government's allocation function to private citizens. That will not work! It will not work for several reasons:

1. Only EPA has the legal authority, the legal process, the expertise and the manpower to generate the necessary factual information for effective cost allocation. The process of generating and developing allocation data at Superfund sites is very much like agency notice and comment rulemaking on technical issues. It is no more appropriate for EPA to delegate to private parties the task of cost allocation at Superfund sites than it would be for the Agency to delegate to a "neutral third party" decision-making under the Clean Water Act as to feasible effluent guideline limitations for a particular industrial category.

Superfund sites present complex technical issues. Allocating responsibility at these sites involves sophisticated technical and legal analysis of difficult questions of divisibility of harm, remedy causation, waste volumes and toxicity. These sites routinely involve dozens, and frequently hundreds of PRPs. Few if any arbiters possess the broad array of technical and legal expertise, the skilled staff investigative personnel, and the information-gathering and data analysis resources that are needed to develop thorough, credible cost allocations at Superfund sites. Further, no arbiter possesses the legal force and power of government to carry out investigations of site use, to compel the production of complete, accurate responses to factual inquiries, and to assure that those PRPs who do not so respond are punished. Only the resources and legal authority of the government are adequate to generate and develop the necessary data for reliable allocation decisions involving thousands of PRPs at thousands of sites.

2. Secondly, EPA's approach will not work because the pool of available arbiters is far too small and will prove far too expensive for widespread PRP use. Outside of government, the requisite experience to perform cost allocation at Superfund sites resides only with some handful of specific law firms and consultants. PRPs need to be rescued from, not further ensnared in, the briar patch of lawyers' fees, "Beltway Bandits" and skyrocketing transaction costs.

3. EPA's arbiter approach will not work because the conflict of interest barriers are too great to be overcome. The few law firms and consultants with the requisite allocation expertise already represent many PRPs at many sites. Private consultants also work for EPA. At any given site, PRPs or EPA will rightfully object to the use of any arbiter with a potential conflict of interest. Even now, when arbiters are used only sporadically, finding one that is skilled, acceptable to all the PRPs at a given site, and available at reasonable cost is very difficult. EPA proposes to employ arbiters at every site. Finding skilled personnel, at reasonable prices, with available time, without conflicts of interest, would prove extremely difficult even if they were to be utilized at just a few dozen sites. It would be impossible for the thousands of sites envisaged under EPA's proposal. With the Agency fully trained and capable of this task, there is no need to turn the whole job over to another, less capable instrument.

4. The EPA proposal raises serious questions of constitutionality. First, is it lawful for EPA to delegate to a private party the authority to decide issues of liability? Probably not, unless the private third party is imbued with all the power and authority necessary to provide due process. Probably not, unless the confidentiality of all materials and of the arbiters' work product is fully protected. Probably not, unless the arbiter's decision is truly non-binding and of no legal consequence.

EPA's proposal meets none of these criteria. Importantly, the Agency asserts that the arbiter's decision would not be binding, but in fact, serious legal consequences would flow from the arbiter's decision. First, any party who accepted it would be protected from contribution by non-settlors. Secondly, any PRP who rejects an arbiter's decision would be liable for all response costs not voluntarily paid, regardless of his actual share. Both of these consequences cast grave doubt over the constitutionality of EPA's proposal. Industry has suffered thirteen years of Superfund enforcement abuse and draconian process. EPA's proposal now is to strip away yet another layer of procedural safeguard, due process and fairness.

In summary, EPA hopes to continue to avoid the burden of doing its function by passing its cost allocation obligations off onto an

army of "third-party neutrals", an army of arbiters that is not even available. To repeat, private arbiters with the necessary skills, resources, legal authority and impartiality are not available to handle the enormous burden that EPA proposes to unload. If they ever become available, it will only be at exorbitant costs, and these "third-party neutral" proceedings still will lack the level of fundamental fairness (to the PRPs) and the level of allocation thoroughness necessary to the task. The allocation process enacted by Congress must achieve a unique blend of thorough fact-generation, reliable fact-evaluation and fair fact-finding. EPA's proposal fails to do so. Only an EPA-directed allocation rulemaking process, followed by a fair hearing opportunity for non-settlors, can provide the necessary ingredients.

AGENCY ADMINISTRATIVE LAW JUDGE (ALJ)
BINDING UNIVERSAL ALLOCATION PROPOSAL

As President Clinton has suggested, experience shows that the Superfund process is already far too lawyer-dominated. The Superfund system would still be defectively lawyer-driven if apportioned liability is required but, as under some proposals, the act of apportionment for every PRP at every site depends on Administrative Law Judge (ALJ) adjudication.

Adjudicatory procedures are adversarial and lawyer-dominated. Adjudicatory procedures tend to be inefficient and expensive. Proposals which make ALJ "adjudication" the central, if not the exclusive, path toward the goal of allocation attempt to accomplish the twin objectives of certainty and predictability. They could, unfortunately, mean only that the apportionment journey in every case will be even more clogged with lawyers, even more unduly long, and even more costly.

NPCA'S HYBRID SETTLEMENTS/ALLOCATION PROPOSAL

EPA's proposal could be called "universal arbitrated allocation". EPA calls it "non-binding", but as we have pointed out, that is not totally correct since serious legal consequences flow from any arbiter's decision. By way of contrast, a counter proposal could be called "universal adjudicated allocation". Proponents of the ALJ approach call it binding, but it is really not binding since any PRP who disagrees with the ALJ's decision as to that PRP can challenge and potentially upset the ALJ's decision as to every PRP.

Over the past two months, we have been asked by the White House, EPA, and House and Senate majority and minority staff to attempt to meld a voluntary, expedited ("non-binding") settlements approach with the more formal ("binding") Administrative Law Judge (ALJ) process such as the one recommended by the Chemical Manufacturers Association. In a treatise we are providing for the

record today, dated January 25, 1994, we have merged some of our ideas with those developed by CMA in its mandatory, universal Administrative Law Judge (ALJ) "Fair-Share" Approach.

In a nutshell, we respectfully submit that both the Administration and CMA are off the mark in proposing to relieve the technical agency (EPA) of its fact-generating/fact-finding function and to give that charge wholesale to either a third-party neutral allocator or an EPA ALJ. This does not make sense practically or as a matter of sound public policy.

If Congress charges EPA very demonstrably with the task of fundamental, complete, and fair fact-finding as a basis for PRPs to offer settlements, or to resolve disputes in good faith in a proper ALJ, adjudicatory hearing, EPA's wayward Superfund program will right itself. The solution is not removing the appropriate fact-gathering and cost allocation functions from EPA and giving them to ill-equipped arbitrators or ALJs. The solution is to provide clear and consistent direction to the Agency to do a good job of cost allocation in the first instance.

In anticipation of Congressional deliberations, we have developed what we think is a good proposed marriage of the best ideas for improving Superfund's liability and settlements system. Simply, our proposal filters settlements. Through notice and comment rulemaking, EPA would be charged with developing a well-founded "Final Allocation of Responsibility (FAR)". Specific requirements would be imposed to insure high quality, credible results. Congress would replace the discretionary NBAR in the current law with the requirement to issue a FAR at the time of the Record of Decision. PRPs would then have 165 days in which to settle with EPA based on their fair share according to the FAR.

Only those PRPs with (in their view) meritorious disputes with EPA's Final Allocation of Responsibility would be referred to an ALJ process that would truly be adjudicatory and binding. In this way, coupled with certain built-in procedural safeguards, such as the right for parties to cross-examine in the ALJ process, very important due process considerations are met. Conversely, we have included disincentives for those PRPs with unfounded contentions regarding their apportioned responsibility, such as paying the costs of the ALJ process and facing joint and several liability. The disincentives should discourage PRP abuse of the ALJ process.

We realize that Superfund reform remains a complex and fluid proposition. Yet, as Congress moves towards Superfund reauthorization, we urge this Committee to seriously consider our unique blend of fundamental approaches. We believe it is a significant consensus-gathering proposal.

NPCA ADDRESSES THE TWO CORE PROBLEMS OF COST ALLOCATION

The settlement system developed by NPCA addresses the two central problems of cost allocation dispute resolution. It does so because, rather than being a theoretical construct, it reflects an understanding of the realities and practicalities of Superfund cases. Currently, PRP groups seek to resolve their cost allocation issues through the voluntary "Steering Committee process". That process is generally based on a cooperative spirit, and it usually produces consensus on allocation. However, in many cases a minority of the PRPs is dissatisfied over and has a significant factual dispute about allocation. Thus, in reality, most liability and allocation problems can be settled "out of court" and most Superfund sites can be the subject of efficient agreements for voluntary cleanup if CERCLA is amended to address two cost allocation/settlement problems: (1) how to build a credible foundation of facts to support an allocation consensus, and (2) how to efficiently yet fairly resolve material factual disputes over allocation.

It seems unwise to allow (as EPA's current approach does) the truly recalcitrant PRP to hold hostage all other PRPs. Yet the CMA proposal could actually aggravate that problem by empowering the recalcitrant PRP in every case to force every PRP that is intent on settlement to go through a lengthy, costly adjudicatory proceeding before any settlement could be achieved with any PRP. It seems especially unwise to empower the recalcitrant PRP thereafter still to go to court. By contrast, the enclosed settlement approach would enable the vast majority of settlement-oriented PRPs to settle promptly while the EPA could isolate recalcitrants and prosecute its liability claims against them using joint and several liability (where it is truly appropriate). The settlors would not be hostage to the recalcitrants.

Successful allocation is, foremost, a fact-gathering business; fact-gathering and analysis are tasks the Agency, not an arbiter or an ALJ, has the expertise to perform. These tasks can be most readily accomplished through detailed, strong, (greatly improved) section 104(e) requests, followed by EPA allocation rulemaking in which the PRPs, themselves, can serve as an important check against conclusory, unfounded assertions and opinions. Arbiters and ALJs are not equipped to gather facts, to investigate, or to undertake allocation analyses.

Yet, if properly limited in scope the proposal for using ALJs in order to resolve cost allocation disputes has genuine merit. It also addresses some of the serious deficiencies of EPA's "arbiter" proposal that we have described. In particular, ALJs, unlike private arbiters, are suitable for competently adjudicating and reliably deciding highly disputed issues of fact. Also, ALJs are already available. ALJs do not possess the conflicts of interest problems (that confront EPA's approach) and they do possess the

necessary "fact-finding" skills (unlike most arbiters that PRPs would be forced to rely upon). Perhaps, most importantly, the current ALJ system of EPA could serve as a preferable alternative to the court system that is now so overloaded with criminal cases and other priorities that Superfund cases assigned to U.S. District Courts too often go ignored or unattended.

Properly utilized, ALJs could quickly develop the Superfund expertise and dedicate the time necessary to move the Superfund cost allocation caseload along. The key, however, is to use ALJs to adjudicate only the difficult cases, those currently being assigned to U.S. District Court. Congress must avoid the central flaw in CMA's ALJ proposal, requiring every cost allocation issue, by every PRP at every site to go through ALJ "quasi-adjudication". Congress must also avoid the two major flaws of EPA's proposal, forcing all PRPs to attempt to allocate costs by relying upon an arbitration proceeding that is fundamentally not up to the task, while unfairly punishing those PRPs who do not accept the arbiter's results.

In summary, this year Congress can build an effective settlements scheme on the solid foundation of three important facts: (1) private industry acknowledges the need and value of a Superfund program; (2) private industry is willing to pay its fair share towards cleanup when named as PRPs at sites; and (3) PRPs are willing to settle expeditiously, given a solid factual basis and a logical, balanced and predictable administrative settlements policy and procedure.

OTHER LIABILITY-RELATED ISSUES

NPCA is heartened to see certain of its specific legislative recommendations (provided over the past year and one-half) on important components of a cohesive settlements policy incorporated almost verbatim, or at least partially, in the Administration's bill, including:

- An expedited settlements policy for de minimis parties based on a sensible two-part test for qualification we have suggested;
- For small business, the fact the President must consider ability to pay based on demonstrable constraints;
- Contribution rights which are not arbitrarily allowed universally, but rather are circumscribed, even using the so-called "English rule" to discourage actions against those who are protected by a settlement with the government;

- A fair share allocation system placed at the heart of the system and mandating that EPA provide notice to all PRPs. Also, where practical, using third-parties (arbitration or mediation) to assist the galvanizing of settlement offers;

- Use of the so-called Gore-criteria to help determine a fair share allocation for PRPs, and as part of the total allocation, an attempt to fix the share attributable to an "orphan share" (attributable to identified but insolvent or defunct responsible parties), and provisions for payments from the Fund to cover it;

- Mandating that the President accept a timely offer of settlement from a party based on its determined fair share, involving a waiver of contribution rights, and covenants not to sue, and contribution protection; and

- Provision for good-faith settling parties to also be reimbursed for any response costs incurred in excess of their determined fair share.

Finally, we have been asked to give our opinion on the way in which the Administration's bill treats the scope of liability standard (read into the current law) of joint and several liability. First, we are not defenders of joint and several liability as an intractable feature of Superfund. We recognize that every rule of law requires a sanction against those who would be recalcitrant or otherwise act in bad faith. On the other hand, too much "prosecutorial discretion" has been left in the hands of the government so that EPA and DOJ have routinely threatened and imposed joint and several liability against good-faith PRPs trying to arrive at fair settlements with the government. This abuse of process has obviously backfired as a public policy.

We note with interest that the Administration's bill recognizes the unfairness and limitations of the sanction of joint and several liability, at least as it pertains to de minimis parties. On page 82 of the bill, therefore, it orders EPA and the Attorney General to set guidelines so joint and several liability may not be used to seek relief from those parties that is "grossly disproportionate to their contribution to the facility". The problem of arbitrary and unfair application of this so-called "nuclear weapon" in the arsenal of the Superfund statute is clearly not limited to PRPs with de minimis status.

If joint and several liability is to remain a part of Superfund, it should be used against recalcitrants and bad actors. Congress should impose restrictions on its availability to the government; it should never be employed for mere administrative convenience; it should serve as a nuclear deterrent, not a tactical weapon. In this way, the sanction would more appropriately

backstop the integrity of a cohesive, predictable settlements procedure, like the integrated one we are hereby recommending.

From a political point of view, joint and several liability may be too sacred a sacred cow to eliminate from Superfund. But as a defender of business everyday, I can tell you that it is commonly despised as a much-abused instrument of enforcement because it so often implodes on those who are trying to settle for their fair share, legal contribution to a problem site. It is generally disruptive of settlements, and incorrectly skews the program from its primary purpose of cleanup.

Numerous legal tomes have been written about the common law evolution of joint and several liability. Generally speaking, it was intended to protect victims by balancing the equities in their favor. However, it takes a large stretch to justify its routine application under Superfund, where joint and several liability as EPA has applied it goes far beyond the "polluter pays" principle and is, in reality, an unfair, harsh expedient for spreading costs and relieving the government of its burden of making the Superfund program work by allocating responsibility.

We recognize that there are a number of movements both within and without the government to ban joint and several liability under Superfund. Further, we understand the reasons for these movements and agree with their motivation and rationale. It would be an unthinking attorney who would suggest to his client that he should pay for the liability of others.

At the same time, we recognize the time limitations of Congress on this legislation. Engaging in extended debate over joint and several liability could jeopardize this opportunity to amend the law so that it actually may work by providing a regime under which attorneys are no longer the central characters in Superfund site cleanup. Accordingly, in drafting our recommendation, we chose the central path of improving the settlements provisions. We feel that the paramount goal of most PRPs, settling cases under Superfund, can be most quickly advanced by requiring EPA to provide an early and thoughtful allocation of responsibility to each PRP.

We thank the Committee for its kind invitation to appear today, and stand ready to answer questions and provide additional thoughts and analysis at your request and direction.

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Mr. SWIFT. Thank you, very much. I was just informed that this room was booked for 2 p.m. It's now 2:07 and we have a vote. We are going to wrap this hearing up before the vote. I recognize you, Mr. Miller, and we will do questions real fast, and be out of here in 10 minutes.

STATEMENT OF LANCE MILLER

Mr. MILLER. Good afternoon, Mr. Chairman. I am going to go real quickly then. Thank you for inviting the Association of State and Territorial Solid Waste Management Officials to testify in this important legislation on the specific topic of liability.

I am Lance Miller, assistant commissioner for site remediation in New Jersey, and vice president of ASTSWMO. As State program managers from across the country, ASTSWMO recognizes the need for Superfund reform. Our comments today are intended to improve upon the proposed legislation so that it provides all parties with a workable statute that can achieve the goals of Congress and the President.

Concerning program goals, Administrator Browner testified last week—and she specified four objectives. Three of these objectives were reduce the time and cost of clean up, make liability scheme more fair, and have greater community involvement. Each of these are very worthwhile objectives.

However, there must be a recognition that trying to achieve all these of these objectives simultaneously is probably impossible. Improvements can be made in each of these areas, but a change in one area can have negative implications in another.

The proposed legislation includes much greater involvement on the part of government in allocating liability and increasing community involvement. These changes will result in a longer time period being required to remediate a site. The legislative intent in this area needs to be clear, so that false expectations are not set for the program that cannot be achieved.

One of the best ways to shorten the time required to clean up a site is to authorize State programs. This would eliminate duplication of effort and, thus, the possible time consuming conflicts that have existed between the State and Federal agencies. This is an issue that is very important to the Association, and with your permission we would like to supplement the record with specific suggestions to improve that system.

Concerning liability, ASTSWMO was very pleased that the administration has recommended the continuation of strict joint and several liability. Forty States have adopted some form of this liability scheme, and a modification to this underlying principle would have major implications in State clean up programs and significantly delay the clean up of thousands of non-NPL sites.

However, it is likely that States will follow this change or the proposed change in the overall liability scheme and enact State legislation with an allocation process and payment of orphan share. This could have significant ramifications to the States.

Would there be enough allocators across the country to handle both, NPL and non-NPL allocations. Also, there is a very strong possibility that this would shift the incentive of States to work with responsible parties prior to sites being listed on the NPL, to States

putting sites on the NPL to reduce their orphan share to the State match of 15 percent as proposed in the legislation.

Couple this with responsible parties possibly wanting to get on the NPL because of the allocation and orphan share approach and funding from the insurance fund, and the end result may be an NPL much larger than currently anticipated.

Turning to the allocation scheme and its ramifications on transactions costs, the proposal will certainly help reduce transaction costs to some parties due to the exemptions and covenants not to sue *de micromis* and *de minimis* parties. Those are supported. However, there will also be a shift of a large portion of the transaction costs from responsible parties to government. This will necessitate additional resources to ensure completion within the defined time periods.

Also, allocators will be faced with a very formidable task and likely need support staff to wade through the volumes of information that will be submitted. We have an allocation current going on in New Jersey that has been underway for 18 months. It has at least another 6 months to complete. It's being done by a large national accounting firm.

This is especially true for municipal solid waste landfills like the example I just gave, where hundreds of potential responsible parties are likely to exist, and the information on who dumped how much and when will be very difficult and expensive to determine.

The final ramification is that the allocation scheme seems to set the stage for responsible parties to settle with the government through payment of their settlement cost plus a premium, and be released from liability. Since the allocation is being done at the remedial investigation stage when cost estimates are still rough, it might benefit a responsible party to cash out.

If all parties cash out EPA will be left to do the clean up itself, and this will not allow for the expeditious remediation of contaminated sites.

A few brief recommendations for improvement. We think that the orphan share for municipal solid waste landfill sites will be very high, possibly on the order of 75 percent. This should be examined. We will be examining it from the State level. It would also be nice if EPA would provide its information on this as well. If that estimate is true, it might be more cost effective to carve out the municipal solid waste landfills from the allocation scheme.

As the attorney general indicated, we would also like to see the elimination of State liability in certain situations, as she indicated. We would also like to see broader innocent party protection, to encourage voluntary clean up on the part of responsible parties.

ASTSWMO is continuing its review of the allocation scheme and would like to supplement its record on this and provide our position and suggestions on this important aspect.

Mr. SWIFT. Without objection, it will be included in the record.

Mr. MILLER. Thank you. In conclusion, the administration and Congress should be complimented for pulling together a very comprehensive reauthorization of Superfund. It is much needed. ASTSWMO hopes that its suggestions will further improve the proposal and make it more workable for the States and EPA to implement. We are available to assist the subcommittee as you continue your deliberations on this important legislation.

[Testimony resumes on p. 618.]

[The prepared statement and attachments of Mr. Miller follow:]

Testimony

of the Association of State and Territorial
Solid Waste Management Officials
(ASTSWMO)

Good morning. I am Lance Miller, Assistant Commissioner of Site Remediation for the New Jersey Department of Environmental Protection and Energy. I am also the Vice President of the Association of State and Territorial Solid Waste Management Officials (ASTSWMO) and am here today representing ASTSWMO. ASTSWMO is a non-profit association which represents the collective interests of waste program directors of the nation's States and Territories. Besides the State cleanup and remedial program managers, ASTSWMO's membership also includes the State regulatory program managers for solid waste, hazardous waste, underground storage tanks, and waste minimization and recycling programs. Our membership is drawn exclusively from State employees who deal daily with the many management and resource implications of the State waste management programs they direct. Working closely with the U.S. Environmental Protection Agency (U.S. EPA), we share the objectives of the Congress and the public in providing for safe, effective and timely investigation and cleanup of the many contaminated sites throughout the nation. We, therefore, have a fundamental interest in the dialogue surrounding the Administration's proposed legislation [herein known as "the proposal"] designed to reform and restructure the Superfund program. As the day to day implementors of the State and Federal cleanup programs, we believe we can offer a unique perspective to this debate.

BACKGROUND:

It is our understanding that, when Congress enacted the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) in 1980, commonly known as Superfund, it was envisioned that there were approximately 400 serious abandoned hazardous waste sites requiring remediation and that Superfund would have a life-span of perhaps five years. As the years passed, however, landfills and active industrial sites began to be placed on the National Priorities List (NPL). With these types of sites came a recognition that 1) the current liability system was not working and 2) the cleanup of contaminated sites was complicated, time-consuming and required more serious resources than the Federal government could provide. Consequently, the Superfund Amendments and Reauthorization Act (SARA) introduced the use of various settlement tools and mandated increased State participation in the program. Unfortunately, these provisions and their implementation did not adequately address the concerns of Superfund stakeholders.

Simultaneously, in response to the thousands of contaminated sites being identified nationwide that either could not wait for U.S. EPA attention or did not meet the Agency's criteria for inclusion on the NPL, States began to develop their own Superfund programs. As of 1990, forty-one States had adopted a State Superfund law based on some form of liability, and forty-four States have developed funding authorities - two essential components to implementing an effective State cleanup program. States now are responsible for enforcing or funding cleanups at

their own State non-NPL sites, and at NPL sites where their responsibility ranges from performing response actions and the signing of Records of Decision (RODs) to simply providing the requisite State funds at the time of the construction of the cleanup remedy. We believe States now remediate the vast majority of the confirmed contaminated sites in this country and will continue to do so in the future.

We offer as a measure of proof preliminary data results from a survey which ASTSWMO has recently completed with the support of the U.S. EPA. In 1992 ASTSWMO and the U.S. EPA agreed that while there was an abundance of data on Federal cleanup levels, there was a considerable gap in data on State cleanups. Therefore, a study was initiated and implemented for the purpose of providing a more comprehensive picture of Superfund-influenced cleanups, both complete and underway, and to lend credibility to the current debate surrounding the issue of the appropriate State role in Superfund. Specifically, the aforementioned survey was designed to measure the extent of State hazardous waste cleanup activity at non-NPL sites exclusive of those sites being cleaned up under RCRA authorities. All hazardous waste cleanup efforts performed by States/territories directly, under State/territory enforcement authority, and under State/territory voluntary and property transfer programs were eligible for inclusion in this data gathering effort. Thirty-eight States and two territories responded to the survey. Preliminary data results indicate that at least 12,000 sites have been remediated in these 38 States and two

territories since the inception of Superfund in 1980. In addition, these States and territories indicated that they are currently working on another 13,700 active sites. Let me stress that these figures are in the final stage of being quality checked and verified and that the data should be used as a point of reference when measuring State cleanup capabilities and when discussing what may be the actual universe of contaminated sites in this country. ASTSWMO and U.S. EPA will present the final report to the Subcommittee upon its completion.

Today, NPL contains approximately 1,289 sites and the total universe of contaminated sites requiring cleanup across the nation is estimated to be in the tens of thousands. From our perspective we believe the universe of contaminated sites is much larger than originally envisioned and, as currently structured, the federal Superfund program will not address even the existing NPL sites in a timely manner, much less meet broader demands as more sites are added to the NPL. The results of Superfund Reauthorization may significantly impact State law, therefore, Congress should consider these implications as part your deliberations.

ASTSWMO LIABILITY RECOMMENDATIONS:

We believe Congress and all other appropriate Superfund stakeholders must first identify the fundamental goal for this Reauthorization, before determining the appropriate liability scheme. Is the goal to speed up the cleanup process and obtain more cleanups, or rather, is it a desire to insert a more meaningful level of fairness into the current system? Once this

determination is made, the appropriate course of action becomes clear. For example, the current liability scheme has not resulted in a "fair" system, but that was also not its primary intent. It was designed for the purpose of funding and achieving the maximum amount of cleanups - and on the State level it has met its goal. The proposed allocation process does add a level of fairness to the system, but it also slows the process - hence less cleanups, but with more equitable settlements. We believe it will be virtually impossible to design a system which meets both goals (fairness and speed) and Congress should be careful not to set unrealistic expectations. Community Working Groups (CWGs) are another example. Establishing a CWG at each site will add time to the process and that fact should be clearly understood with the expectations of shortening the time required to cleanup a site.

ASTSWMO has adopted a position strongly supporting the retention of the Strict, Joint and Several Liability scheme in CERCLA.(Enclosure #1) We are joined in our support of the current liability scheme by the National Governor's Association and the National Association of Attorneys General. As of 1991, a total of 40 States have adopted State Superfund laws based on some form of the current liability scheme. From our viewpoint, there are two primary benefits to the Strict, Joint and Several Liability scheme. First, the "polluter pays" principal. The U.S. EPA estimates that approximately 70% of the NPL sites are being remediated by Responsible Parties (RP), and in New Jersey, approximately 90% of the State-required cleanups are RP funded. Second, Strict, Joint

and Several Liability has proven to be a powerful incentive for the proper disposal of hazardous waste which is now and will continue to be generated.

ASTSWMO does recognize, however, that CERCLA could be amended to make it more "fair" and we commend you and the Administration for your efforts in this area. For example, we approve of the provisions in the proposal which clearly define when a party is eligible for de micromis and de minimus settlements. Having clear guidance in these areas will enable regulators to more easily implement the directives of the statute and eliminate unnecessary litigation concerning these parties.

And while we do support some relief for municipalities held responsible for the cleanup of old municipal solid waste landfills, we do not believe the answer is to establish separate classes of responsible parties with differing liabilities, i.e., the proposal to cap the liability of the generators or transporters of municipal solid waste at 10 percent of the total response costs at the facility. Because municipal solid waste (MSW) landfills are a societal problem, we would prefer to see a separate funding system developed for treating this particular classification of sites, rather than alleviating one particular symptom of the problem. The proposal would not eliminate the liability for municipal owners and operators who could and do, argue that they were performing a service for the citizens of their communities by operating a public landfill. The proposal also will not significantly reduce the transaction costs associated with landfill sites. Rather, it will

shift the responsibility and time from the private sector to the public sector and from the end of the process to the beginning.

ASTSWMO recommends that MSW Landfills which closed prior to the effective date of 40 CFR 258 of RCRA Subtitle D be addressed under a public works type program rather than Superfund. ASTSWMO has developed a definition of MSWLF that is based on past regulatory requirements and thus does not try to make landfills subject to RCRA Subtitle C requirements simply because they took wastes in the 50s, 60s, and 70s that later became classified as hazardous waste. The remedy selected for each landfill would be based on the risks associated with each site. The amount of time and money which will be spent searching for viable PRPs, plus the orphan share which will be necessary to fund the municipalities share lead us to believe that a public works approach for MSW landfills may be the most cost-effective method.

A public works type program for MSW landfills should provide a reduction in cost as the concept is predicated on three assumptions: 1) the development of presumptive remedies for MSW landfills (EPA directive #9355.0-49FS); 2) the elimination of the need to establish and prepare enforcement cases against all responsible parties associated with a landfill; and 3) and perhaps most importantly, the elimination of third party lawsuits. I have included the ASTSWMO proposal as Enclosure #2.

ASTSWMO also recommends that provisions be inserted into CERCLA to protect otherwise innocent parties and their successors and assigns from CERCLA liability in an effort to continue the

development and expansion of State voluntary cleanup programs. For example:

1. CERCLA should offer protection from future liability for parties conducting a voluntary cleanup who were not otherwise responsible under the Superfund law.

2. CERCLA should assure that conducting an approved cleanup does not unduly associate a person with the release.

3. CERCLA should allow a State to provide certification that a cleanup is complete.

The goal of Superfund should be to not only protect human health and the environment but to protect human health and the environment in the most time-effective manner possible. We are pleased that the proposal recognizes the primacy role of States in the area of voluntary cleanups. However, we are concerned that the proposal may be interpreted in a manner which Congress did not intend. For example, the following two provisions outlined in section 302 require that a State provide technical assistance throughout each voluntary cleanup and have the capability, through enforcement or other mechanisms, of assuming the responsibility for undertaking a cleanup if the current owner or prospective purchaser fails or refuses to complete the necessary cleanup. This could be interpreted to mean that a State must immediately finish or perhaps begin the remediation of the site in question, even though the site may not be a priority for the State. Each State has an internal prioritizing system designed to balance the needs and unique demands each site poses with the actual available State resources

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The above-mentioned provisions could attempt to force a certain priority-setting scheme onto States, based strictly on the availability of funds to proceed with remediation. This priority system may or may not account for the many variables which should affect a State's determination to proceed with the remediation of a site. This provision may ultimately preclude many States from seeking federal aid to develop and foster Voluntary Cleanup programs. State Voluntary Cleanup programs should be viewed as pilots, pioneering new ground and new approaches to solving the cleanup dilemma in this country. We, therefore, recommend that Congress provide as much flexibility as possible and not allow for the possibility of prescriptive interpretations.

The last ASTSWMO recommendation concerning CERCLA liability is the desire for CERCLA to be clarified to reflect the fact that States should not be held liable, in whole or in part, for the costs of cleanup. It is inappropriate and counterproductive for a State to be held liable when it merely regulates a facility, when it is attempting to remedy a release of hazardous substances from a site, or when it is simply a trustee. Despite the trend of court decisions towards finding States not liable under CERCLA in these circumstances, counterclaims are continuing and enormous sums are being spent on legal suits and, more importantly, actual cleanup activities are being delayed.

ASTSWMO RESPONSE TO THE LIABILITY PROPOSAL:

ASTSWMO does have several specific comments regarding the proposed changes to the liability scheme. ASTSWMO is concerned that the proposed allocation scheme for multi-party sites may unduly slow the cleanup process - primarily from the State perspective. First, the proposed allocation scheme is applicable only for sites proposed or listed on the NPL. Therefore, this system would apply only to a small percentage of the total universe of sites in this country. As long as the NPL remains, there will always be two separate and distinct cleanup programs in this country, an issue which should be fully debated, with the ramifications of maintaining two cleanup programs fully understood by all Superfund stakeholders. Second, allocation is a very time intensive process, which may work when one is dealing with a limited universe of sites, but when one is responsible for over 20,000 sites as is the case in New Jersey, the allocation process becomes more of a impediment than an aid in speeding up cleanups. In addition, the allocation scheme may end up delaying the start of the Remedial Investigation (RI) at newly listed NPL sites. Since the proposal sets a starting point for the RP search (90 days after commencement of RI or listing on the NPL) and an end point (18 months after initiation or the RI), EPA may be forced, based on resource limitations, to delay the start of an RI at a newly listed site so that the clock won't start running until they know they can complete the RP search in 18 months. In addition, the factors to be used in the allocation process will be difficult to apply to

certain types of sites, e.g., MSWLF and chain of title sites, as many of the factors require subjective judgement that cannot be consistently applied to all allocations.

It appears as if the intended results of this proposal are questionable, as the time and costs associated with up front PRP negotiations and searches will merely be transferred from the private sector to the public sector.

Further, we think the proposed allocation system will produce a strong financial incentive for RPs to actively try to be listed on the NPL rather than settle with a State or enter a State voluntary cleanup program. In the proposal, an RP can obtain finality at a site during the Remedial Investigation (RI) phase by paying their "fair share" with a premium. For this payment the RP can obtain a final covenant that releases them from future liability. Given the experience of cost estimates from RI to actual implementation, most RPs will relish the opportunity to cash out. This will leave EPA responsible for completing the cleanup and the fund liable for any cost overruns. The universe of NPL sites, let alone the entire universe of contaminated sites, cannot be addressed in a timely manner unless the RPs conduct the vast majority of site cleanups. We also question whether EPA will have the resources available to address an expanded NPL universe. NOTE: EPA currently estimates in its "Getting to Cleanup Initiative" that it will complete construction at one NPL site a week - 650 sites by the year 2000.

Lastly, with the Administration's intent to keep the retention of two separate cleanup programs in this country, States will have a difficult time implementing two distinct liability systems which are determined only by where a site is listed. However, one requirement for authorization of the Superfund program will be the ability of a State to demonstrate "that it has a process for allocating liability among potentially responsible parties". Therefore, the Administration clearly intends for States to adopt an allocation process, regardless of the time or expense inflicted onto State governments.

THE STATE ROLE PROPOSAL:

We are pleased that there has been a recognition on the part of Congress and the Administration that, to more effectively combat the cleanup problem in this country, the State role in Superfund must be enhanced. ASTSWMO fully supports authorization of the program to willing and qualified States.

We have reviewed the proposal and have several comments on the authorization/referral process. As the State Role is not the primary subject for this hearing we will submit additional comments for the record at a later date. We feel it is appropriate, however, to briefly outline our position which we believe is an effective alternative to the current proposal. Our position paper, "A Comprehensive Superfund Program - State Authorization/Delegation" is provided as an enclosure(#3).

First, our proposal is predicated on the establishment of a national cleanup goal with a preference for permanence and from

that the development of reasonable and consistent national models for cleanup standards. Currently, CERCLA does not specify "how clean is clean". EPA performs a risk assessment for each individual site based on the NCP and agency guidance for the development of cleanup standards protective of human health and the environment. This individual decision-making process to determine "how clean is clean" has resulted in a continuum of "permanence" and "cleanliness" at sites throughout the nation. Besides dramatically increasing the time necessary to study and remediate a site, this system has caused inequities in cleanup. Moving to a system with a nationally defined cleanup goal, specifically one single national target risk level as opposed to the current flexible risk range (10-4 to 10-6), will alleviate many of the environmental justice concerns and speed the cleanup process. The Administration is not clear as to whether they continue to support their risk range approach or will adopt a single national risk target. We, therefore, strongly encourage Congress to be very clear in specifying that EPA develop a single national target risk level in order to alleviate the current inequities and inconsistencies in cleanups.

The second element of our model is the consolidation of the current two cleanup systems in our country into one comprehensive cleanup program, i.e., the elimination of the NPL.

The third and final element of our proposal is the retention of the polluter pays system, i.e., strict, joint and several liability.

THE ASTSWMO PROPOSAL FOR A COMPREHENSIVE CLEANUP PROGRAM - STATE AUTHORIZATION/DELEGATION:

1. We believe that CERCLA should be modified to reflect the full range of the national cleanup needs, to include all sites which require cleanup. This recognition of the full range of the problem cannot ignore the present NPL completion obligations, nor the finite limitations of the current trust fund, but would reflect the need to delegate some of the authorities and enforcement tools of the national Superfund program to willing and able States. In short, CERCLA goes beyond the NPL in requiring government action to remediate hazardous releases, and the States should be provided similar authorities to those now provided to the Federal government for remediation of sites whether listed on the NPL or not.

In order to achieve this result, we propose the development of a National Registry of sites exclusive of RCRA authorities requiring cleanup under CERCLA authority. Superfund has the ability to potentially affect all of the contaminated sites in the country but does not provide the mechanism to allow all sites (i.e., those which do not score above 28.5 in the Superfund site scoring system) to reach cleanup under the Federal program. Under such a program, U.S. EPA could be required to solicit from each State a list of sites that fall under Superfund authority. This list would represent **all the sites that are contaminated above a certain nationally established target risk level. Sites below this established risk level would not be placed on the National Registry nor be subject to CERCLA liability.** This national registry would

replace CERCLIS.

An efficient mechanism for removing sites from the National Register once they are cleaned up would be required. Such a removal mechanism would provide finality for responsible and voluntary parties and serve as an incentive to accomplish clean up activities.

Through this National Register process a "true priority list" of sites that require public financing for cleanup would be developed. Congress would continue to authorize an overall program funding level and U.S. EPA would be responsible for distributing site-specific monies available each year. Each State implementing the program would receive monies from the Federal Trust Fund (on a prioritization basis or under a grant formula) to address these fund-financed sites.

After exhausting enforcement efforts based on the current Strict, Joint and Several Liability scheme or the invitation to enter a voluntary cleanup program, a subset of sites on the National Register would remain. These sites would comprise a National Funding List and replace the NPL. Sites would go through a prioritization process for public funding once the State (or U.S. EPA in those States choosing not to participate in the program) determined that no responsible parties or other party were willing or able to pay for or conduct the cleanup. This qualification process would consider the severity of the contamination in relation to the other sites requiring public funding.

The Administration appears to have supported the concept of a national registry as the proposal did contain one aspect of the concept - the State registry. We do not understand the rationale or the intent for adopting only part of our recommendation. We believe this will not result in the elimination of two cleanup systems in this country or alleviate interagency conflicts. The only purpose it appears to serve is the continued promotion of the unequal partnership between the U.S. EPA and the States and the fostering of continued "turf" battles. **We strongly recommend that if our proposal is not adopted in its entirety, the provision of a State registry be removed from the proposal.**

2. We are strongly committed to an expanded State role, by which capable States may voluntarily seek the authority to fully implement significant elements of the Superfund program within their own State. State programs are prepared to be fully accountable for the use of public resources, and for the effectiveness of their cleanups, but should be given wide flexibility in the ways in which they carry out their responsibilities. Consistency is important, but this is not a preventative regulatory program, and site cleanups require a broad range of management decisions to reach necessary results. Therefore we propose the following mechanism for implementing and operating an authorized/delegated Superfund program:

A. QUALIFYING CRITERIA: Congress would direct U.S. EPA to work jointly with the States to develop qualifying criteria for delegation of the program to requesting States.

B. DETERMINATION OF STATE QUALIFICATION: Determination of State-Qualification would be made on a performance basis (i.e., self-certification) as is done with the Underground Storage Tanks program rather than on a process basis. This will enhance the likelihood and availability of State innovation and improvement, thereby helping to ensure the desired end result - namely the greatest possible number of timely and protective site cleanups given the available resources.

C. PARTIAL DELEGATION: Delegation should be strictly voluntary and all States should have the opportunity to qualify for either full or partial delegation.

3. Based on the assumption that site specific cleanup funds will continue to be provided by responsible parties, the Federal Trust Fund and State cleanup funds, there will also need to be an investment in the building and maintenance of State cleanup programs. We believe the most cost-effective and cost efficient means of providing funding to States with delegated programs would involve the use of two-year program grants. The program-grant funding method that the U.S. EPA is using for the Underground Storage Tanks program has worked very well from both the State and Federal perspectives. A program grant should be equally as effective in the Superfund program as in the LUST program, as the large number of sites on a national Superfund registry would still be less than the current number of LUST sites. The program grant could cover items such as part of the State costs for administering the program, performing site assessment work (i.e, site

identification and decision on the need to cleanup), enforcement activities, and/or emergency type activities. We believe State programs could perform the work for less cost than the for-profit Federal contractors and so reduce total costs.

ASTSWMO also believes that there must be a careful reevaluation of how Federal funds are utilized for publicly financed site-specific cleanups and how cost sharing requirements, and/or cutoffs for the federal funds, impact State cleanup funds. These government funding bases must be harmonized to ensure fair and appropriate division of responsibilities. I must add that, as program managers, our experience and expertise is in using these funds, and not in the manner in which they are best collected. This is an area where our Governors and State legislators can provide better input.

OTHER COMPONENTS OF THE PROPOSAL:

ENVIRONMENTAL INSURANCE RESOLUTION FUND: Although we have had little time for analysis, ASTSWMO's initial concern with this provision centers around the retention of retroactive liability. Technically this provision has no effect on the liability scheme. The reality, however, is that this provision will effectively eliminate retroactive liability for parties associated with pre-1985 sites. The proposed insurance fund will only apply once again to a very finite number of sites. What will be an RPs incentive to settle with a State or enter a voluntary cleanup program? Even if the provision could apply to non-NPL sites, would there be enough money to fund the pre-1985 shares of literally thousands of sites?

ASTSWMO recommends Congress seek further clarification on the funding scheme and universe of sites associated with this program.

RESEARCH, DEVELOPMENT AND DEMONSTRATION - ASTSWMO recommends adding a provision to the bill which would allow the administrator to award grants and cooperative agreements to "State, Tribe, Consortium of Tribe, or Interstate Agency, municipality, educational institution, or other agency organization for the development and implementation of training, technology transfer, and information dissemination programs to strengthen environmental response activities, including enforcement, at the Federal, State, Tribal and local levels...." ASTSWMO strongly urges the Congress to insert a provision of this nature into the current proposal. As I have stated previously, State programs have developed significantly since the inception of Superfund in 1980 and will continue to do so, but only if sufficient resources are allocated. Currently, over 40 States receive CORE cooperative agreements (non-site specific money) from the U.S. EPA for the express purpose of strengthening the State infrastructure which is responsible for remediating contaminated hazardous waste sites. The increased responsibilities assigned to States in this proposal will not be accepted unless adequate resources are provided.

CONCLUSION:

The Administration and Congress should be complimented for developing such a comprehensive reauthorization proposal for Superfund. ASTSWMO hopes that its suggestions will further improve the proposal and make it more workable for the States and EPA to implement. We are available to assist the Subcommittee as you continue your deliberations on this important legislation. I will be happy to answer any questions. Thank you.

ENCLOSURE #1

Association of State and Territorial
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ASTSWMO CERCLA POSITION PAPER

ISSUE: STRICT, JOINT AND SEVERAL LIABILITY

BACKGROUND:

The Strict, Joint and Several Liability provision of the Comprehensive Environmental Response and Liability Act (commonly referred to as Superfund) is expected to receive considerable attention during the Superfund Reauthorization Debate in the 103rd Congress. As of 1991, 18 States have adopted a Strict, Joint and Several liability State Superfund Law and 8 additional States have adopted strict, joint and several liability with provisions to prove apportionment. A total of 40 States have adopted State Superfund laws based on some form of liability. The two key benefits of the Strict, Joint and Several Liability scheme are 1) the "polluter pays" principal - currently, the majority of NPL sites (EPA estimates 70%) are being cleaned up by Responsible Parties and 2) it provides an incentive for the proper disposal of hazardous waste which is currently being generated. The Strict, Joint and Several Liability standard must be retained in the federal law.

However, unintended side-effects have been produced by the implementation of the Strict, Joint and Several Liability law. For example, there is a strong perception that transaction costs are increasing disproportionately to the actual amount spent on cleanup. Types of sites primarily associated with this issue are municipal solid waste landfills, which are generally large multi-party sites, containing high percentages of orphan shares and involving local governments and numerous small businesses. Capping the liability of municipalities would not completely solve the problems associated with these sites. Therefore, CERCLA could be amended to address municipal solid waste landfills differently from the traditional Superfund approach (ASTSWMO position paper on Landfills and Superfund, Adopted July 22, 1993).

In addition, CERCLA should clearly define and/or clarify under what circumstances a mix of federal and responsible party dollars can be used for orphan shares and to facilitate the increased use of creative settlement tools, particularly for small and de minimus contributors.

CERCLA also needs to be amended to protect against future liability for those parties who conduct voluntary cleanups who would not otherwise be responsible under the Superfund law. These parties who are voluntarily

remediating a site should not be held responsible for a problem they did not create.

Lastly, CERCLA needs to clarify when States should be liable, in whole or in part, for the costs of cleanup to provide protection for States against counterclaims. It may be appropriate for a State to be held liable when it is actually involved in the day to day running of a hazardous waste facility. It is inappropriate and counterproductive, however, for a State to be held liable when it merely regulates a facility, when it is attempting to remedy a release of hazardous substances from a site, or when it is simply a trustee. Despite the trend towards finding States not liable under CERCLA in these circumstances, counterclaims are continuing and enormous sums are being spent on legal suits and more importantly, actual cleanup activities are being delayed.

ASTSWMO POSITION:

ASTSWMO urges Congress to retain the Strict, Joint and Several Liability provision of CERCLA during Reauthorization with the following amendments:

1) address the municipal solid waste landfills liability issue differently from the traditional Superfund approach (see MSW Landfills paper, Adopted July 22, 1993)

2) develop clear criteria for mixed funding and de minimus settlements;

3) insert provisions to protect otherwise innocent parties and their successor and assigns from CERCLA liability to promote voluntary cleanups, i.e.:

- CERCLA should offer protection from future liability for parties conducting a voluntary cleanup who were not otherwise responsible under the Superfund law.

- CERCLA should assure that conducting an approved cleanup does not unduly associate a person with the release.

- CERCLA should allow EPA or preferably a State to provide certification that the cleanup is complete.

4) the adoption of an explicit exemption from liability for States carrying out regulatory and cleanup activities at Superfund sites under the Comprehensive Environmental Response and Compensation and Liability Act of 1980, 42 U.S.C. $$ 9601 et seq.

Adopted by the ASTSWMO Board of Directors, July 22, 1993.

ENCLOSURE #2

Association of State and Territorial
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ASTSWMO CERCLA POSITION PAPER

ISSUE: **MUNICIPAL SOLID WASTE LANDFILLS (MSWLFs)**

SUMMARY: The current approach for the remediation of municipal solid waste landfills (MSWLFs), which are discharging or have discharged hazardous substances, involves two different authorities. The first authority, the federal Resource Conservation and Recovery Act Subtitle D (RCRA-D) and its State counterparts, focuses primarily upon closure and post-closure monitoring of MSWLFs and other Solid Waste Management Units (SWMUs) (e.g. industrial landfills, lagoons, and other waste disposal or storage areas). The flaw in this closure oriented approach is that the vast majority of MSWLFs produce hazardous leachate which is not adequately addressed by traditional closure and postclosure practices alone. This leaching of hazardous substances occurs irrespective of our ability to demonstrate that hazardous wastes were disposed in the MSWLF, a prerequisite to qualifying for consideration under the federal Superfund program, discussed below. This leaching is likely a result of the ubiquitous presence of hazardous substances in household refuse and commercial and industrial wastes which were for the most part legally disposed in these MSWLFs. Consequently, RCRA-D does not provide adequate funding nor authority for the remediation of MSWLFs, thereby leaving these sites to leak and contaminate broad expanses of groundwater.

The second authority, the federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or as commonly referred to, Superfund) focuses upon only those MSWLFs which have been documented to have received hazardous substances or waste sometime during their operations and which are releasing these hazardous substances or waste into the environment. As a practical matter, this receipt of hazardous substances or wastes is generally considered separately from the municipal waste which was appropriately disposed at these sites.

Superfund employs an enforcement based approach which focuses upon the worst hazardous waste sites in the nation. These sites are ranked based on human and environmental impacts and the worst sites are placed on the National Priorities List (NPL). This ranking is

generally followed by years of negotiation, litigation, engineering and design, before any actual cleanup begins.

It is generally understood that sites on the NPL, due to the nature of the Superfund process, often entail significant litigation and negotiation periods and expenses and, therefore, very high transactional costs in dollars and time which delay site remediation and therefore protection of human health and the environment. Furthermore, MSWLFs, by their very nature and intent, have generally accepted wastes from hundreds, if not thousands, of persons who could be considered responsible parties under Superfund, thereby requiring contribution from those parties for the cost of remediation. The USEPA currently conducts investigations to identify all potential responsible parties; this process, being done through contractors, can take years to complete. Following this is a period of negotiation whereby USEPA will try to get many of the responsible parties to settle their liability to the government for some set cost figure, leaving the remaining non-settlers to litigate for the remaining costs of the actual cleanup of the site. This issue is further complicated by private contribution actions as allowed under federal and certain States' laws even after the settlement of liability to the government.

Furthermore, these MSWLFs currently must go through the full Superfund process including a detailed remedial investigation and feasibility study when in fact the current experience demonstrates that there is generally accepted remedies which in essence would suggest an opportunity for significantly reduced remedial investigation and feasibility study costs and time delays through employment of a presumptive remedy.

The issue of remediation of MSWLFs is further clouded by the ongoing debate regarding municipal liability and the resulting third party or contribution law suits which have continued to delay the remedy of these MSWLFs and increase the transactional costs significantly. The debate basically involves the questions of "Who benefited?", "Who pays?", "Enforcement or remediation first?", "What is the appropriate allocation of liability and costs?", and, "Should municipalities and other government entities' who operated MSWLFs for the public good be held to the same standards of liability as the more classic "violators" under environmental law?". The debate is currently being heard in the federal and State legislatures across the country.

PROPOSAL: ASTSWMO proposes to establish a rebuttable presumption that all landfills which received for disposal household wastes, and may have received commercial solid wastes and/or industrial solid wastes, and may also, at a time prior to the effective date of RCRA Subtitle C requirement, have received wastes now characterized as hazardous waste, but does not include any landfill that was subject to RCRA Subtitle C jurisdiction to be considered a "municipal solid waste landfill". This proposal recommends that these sites be remediated via a public works type program whose focus is on the remediation of worst sites first and is irrespective of the demonstration of hazardous substance or waste disposal at these sites. Presumptive remedies maybe used at many MSWLFs to further facilitate completion of the remedy. This would include those sites currently on the NPL as well as any currently in process of identification, investigation or cleanup by the federal government or the States. The CERCLA enforcement provisions of this proposal would not apply to any MSWLF. This proposal, however, applies only to those facilities which closed prior to the effective date of 40 CFR 258 of RCRA Subtitle D and would not apply to Federal Facilities not currently entitled to CERCLA trust funds. The existence of this program would not preclude the prosecution of civil and criminal acts under the provisions of federal RCRA and analogous State waste management and other applicable laws.. However, the remediation of all MSWLFs would continue to be handled under this program rather than on the NPL once an acceptable funding mechanism is in place. Prior to the enactment of a viable funding source, the current CERCLA approach would be maintained.

This proposal recognizes the true and equivalent threat to the public health, which is posed by MSWLFs "unlucky enough" to be unable to demonstrate that they received hazardous substances or wastes, or which, through the presence of hazardous substances in normal household and business waste, are none the less producing toxic leachate which is contaminating the groundwater and posing a significant risk to the public. The MSWLF presumption would be a rebuttable presumption for the purposes of listing and ranking the sites for remediation. This fund would be established separate from Superfund.

It is not unreasonable to assume that the average cost of studying and remediating a landfill on the NPL would decrease by the abbreviated and focused remedial investigation, feasibility study and design phases, which are proposed in this paper. Cost reduction would occur

due to the abbreviated and focused remedy selection process, the absence of need to establish an enforcement case against all "responsible parties", and the absence of public and private litigation throughout.

Some would recommend that a portion of the fund be capitalized by some form of tax upon industrial sources who improperly disposed of hazardous wastes into the MSWLFs. Due to the very real possibility of creating another enforcement based program with its attendant high transactional costs in time and litigation dollars, ASTSWMO is recommending that cost recovery not be a component of the MSWLF remediation program. Funding sources such as general tax revenue or broad based user or facility fees, or industry taxes might be appropriate. Additionally, a State match could be required, and one possible source of such State funds would be the financial assurances established to effectuate the closure of the MSWLFs. The fund established under this proposal would also be responsible for O&M and other future costs, subject to a State cost share provision.

Enforcement:

This approach differs from the traditional Superfund remedial approach because this is a remediation first strategy, more similar to the Superfund removal program. This would focus the priority on site remediation and would essentially remove municipalities, and respective tax payers, from their current jeopardy from third party law suits.

Remedy:

For this strategy to work, presumptive remedies must be established based upon existing knowledge of MSWLF physical characteristics and MSWLF remediation experiences. A review of Superfund ROD and State decision documents involving MSWLF remediation should be conducted and followed by publishing a presumptive remedy allowing for focused remedial investigations and focused feasibility studies intended to "size" the presumptive remedy as well as to ensure appropriate post remedial monitoring systems. The ranking system for such sites on a MSWLF priority list would contain many of the current NPL ranking components, including threat to groundwater, air and direct contact. This will ensure a reasonable addressing of worst sites first. This listing should result in the removal of all MSWLFs from the current NPL and would prevent MSWLFs from being listed on the NPL in the future.

Implementation:

This program could be implemented as a delegated program by the federal government to States, much like the construction grants programs of the 1970s. These were engineering based programs with very clear performance criteria, involving the pass through of the federal dollars with the State oversight to ensure appropriate design and construction and expenditure of those funds. It is important to note that this proposal would not apply to landfills which were operated as industrial landfills or hazardous waste landfills. Industrial or hazardous waste landfills would continue to be addressed under the corrective action provisions of the Resource Conservation and Recovery Act and/or Superfund as is currently the case. This proposal also differs from prior proposals in that it would not consider municipalities which owned and/or operated MSWLFs to be responsible parties.

Definition:

Municipal Solid Waste Landfill means a landfill that received for disposal household wastes, and may have received commercial solid wastes and/or industrial solid wastes, and may also, at a time prior to the effective date of RCRA Subtitle C requirement, have received wastes now characterized as hazardous waste, but does not include any landfill that was subject to RCRA Subtitle C jurisdiction.

For the purposes of this definition, the following definitions apply:

Commercial solid waste means all types of nonhazardous solid waste generated by stores, offices, restaurants, warehouses, and other non-manufacturing activities, excluding household and industrial wastes. (Subtitle D Part 258.2 definition.)

Household waste means any solid waste (including garbage and trash) derived from households (including single and multiple residences, hotels and motels, bunkhouses, ranger stations, crew quarters, campgrounds, picnic grounds, and day-use recreation areas). (Subtitle D Part 258.2 definition with sanitary waste from septic tanks removed.)

Industrial solid waste means solid waste generated by manufacturing or industrial processes that is not a hazardous waste regulated under Subtitle C of RCRA. This term does not include mining waste, oil and gas waste or

cement kiln dust waste. (Subtitle D Part 258.2 definition.)

ASTSWMO POSITION:

ASTSWMO recommends that Municipal Solid Waste Landfills which closed prior to the effective date of 40 CFR 258 of RCRA Subtitle D be addressed under a public works type program rather than Superfund. Federal Facilities not currently entitled to CERCLA trust funds would be excluded from this program. In addition ASTSWMO recommends that landfills containing Municipal Solid Waste and Industrial Waste and/or Hazardous Waste or Municipal Solid Waste only be addressed through a public works program rather than Superfund once an acceptable funding mechanism has been established. Prior to the enactment of a viable funding source, the current CERCLA approach would be maintained. ASTSWMO recommends that Industrial Waste and Hazardous Waste Landfills continue to be addressed under Superfund or RCRA authority.

RESEARCH: Determine support for a public works program. Develop mechanics of a public works program. Evaluate cost, tax, and time impacts.

Determine feasibility of modifying RCRA Subtitle D to address closed landfills. Work with ASTSWMO RCRA Subtitle D Subcommittee to develop joint position.

Adopted by the ASTSWMO Board of Directors July 22, 1993 in Orlando, Florida

ENCLOSURE #3

ASTSWMO

"Comprehensive Cleanup Program - State Authorization/Delegation"

The Association of State and Territorial Solid Waste Management Officials (ASTSWMO) is introducing this proposal in the hopes of contributing to a constructive and productive debate about the future cleanup of contaminated sites throughout the nation. This paper does not answer all the questions concerning the State role issue. Rather, it provides a broad framework for what a delegated Superfund program would entail with specific details to be developed via discussion with Superfund Stakeholders.

Background

The United States Congress enacted the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) in 1980 "to provide for liability, compensation, cleanup, and emergency response for hazardous substances released into the environment and the cleanup of inactive hazardous waste sites." At the time of enactment, the law (commonly known as Superfund) was designed to deal with a finite number of sites and to sunset in five years. The belief in those years was that there were a manageable number of contaminated sites like Love Canal, NY needing to be cleaned up. During debate leading up to passage of Superfund, the Congress decided that because there were a finite number of these inactive contaminated sites there was no need to provide for the traditional model of State involvement used in other major environmental statutes (e.g., Clean Water Act, Clean Air Act, Resource Conservation and Recovery Act). Superfund was to be a five-year, EPA-run

program, which would take care of these contaminated sites once and for all, while the Resource Conservation and Recovery Act would prevent such sites from being created in the future.

In 1986, the Congress reauthorized the Federal Superfund program for another five years, recognizing that the universe of contaminated sites nationwide was far greater than the 400 to 500 sites originally envisioned. In addition, the Superfund Amendments and Reauthorization Act (SARA) recognized that cleaning up these sites was complicated, time-consuming and needed to involve more actors than just the Federal government. Among many other changes, SARA mandated increased State participation in the program.

In 1990, the Congress, again recognizing that the Superfund program was not in a position to go out of business, reauthorized the statute for another three years (the authority to collect taxes funding the program was extended for four years). This simple time and money extension of the statute did not address the future of contaminated site cleanups.

Status Quo

Over a decade since its inception, the National Priorities List (NPL) contains only 1,200+ sites, with the total universe of contaminated sites nationwide needing cleanup estimated to be 10 to 20 thousand. In response to the thousands of contaminated sites being identified nationwide that either could not wait for EPA attention or did not meet EPA's criteria for funding (i.e., inclusion on the NPL), States developed their own Superfund programs.(1) Currently, CERCLA covers all releases, but the EPA-administered Superfund program does not address the full universe of sites subject to CERCLA liability.

The Superfund program is the only major environmental program the Congress has not directed be implemented by the States. (States are authorized to administer a variety of programs under the Clean Water Act, the Clean Air Act, the Safe Drinking Water Act, the Resource Conservation and Recovery Act, etc.) States are currently dealing with non-NPL sites either through responsible party enforcement actions or using State funds to accomplish cleanups. At NPL sites, State involvement is a patchwork, with State responsibilities ranging from performing most response activities under cooperative agreements and the signing of Records of Decision (RODs) to simply providing the requisite State funds at the time of the construction of the cleanup remedy. In reality, under the existing Federal Superfund program with its limited scope and resource constraints, States are now, and will continue to remediate the vast majority of contaminated sites nationwide.

The current Federal Superfund program is not utilizing the resources of both the Federal and State governments in the most efficient manner possible. At those NPL(2) sites where the State has been designated the lead agency responsible for site cleanup and all dealings with the responsible parties, EPA still reserves the right to select and enforce its own remedy should it disagree with a State-selected remedy. Responsible parties are understandably wary of proceeding with cleanup activities directed by the States without some assurance EPA agrees with the State's cleanup activities. The overall result of this approach is a duplication of effort by EPA and State agencies overseeing and enforcing cleanup on the same sites, resulting in lengthy disputes between EPA and State agencies about the cleanup remedy and cleanup standards required at these sites. This produces a slower, more expensive and cumbersome Superfund process overall.

Perhaps more importantly, by not relinquishing the final decision on remedy selection to States, EPA has undercut the States' ability to achieve cooperation and compliance from responsible parties. Instead of enlisting the resources of willing and able States in an effort to speed up and expand cleanups, the current system reduces the enforcement credibility of the States, results in delays in actual cleanup, and inevitably increases costs. As a result, public dollars (both State and Federal) are not being spent in the most efficient manner and the maximum number of contaminated sites are not being addressed.

Opportunity for Change

The current Superfund program is flawed because it is not national in scope nor equally protective of human health and the environment. The Superfund program, as currently enacted by Congress and operated by EPA, does not encompass the thousands of contaminated sites nationwide nor does it explicitly recognize that a 20 to 30 year effort is needed nationally to remediate these sites and protect all the citizens and the environment of the United States
equitably.

With the deadline for reauthorization of the Superfund program approaching, ASTSWMO believes the most effective solution for improving the current system is to create a comprehensive Superfund program--eliminate the distinction between NPL and non-NPL sites and allow for State implementation of the program utilizing Federal funds. State implementation of the Superfund program would avoid duplicative efforts, leverage limited resources to the maximum extent, minimize intergovernmental disputes, provide greater

certainty and finality for responsible parties, and still allow flexibility and innovation. The State agencies administering cleanups are usually geographically closer to the sites, more familiar with site histories, and more sensitive and better equipped to respond to community concerns. Also, States have a vested interest in seeing more contaminated sites returned to productive use within their boundaries.

Most importantly, ASTSWMO's proposal for a comprehensive Superfund program will enhance the number of contaminated sites actually cleaned up thus fulfilling the primary mandate of the law--protection of human health and the environment.

ASTSWMO'S PROPOSAL

The following comprises the outline for a comprehensive, State-implemented Superfund program. This proposal does not attempt to formulate nor provide all the details such a unified Superfund program would necessitate. However, many concepts are provided in order to exemplify the benefits and workings of a State-implemented Superfund program.

1. National Register of Sites

Under a comprehensive Superfund program, EPA would be required to compile a National Register of sites subject to CERCLA liability and enforcement actions (as they, in fact, are now). The National Register would replace CERCLIS and the NPL. The National Register would be compiled by soliciting lists from each State based on an assessment process (not potentially contaminated sites as is the case with many CERCLIS entries). The assessment process must be less cumbersome than the current HRS system. All sites that are contaminated above a certain nationally-established target risk level would be placed on the National Register; sites below this level would not be placed on the National Registry nor be subject to CERCLA liability. (See ASTSWMO position paper on Cleanup Goals and Standards)

CERCLA Section 105(8) includes a mechanism for State submittal of such lists to EPA for cleanup under the Superfund program. Section 105 should clearly specify that coverage under the program encompasses those sites with confirmed contamination needing cleanup. The universe of sites that would comprise the National Register could be based upon current lists of sites (both NPL and non-NPL) developed by States for their own existing

Superfund programs. EPA, in a technical assistance role, would be expected to develop and provide guidance to ensure that States submitted only sites in need of cleanup against a national backdrop of minimum cleanup goals and standards (see ASTSWMO position paper on Cleanup Goals and Standards). For those States without existing data from which to develop a list of sites, or those States that chose not to participate, EPA would be required to develop a list of sites for that State (i.e., a continuation of the status quo under the existing program).

Programs currently excluded from CERCLA (e.g., RCRA Corrective Action) would continue to be ineligible for inclusion under a comprehensive Superfund program. Federal facilities needing clean up would be placed on the National Register, although no Federal Trust Fund monies would be involved. (see discussion on Federal Facilities)

An efficient mechanism for removing sites from the National Register once they are cleaned up would be required. Such a removal mechanism would provide finality for responsible and voluntary parties and serve as an incentive to accomplish clean up activities.

Rationale

The use of a National Register would more closely reflect the intent of the 1980 statute--to provide a public list of those contaminated sites throughout the nation warranting some level of sustained cleanup activities. The Congress intended to provide a public list of supposedly the worst sites in the nation that could not be forgotten or overlooked by governmental bureaucracies. A National Register would reflect the reality

that all releases are subject to CERCLA liability. A National Register would explicitly recognize that contamination must be addressed by responsible parties and, in their absence, by government. By utilizing a National Register, cleanup officials would not be determining funding priorities, but rather verifying sites actually requiring cleanup and subjecting those sites equally to CERCLA liability. The National Register would fulfill the original intent of the statute.

Currently, States implementing programs to deal with non-NPL sites have developed many different systems. Some State programs deal with all sites that score below the NPL's 28.5. Other State programs might deal only with sites scoring between 10 and 28.5 on the Hazard Ranking System (HRS) scale. Still other States have developed independent measures to determine the need for cleanup and establish cleanup priorities. By utilizing a National Register, the Congress would be promoting national consistency and equal protection of human health and the environment. This universe of sites should not take much effort to compile since many States already have this information through their State Superfund lists and would give States a primary role in identifying sites for cleanup, thereby exploiting States' existing knowledge of contaminated sites within their borders.

2. Federal Facilities

While Federal facilities would be included on the National Register, no CERCLA Trust Fund monies would be available for clean up purposes. Federal agencies and departments would continue to support the clean up of Federal facility sites from their agency

or department budgets. The prioritization of these funds for Federal facility clean ups would be determined consistent with sites on the National Registry. Under a comprehensive Superfund program, States choosing to implement the program would also have jurisdiction over the clean up of Federal facilities. Federal facility clean ups and the selection of a particular remedy at a Federal facility would be the responsibility of the implementing State. Removal of Federal facility sites from the National Register (i.e., delisting) would only be possible through agreement with the State implementing the Superfund program. Should a State choose not to implement the Superfund program within its borders, EPA would implement the program and direct and oversee Federal facility clean ups in consultation with the affected State.

Rationale

Currently, Section 120 of CERCLA subjects Federal facilities to the same rules, regulations, guidelines and criteria, and to the same extent, as they apply to non-Federal facility sites in need of clean up. However, "substantial and meaningful" State involvement as directed by SARA in 1986, particularly with regard to Federal facilities, has been limited. To date, the EPA interpretation of State's role in the clean up of a Federal facility is one of "consultation". While not expressly defined in the statute, State consultation in the development of Federal Facility Agreements (FFAs) has been further limited by the model language used in FFAs.

The Federal Facilities Compliance Act of 1992 establishes a State's authority when faced with an environmental clean up at a Federal facility within its borders. Such authority

far exceeds the current "consultation" role and places the State in the role of partner with the Federal agency or department in accomplishing necessary cleanup. During this reauthorization cycle, CERCLA should be revised to reflect the Federal Facilities Compliance Act of 1992 (as should all requisite Executive Orders).

By clarifying States' roles in the clean up of Federal facilities, current needless disputes, lengthy delays, etc. can be avoided. By treating Federal agencies and departments responsible for sites needing clean up the same as other responsible parties on the National Register, and subjecting such sites equally to the authority of a State implementing the Superfund program within its borders, the Congress would be further promoting national consistency and equality of treatment for all sites on the National Register.

2. Enforcement First

All sites on the National Register would be subject to enforcement actions compelling responsible parties to accomplish cleanup either under independent State authorities or through delegation of Federal CERCLA authorities to the States. States implementing the program would identify the responsible parties and offer them the opportunity to voluntarily cleanup the site. If the responsible parties voluntarily elect to cleanup the site, the State will oversee the cleanup activities. If the responsible parties do not cooperate, the State implementing the program will move to enforce compliance. Should the responsible parties refuse to comply with either a State order or a State-issued CERCLA Section 106 Order, the site would then move onto a Fund-financed eligibility list (see discussion below).

Rationale

Since the inception of the Superfund program, both EPA and the States have moved to increase responsible party implementation of cleanup activities. EPA statistics indicate that in FY 92 over 70 percent of activities at NPL sites are being conducted by responsible parties with governmental oversight. States have led the way in developing enforcement-first Superfund programs because of limited State resources and the sheer magnitude of the numbers of contaminated sites needing cleanup. Some States indicate nearly 90 percent of their cleanups are being conducted and paid for by responsible parties. By clearly articulating that responsible parties are expected to remediate their sites, public funding can and should be reserved for those sites where there are no responsible parties or the responsible parties are not willing or financially viable.

3. National Funding List

After exhausting enforcement efforts, a subset of sites on the National Register would remain. These sites would comprise the National Funding List and replace the NPL. Sites would go through a prioritization process for public funding once the State (or EPA in those States not participating in the program) determined that no responsible parties or other party (e.g., the State could always use its own funds for cleanup) were willing or able to pay for or conduct the cleanup. The prioritization process would consider the severity of the contamination at the site and the need to begin remediation. Through this process, a "true" priority list of sites that require public funding for cleanup would be developed. The existing HRS might be the mechanism used to prioritize these sites; however, any ranking system

used should not be onerous. It should be noted that this approach would, in essence, be the continuation of the status quo under the current program for those States not participating in implementing the Superfund program.

The Congress would authorize the overall program funding levels and EPA would be responsible for distributing site-specific monies available each year based upon an allocation formula developed by EPA and the States. Each State implementing the program would receive monies from the Federal Trust Fund (on a prioritization basis or under a formula) to address these Fund-financed sites. States not implementing the site-specific cleanup portion of the program would rely upon EPA to use the funds to cleanup priority sites in that State. Any prioritization formula could be based upon a number of factors, perhaps up to a maximum dollar amount; the number of State sites requiring public funding v. the number throughout the nation; individual site progress; length of time on list without receiving public funding; availability of State funds; etc. States administering the Superfund program in their States would have some discretion as to the use of the funds allocated (e.g., mixed funding or coverage of the "orphan" share at certain sites).

Two options that might be used to determine sites eligible for public funding are: 1) sites above a certain cut-off would be eligible for Federal funds with the remainder of the sites on the funding list eligible for State funds; or 2) another option would be that all sites requiring public financing would be eligible for Federal funding. In either case, the list of sites prioritized for public financing would be updated periodically (e.g., biennially) as States exhaust enforcement activities at sites on the National Register. States would have an incentive to resort to public funding only at sites where responsible parties are unwilling or

unable to conduct the cleanup because the 10 percent State match requirement for remedial action would be retained at Fund-financed sites on the National Funding List. (See discussion below on Costs.)

Any expenditure of Federal monies for cleanup where there are unwilling responsible parties will trigger cost recovery activities undertaken by the States.

Rationale

This approach would redirect site assessment data collection requirements from the question of "which" sites to cleanup (and include on the current NPL) to simply "when" to remediate any given site. The National Funding List will provide a clear picture of the subset of contaminated sites nationwide requiring public financing for cleanup. Federal dollars will be available on a more equitable basis for protecting human health and the environment from contaminated sites. In addition, shifting from a "which" to "when" funding scenario will also assure responsible parties that should they not undertake cleanup activities, the site will get cleaned up and they will be required to repay the public monies expended. This, in turn, will reinforce the enforcement-first message of CERCLA.

4. State Authorization/Delegation

There are two terms that are generally used when discussing States' implementation of various public programs. State authorization is when a State has been approved to use its

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equivalent State laws. State delegation is when a State has been delegated the use of Federal authorities.

ASTSWMO suggests that for a successful transition to a State-implemented Superfund program, three options should be offered to States. First, a State could implement their own cleanup statute and regulations instead of CERCLA if a State's requirements met or exceed minimum Federal requirements (i.e., State authorization). Second, in the absence of a comprehensive State program, States could be delegated administration of Federal authorities (i.e., State delegation). Both the first and second options would allow States to operate individual parts of the cleanup program (e.g., Site Assessment program) where the State does not desire delegation of the entire program. If Federal authorities were delegated under the second option, each component of the program would be delegated with the appropriate accompanying CERCLA authorities. The third option would retain the status quo, where EPA would administer the program in those States that do not participate.

ASTSWMO proposes States should have the opportunity to apply for full or partial program authorization/delegation. Partial program authorization/delegation would be based upon dividing the Superfund program into three primary components:

1. site identification and decision on whether cleanup is needed;
2. cleanup activities (divided by enforcement sites and publicly-funded sites); and
3. removal activities (divided by time-critical and non-time-critical).

Rationale

States with their own programs, tailored through experience to meet their needs, would be able to retain flexibility in implementing the Superfund program under the authorization option. The second option would allow States to implement the specific aspects of the program they are most capable and best suited to implement under delegated CERCLA authorities. The second option would also allow for a transition of responsibilities should States wish to develop full program capabilities. The third option covers those States choosing not to participate in the administration of the Superfund program and would not change the status quo. EPA would operate the program or program components in those non-participating States without the State surrendering any of its rights or obligations.

By embracing existing State capabilities and resources to administer the Superfund program, EPA's own resources will be maximized to focus upon the development of guidance and research and development activities. Under a State-implemented Superfund program, EPA will be able to redirect Federal resources to the authorization/delegation process and general oversight functions. EPA would retain responsibility for the program in those States that did not choose to implement either the full or partial program, which would minimize any significant disruption/reduction of the EPA workforce. Additionally, providing responsible parties with surety as to whom to deal with will undoubtedly increase the number of voluntary or cooperative cleanups, which in turn affects the public perception of the rapidity or success of the Superfund cleanup effort.

5. Effect on Non-Participating States

In those States that do not choose to implement the Superfund program or program

components, EPA will be responsible for administering the program in much the same fashion as it operates today. EPA will be responsible for the National Register listing, just as it is responsible for NPL listing. EPA will be responsible for CERCLA enforcement activities and National Funding List prioritization, just as it is today. EPA will manage pre-remedial, removal and remediation activities, just as it does now. Support agency activities, such as ROD concurrence, would remain available to States, as is the case today. Those existing State programs that operate independently of EPA's Superfund program today would not be affected.

Rationale

ASTSWMO believes those States opting not to implement the Superfund program or program components in their States will experience a continuation of the status quo. Because CERCLA liability extends to all releases (see ASTSWMO position paper on Liability Issues), EPA is currently able to undertake activities at non-NPL sites. (The EPA Removal Program is an explicit example.) In practice, EPA consults with States before taking action or becomes involved at the request of the State; which will not change under the ASTSWMO proposal. Further, because of the prioritization process for the proposed National Funding List, contaminated sites being addressed under existing State programs (e.g., State voluntary cleanup programs) would not be impacted since such sites do not need public funding or are being addressed through independent State enforcement actions. As is the case under the existing system, EPA involvement would not be necessary nor a cost-effective use of scarce Federal resources. It is the position of ASTSWMO that the voluntary nature of State

participation in this proposal will not disrupt current State programs but rather will take advantage of the considerable State experience and expertise in contaminated site cleanups for the benefit of the nation as a whole.

6. Qualification for Authorization/Delegation

The Congress, under a reauthorized Superfund statute, would set general guidelines for determining if a State is qualified to implement the Superfund program. For purposes of increased credibility, acceptability, and implementability, EPA and State representatives would work jointly to develop specific qualifying criteria in guidance for State authorization/delegation. In order to address the potential Federal Advisory Committee Act (FACA) concerns, which are currently cited by EPA as justification for excluding States from a truly interactive role in Superfund policy development, the Congress in reauthorizing Superfund would statutorily require State and EPA officials to participate in the development of the qualification criteria and all Superfund guidance and regulations.

ASTSWMO believes the State qualification criteria should take the form of Federal guidance in lieu of regulation. Guidance is preferred to allow for sufficient time for EPA and States to gain experience as well as to accommodate the diverse interests and capabilities of the States. A public comment period on the guidance would allow for input from the other Superfund stakeholders, including other Federal agencies, environmental groups, local governments, industry groups, lenders, contractors, attorneys, consultants, etc. ASTSWMO recommends that self-certification, modeled after RCA Subtitle I be the basis for the development of the qualification guidance. At a minimum, the qualification guidance should

address the following factors:

- Does the State have sufficient personnel and resources to carry out the program (e.g., State delegation scenario)?

- Does the State have the legal tools to compel responsible party cleanups meeting national minimum cleanup goals and standards (e.g., State authorization scenario)?

- Has the State a demonstrated record of compelling responsible party cleanups?

- Will the State implement a program (or portion of the program) that will achieve protection of human health and the environment, including meeting any national minimum cleanup goals and standards?

- Will the State ensure an appropriate level of public participation?

The qualification process would contain an appeals process to allow States to challenge a program denial, for example, as well as to allow other stakeholders to appeal decisions involving States' qualification to implement the Superfund program. The process might range from an informal exchange of positions and dispute resolution to a formal hearing process, depending upon the issue.

The current statutory and regulatory requirements for public participation would be retained. States would conduct public meetings, publish proposed plans and consider the comments generated by the public before selecting the final remedy for the site.

Rationale

Experience suggests the determination of State qualification should be made on a

performance basis as is done with the RCRA Subtitle I (LUST) rather than on a process basis. This approach would avoid, to the greatest extent practicable, a repeat of the Federal program scenarios States generally find largely unacceptable and unmanageable. Examples are the RCRA Subtitle C program, in which States must become authorized to administer the Federal program by meeting program criteria into which they have had very little input, and the current Superfund program, in which the States have been prevented from being true partners because EPA's current interpretation of the statute does not permit a State role significantly different from that of a Federal contractor. The RCRA Subtitle I approach allows States to be innovative in dealing with contaminated sites throughout their States rather than mandate only one approach for all 50 States.

States are in a unique position to make both formal and informal public participation requirements more meaningful and effective. Most States have district offices that place project managers close to sites and affected communities. States with only one office are almost always physically closer to the site than the regional EPA office. This proximity allows the State project manager to visit the site more often and thus be more familiar with the site and surrounding community. State project managers interact with the community on a routine basis and are knowledgeable of the community concerns throughout the life of a cleanup, rather than just during public meetings. Also, since the State project manager is part of the community, their credibility and accountability are enhanced compared to that of the EPA project manager. This increased enhancement of public participation occurs without commensurate cost increases, as the State project managers can usually travel quickly and easily to the sites.

7. EPA Role in a State-Implemented Superfund Program

EPA's role in a comprehensive, State-implemented Superfund program would be first and foremost to ensure the proper implementation of the program throughout the nation thereby providing all citizens are equally protected from the effects of contaminated sites. EPA would be responsible for maintaining the National Register and the National Funding List. EPA would be responsible for administering the two year State program grants and the site-specific National Funding List monies; establishing minimum program requirements for authorization/delegation in conjunction with State representatives and other stakeholders; implementing part or all of the program in States that choose not to participate; monitoring/auditing State programs; providing technical assistance and training; establishing national guidance and policy; conducting research and training; communicating national accomplishments; and fostering the overall development of State capabilities.

EPA would establish national guidance for determining cleanup levels that an authorized/delegated State program must meet (i.e., authorization) or utilize (i.e., delegation), provided State standards are not more stringent. Specifically, EPA could provide national standards or methods to determine site-specific cleanup levels and develop national guidance for maintaining consistency in the application of the Superfund program in the 50 States. Such guidance and policy could include national soil, sediment, groundwater and surface water cleanup goals and methodologies for setting site-specific cleanup levels. The guidance and policy could also encompass direction on the performance and utility of risk assessments, standardization of remedies, the impact of future

land use, a threshold for comparing cost differences between permanent and non-permanent remedies, and quality assurance/quality control requirements for environmental data. The amount of guidance should be kept to a minimum and should be directed toward program performance with the maximum amount of flexibility and discretion.

EPA, with assistance from the States, would provide the focal point for communicating accomplishments of the Superfund program to the nation. In the process of administering programmatic and site-specific funding, EPA could also work with the State to develop performance criteria and goals, which could be used as an opportunity for developing more meaningful measures of success in the Superfund program. Alternative measures of success could include risk reduction, population affected, and natural resources protected and/or restored.

EPA oversight would also involve some site-specific precautions or safeguards. For example, one option might be to provide for EPA involvement at a site should a citizen, responsible party or EPA itself have evidence the remedy at the site will not meet the minimum national cleanup goals or standards. Another option might be to allow citizen suits to be filed if the remedy at the site will not meet the minimum national cleanup goals and standards.

In order to ensure that authorities and funds are managed appropriately by States, EPA would conduct audits of State programs on a predetermined basis. A process would also be developed whereby stakeholders could request EPA to audit a State program or program component or action on a particular site.

8. Costs

State activities in furtherance of the Superfund program would be funded through two mechanisms--program grants and site-specific funding.

Program Grants

It is the opinion of ASTSWMO that the use of two-year program grants would be the most efficient and cost-effective means of funding States with authorized/delegated programs. The program grant method of funding is consistent with the self-certification approach ASTSWMO proposes for program adoption. The program grant would cover some of the State cost for implementing the authorized/delegated program or program components. The program grants would be augmented as responsible parties would reimburse States administering the program for their oversight costs, as they do now with EPA. Program grants could be structured along the same lines as the current CORE cooperative agreements.

A State cost share is appropriate. It provides for accountability from the State and ensures the State shares the cost of the benefit received from the Superfund program. The cost share for the States should be fashioned such that States share in the cost of the program grant and on a site-specific basis. Program grants would cover overall program administration, in addition to discretionary monies for emergencies. State implementation of program components (e.g., removal program) would increase the amount of the basic program grant.

The States would prepare two-year workplans identifying cleanup priorities and work to be performed during the program grant funding period, with the opportunity for annual

adjustments of those specific sites to be funded. The workplans would be used by EPA to evaluate State performance.

Site-Specific Funding

Under a funding formula, Federal funds available for any given Federal fiscal year will be allocated among the sites on the National Funding List in priority order. Those sites that States decide will not receive public funding in one fiscal year will be funded in subsequent fiscal years (or funded by the State "if necessary" with a mechanism for a credit in the future). Site-specific funding will be redirected from "which" sites to fund (i.e., NPL sites only) to "when" to fund (i.e., in what order to fund) those sites truly in need of public financing. The current 10 percent State cost share for remedial action would be retained.

Rationale

Two-year program grants would provide some certainty of program continuity. It has been the experience of the States that the self-certification and program grant funding method EPA currently uses under the RCRA Subtitle I (LUST) program has worked very well. The larger number of sites addressed under a reauthorized Superfund with a National Register is less than those under the LUST program and a program grant approach should be equally effective.

The award of State program grants will not in itself increase the cost of the program. Currently, nearly 75 percent of the States receive CORE grants. By converting Federal monies now used for CORE grants to program grants, there could very well be no increase

in Federal monies directed toward program administration. While the actual dollar amount in any given fiscal year directed toward the States under ASTSWMO's proposal might exceed the existing funding in CORE grants, this would be off-set in terms of EPA savings for contractor support. ASTSWMO asserts a comprehensive, State-implemented Superfund program will not result in an increase in the Federal funding directed toward the program. Rather, with the recognition of a comprehensive Superfund program with expanded, ongoing enforcement activities and with a shift from "which" sites to fund to "when" to fund sites, Federal funding need not be increased on a yearly basis.

Finally, by redirecting EPA resources to sites in those States not administering the program and to the development of national cleanup goals and standards and policy and guidance development, EPA will increase the cost-effectiveness of its own activities, with a commensurate benefit to human health and the environment as more sites are addressed under a comprehensive, State-implemented Superfund program.

NOTES

1. EPA's "An Analysis of State Superfund Programs: 50-State Study, 1991 Update" indicates the majority of States have their own Superfund programs, with sufficient statutory authority to support a fully operating program and cleanup Funds. The study provides statistics and information on State programs and can provide a varying "total" of State activity depending upon the criteria chosen. However, it is clear the majority of States have developed statutes, resources and funding mechanisms to support their Superfund programs.

2. In FY 92, according to EPA, 70 percent of cleanup actions at NPL sites were conducted by responsible parties with private monies and governmental oversight.

Adopted by the ASTSWMO Board of Directors, October 18, 1993 in Tampa, Florida
Revised by the ASTSWMO Board of Directors, January 24, 1994 in Santa Fe, New Mexico

Mr. SWIFT. Thank you very much for your testimony, as well. I recognize the gentleman from Colorado.

Mr. SCHAEFER. Very briefly, Mr. Chairman. I know that we have to clear the room and have a vote going. I do just want to say that I really appreciate all of the witnesses here today, and in particular our own attorney general, who is doing a terrific job in the State of Colorado.

I did provide her with a letter that we had sent to Carol Browner, pertaining to the Tenth Circuit Court of Appeals decision. I hope that we will get a clarification on that. We want to make sure that you know that the chairman and I are going to be working together, to make sure that this is not going to be a problem or try not to be a problem. I know that not only will it affect the State of Colorado but other States as well, if there is some precedent.

A very brief comment, and I will turn it back to the chairman.

Ms. NORTON. Certainly, Colorado is very directly affected by this. I am familiar with the points that we raised in our litigation, saying that CERCLA does not really deal with many aspects of hazardous waste management, with day to day management of hazardous waste, and with assurance that there are contingency plans in place, many of those kinds of things that are not currently covered by CERCLA.

The attempt by the administration to say that CERCLA preempts any aspect of State law is an attempt to say that there's no one looking at day to day hazardous waste management, and that the Federal Facilities Compliance Act with which you worked very tremendously in support of the States' position, that whole State protection and State oversight would be thrown out the window by the administration's proposal.

Mr. SCHAEFER. Thank you, very much.

Mr. SWIFT. Thank you. Mr. Harker, the concept that you offered may well offer some opportunities for compromise in that area, and I think it's very constructive. We will no doubt working with you and the others who are concerned with that whole general topic, and see if there aren't things in your concept that can resolve some of the differences that exist elsewhere. Thank you, very much. We will be back in touch.

Mr. Pollard, as I think you know, I have always had a lot of sympathy with the lender liability problems here. I have not wanted to deal with them separate from Superfund. Now is the time, and we are very sympathetic with the concerns of the lending industry. I had one question, and I am wondering that if afterwards you could just come up and talk to the two counsel. It's a simple question, and I am sorry that the time is running so late. We can't just ask it to you.

Finally, Mr. McGavick, thank you very much. I have always felt as well, that the insurance industry had some legitimate concerns with this. I have never seen Superfund as a good guy/bad guy thing, but a bunch of good guys with a lot of problems and sometimes just some conflicting legitimate interests.

I would make one observation, and it's not directed only at you. There have been a couple of other people here today. I see movement from some people on some issues and I see no movement in

some other areas because, it seems to me, that some are willing to entertain that there are a number of ways to skin a cat, and some entities have decided that their way to skin the cat is the only way to get the job done.

I think as I suggested to Mr. Wallace, it's his move. I think it's kind of your move. We wanted it and we include your industry's concerns, and we want to resolve those problems in the context of whatever we do in Superfund. But where you draw the bottom line will probably determine whether we can reach that far or not. I am extending again an invitation to work with you and with your principals in every way that we can. You should not be left out of the resolution of this situation.

I don't know that we can leave you out if we wanted to because of the political realities. But I can say that if as long as one side is insisting that they must have what will clearly drive another group who we need to pass the bill off of it, then we are dealing with a sheet that is too short for the bed. We will never get the thing solved.

I am pleading not only with you but with everybody, what we need here desperately is a little flexibility. Hang in there on the principles of what you need but don't get hung up on the technique of skinning the cat. It would help us one hell of a lot in order to try to resolve these things.

We thank you all, particularly for your patience. The subcommittee stands adjourned.

[Whereupon, at 2:17 p.m., the subcommittee adjourned, to reconvene at the call of the Chair.]

[The following material was received for the record:]

STATEMENT FOR THE RECORD OF THE AMERICAN BANKERS ASSOCIATION

Mr. Chairman and members of the Committee, the American Bankers Association (ABA) appreciates the opportunity to submit this statement to your Committee on the liability portion of the Superfund Reauthorization Bill. The ABA is the national trade and professional association for America's commercial banks, from the smallest to the largest. ABA members represent about 90 percent of the industry's total assets. Approximately 94 percent of ABA members are community banks with assets of less than $500 million.

The ABA wishes to take this opportunity to present our views on the critical issue of environmental lender liability, its effect on the banking industry and the Clinton Administration's Superfund Reform proposal (H.R. 3800). Mr. Chairman, the ABA wishes to express its appreciation to you for holding these important hearings.

The ABA has long been active in assisting our members to understand the complexities of environmental law and how it affects the banking industry. As you know, Mr. Chairman, the ABA has continuously supported legislative and regulatory attempts to remedy the problem of holding innocent lenders and fiduciaries liable for the environmental damage caused by others. Members of Congress have consistently supported our efforts to clarify this environmental liability morass, whether through co-sponsorship of various bills, requesting the Environmental Protection Agency (EPA) to promulgate the Lender Liability Rule or the passage in the United States Senate, on two occasions (1991 and 1992), of language designed to protect innocent lenders.

The ABA actively supported various proposals in the House to alleviate this unfair burden such as Congressman LaFalce's recent environmental liability bill (H.R. 2462). These approaches which complemented the EPA Lender Rule were designed to rationalize the lending process that the courts have distorted with decisions that expanded liability. The fact that the United States Court of Appeals concluded that EPA had no authority to issue the rule puts a cloud over all lending activity.[1]

We have stated on many occasions that unless some changes are made to current law, major segments of the business community, particularly small business, will not be able to receive adequate financing when purchasing property which presents environmental risks or when using such property as collateral. Furthermore, this reluctance to lend will reduce the capital available to businesses which want to protect or restore the condition of the environment. In addition, the ability of businesses, their owners, and others to use bank fiduciary services will be severely curtailed.

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[1] Kelley V. EPA, (D.C. Cir. No. 92-1312, Consolidated with Chemical Manufacturers Association V. EPA, No. 92-1314, 2/4/94)

Mr. Chairman, it is imperative that we act now. We believe that the Administration's bill takes a giant step toward the needed change that is already included in Representative LaFalce's bill. We urge the Congress to quickly work toward enacting legislation such as H.R. 2462 either in that vehicle or some manifestation of the Administration's bill. We offer our help in assisting this Committee and others in fashioning a bill that can be enacted into law.

It is critical to understand that the environmental liability issue has never been just a lender problem, but a major problem for borrowers, businesses, farmers, and has also been even homeowners. Representatives of the business community have long supported efforts to restore the original intent behind the laws regarding environmental liability for lenders. Business was particularly pleased at the promulgation of the EPA Rule. Now that the guidelines provided by EPA Rule have been removed, problems will grow and grow since lenders will once again reject potential borrowers as they ask for loans. This sentiment was echoed by Rep. LaFalce when he announced the introduction of his bill in the 103rd Congress:

> Ironically, lack of clarity in Superfund can impact not only on lending to clean-up the environment, but also compliance with other environmental laws. For example, a small business may seek a loan to buy equipment to meet Clean Air or Clean Water Act requirements. The borrowing must be based on collateral, usually real property. Lender concerns about their Superfund and RCRA liabilities may prevent extending credit to clean-up the property or to meet other environmental goals.

Mr. LaFalce also stated that EPA "took a strong first step in adopting the Superfund rule [but it was incumbent] on Congress to finish the job". Without the rule or legislation there is no guidance for banks.[2]

Here is an illustration of the practical effect of no action by the Congress in the wake of the Court's decision on the EPA Rule.

Suppose a dry cleaner owner asks a bank for a $50,000 loan. It might even be for a loan to clean-up an environmental problem. The collateral for the loan would almost always be the real property of the dry cleaner, itself. An environmental study -- paid for by the business owner would be required. This could cost

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[2] In Kelley V. EPA, the court concluded by stating that "we well recognize the difficulties that lenders face in the absence of the clarity EPA's regulation would have provided. Before turning to this rulemaking, EPA sought congressional relief and was rebuffed. We see no alternative but that EPA try again."

from $500 to $2500 -- a very stiff expense on a $50,000 loan. But even with a clean result from the study, would the bank make the loan? The answer may now be "no!" because the study is not foolproof; and therefore the bank is still at risk. Remember that its collateral may prove worthless and, second, that if the institution has to foreclose, it could face clean-up costs many times the value of the loan. Simply put, why would any lender risk, potentially, hundreds of thousands of dollars of liability over a loan on which it might make a profit, if all goes well, of a thousand dollars or so per year? Can a bank justify such a risk to its shareholders or to its regulators?

Now take this hypothetical and apply it to all types of businesses using chemical products, petroleum, fertilizers, pesticides, etc.... It should not be hard to see that this growing problem will have a dramatic impact on whole segments of our economy. One other hypothetical -- suppose the dry cleaner owner (or the gas station, or auto repair shop, or fertilizer distributor) wants to sell his or her business. How is the purchaser going to obtain a loan to buy it when the collateral for the loan would be business property? Thus, the value of thousands of existing small businesses may be severely impacted.

Unless the law is changed, Mr. Chairman, who is going to finance the efforts of businesses and agriculture to undertake environmental clean-up? Carrying it one step further, who is going to finance those companies which specialize in environmental cleanup such as waste management companies? Unless something is done to change the current situation, financing for environmental cleanup is going to be virtually non-existent. Those businesses which need to borrow to clean-up their properties and those businesses which are in the environmental clean-up business are, by definition, those with the highest risk of environmental problems and, therefore, those that are going to have the hardest time obtaining financing. Superfund Reform will not mean much without protection for innocent lenders.

History of the Problem

Since the passage of the Federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §9601, et. seq., known as "Superfund," financial institutions have faced the possibility that their security interest will be impaired and their potential for liability increased if hazardous or toxic materials are discovered on premises the purchase of which the bank has financed through a mortgage loan on which the property serves as collateral.[3]

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[3] See, Brown, Superfunds and Superliens: Super Problems for Secured Lenders. BNA's Banking Report, April 14, 1989.

CERCLA provides for strict, joint and several liability for the cost of removing and remedying a release or threatened release of hazardous substances and for harm to natural resources caused by such release. 42 U.S.C. § 9607(a).[4] This means that the person bringing an action is not required to prove the defendant acted negligently and that one person can be forced to pay for the entire amount of damages even if other defendants are also found to be responsible.

Holding lenders liable for clean-up costs caused by their borrower's misdeeds is having a tremendous negative effect on commercial lenders and others who use real estate as collateral. There has been a hue and cry by both lenders and borrowers who have expressed dissatisfaction with the current provisions of, and decisions under, CERCLA.[5] It must be noted that the legislative history regarding CERCLA liability for lenders should have been clear. A 1980 Committee report indicated that the class of potentially liable owners does not include financial institutions who hold title in order to secure a loan. (See, H.R. Report No. 172, 96th Cong. 2d Sess., PL 96-510, 1980 U.S. Code Cong. & Admin News 6181.) Unfortunately, court decisions have often disregarded the statute's protection for secured lenders.

From the lender's perspective, potential liability for multi-million dollar damages has greatly increased the risk of doing business. Even where the lender is not held responsible, such liability creates credit risks by reducing the borrower's ability to repay the bank and by impairing the value of the collateral. At best, many borrowers are facing greatly increased loan transaction fees as a result of the lending community's reaction to CERCLA. There are, however, borrowers engaged in certain types of commerce who are finding it difficult to obtain any financing because lenders are peaceful of the environmental risk.[6]

A 1990 ABA poll of the Association's Community Bankers Council found that 43 percent of the respondents have already stopped

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[4] See, e.g.; State of New York v. Shore Reality Corp., 759 F. 2d 1032 (2d Cir. 1985).

[5] See, Hearing on The Impact of Superfund Lender Liability on Small Businesses and Their Lenders. Before the House Committee on Small Business, 101st Cong., 2nd Sess. (June 7, 1990) and Hearings on Lender Liability under Hazardous Waste Laws. Before the Subcommittee on Policy Research and Insurance of the Committee on Banking, Finance and Urban Affairs, 102 Cong., 1st Sess. (June 6, 1991 and July 10, 1991).

[6] The risk that, aside from the statutory liabilities of Superfund, there is also potential liability for personal injury or property damage.

lending to certain types of small businesses most frequently associated with environmental pollution and that another 11 percent plan to do so. In 1991 we found that 62.5% of our members declined potential borrowers based on the possibility of environmental liability. This is just the tip of the iceberg. More and more lenders now understand the dangers they face and are reacting. We are certain that whole categories of businesses -- businesses central to our economy -- will be cut off from affordable financing, after the ramifications of the EPA Rule case are fully understood by the industry.

The risks to lenders from Superfund liability continue after the loan is made. For example, CERCLA presents problems for lenders who are considering whether or not to foreclose on real property. While prudent financial practice may dictate that a bank foreclose on collateral which secures a defaulted loan, the threat of liability often requires the lender to perform an audit of the property and -- in some cases -- walk away from the contaminated property.

The difficulties faced by those who hold property in a fiduciary capacity may be even more severe. In many cases the trustee will have no specific knowledge of the nature of the property which is the subject of the trust until the trustee's fiduciary duties become operative. The most common circumstances in which a bank acting as fiduciary may hold real property include: 1) as executor of an estate, sometimes with property flowing into a testamentary trust; 2) in a pension fund which may hold title to a plant or office building; and 3) under a bond indenture in which the bank represents the bondholders and may need to foreclose or exercise other rights over property held as collateral in the event of default.

Superfund liability is not only a private sector concern. Several government agencies have acknowledged the threat they face from the broad scope of CERCLA. The Small Business Administration has told Congress that it faces CERCLA liability when it guarantees small business loans. Even residential lenders have become wary of lending to prospective homebuyers. Properties adjacent to commercial manufacturers or pesticide-contaminated farm land are being turned down for financing.

Due to court interpretations of CERCLA, there is a new philosophy of environmental enforcement that has made lenders increasingly wary of the risks inherent in loan transactions secured by property containing hazardous substances. The risk of decreased value of the collateral for a loan, coupled with potentially enormous liability under CERCLA, has resulted in not only caution on the part of lenders but, as Congressman John LaFalce has pointed out time and time again, the unwillingness of lenders "to provide financing to businesses located generally in an area where a possibility of hazardous waste contamination exists even if there is absolutely no showing that the specific property owned by a prospective borrower -- or any adjacent properties are

contaminated."[7] As a matter of fact, Mr. Chairman, banks are learning that they cannot afford to lend at all to certain types of small businesses (such as chemical companies) because of environmental liability.

As the Tampa, Florida Tribune so aptly put it in an editorial entitled, "Misplaced Environmental Blame":

> It seems incredible, but in the United States you can be held liable for something you didn't do, didn't even know about, and that might have happened long before you were born.
>
> Courts are interpreting pollution legislation of the mid-1980's so strictly a bank can be forced to pay to clean up property whose development it financed. Because major clean-ups may cost much more than the value of the polluted land, and because innocent lenders are being taken to the cleaners, credit for certain small businesses and farms is becoming very hard to come by.[8]

A Problem for Lenders and Borrowers

Mr. Chairman, while the banking industry was hopeful that the EPA Rule would be used by financial institutions to handle day-to-day activity, the decision last week will cause a resurgence of the reluctance to lend to segments of the small business community. In 1990, one of our members told the House Small Business Committee that as a community banker (from Dana, Indiana (population 800)):

> With the recent surge of court decisions on environmental liability, our bank has had to carefully consider what types of businesses in Dana could present liability problems. Some of the businesses that are located in Dana that could be affected by possible environmental problems are the community's only auto body shop and convenience store which is also the only place where you can buy gas in Dana. (The other service station closed because of environmental problems and cannot be reopened because it cannot get financing.) Mr. Chairman, there are only two auto repair places in the community and our bank does business with both. There is also only one fuel dealer in the community and we have loaned on the property where the bulk storage is done: financed and secured by that property.[9]

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[7] Cong. Rec. E1325 (April 25, 1989).

[8] Tampa Florida Tribune (June 14, 1990).

[9] Statement of Lee Schroeder, President, First National Bank, Dana, Indiana, Before the House Small Business Committee (June 7, 1990).

Imagine the damage to the town of Dana if this bank decides it can no longer lend to these businesses; and this bank, the only one in town, was concerned that it might have to cease lending because environmental liability for clean-up of any of these properties could literally wipe out the bank's capital.

We should not forget what the National Federation of Independent Businesses (NFIB) pointed out several years ago when testifying on the lender liability issue:

"The constant threat of being held liable for clean-up costs has resulted in an uneasiness among the lending community nationwide. This fear has spread down through each segment of the business community and is having a chilling effect on job creation and business growth."[10]

NFIB points out that there is a large segment of the business community that is potentially vulnerable to lender reluctance to loan money. This segment includes gas station owners, autobody shops, and garages. Other firms which use chemicals, such as printers, dry cleaners, carpet cleaners, pest control firms, or agri-business operations may also be at risk. NFIB has made it clear that not addressing these problems "will certainly lead to many small business failures."[11]

A Problem for Fiduciaries

Another major concern of bankers for environmental liability has always been in the trust area. ABA strongly believes that banks should not be burdened with the liability for clean-up of hazardous substances on land merely because they hold title in a fiduciary capacity. This is why we are pleased with the Administration's attempt to alleviate the risk that trustees "will be found personally liable as "owners" under 107 (a)(1) when response cost are incurred at property held in trust." Innocent fiduciaries who were not involved or did not cause contamination should not be required to pay clean-up costs out of personal assets.

At least one court has ruled that a trustee holding title to trust property is an owner under Superfund and can be liable for cleaning up contaminated property. City of Phoenix, Arizona vs. Garbage Services Company, 816 F. Supp. 564 (D. Az. 1993). Clearly trustees are in need of guidance, similar to the lender rule, to navigate the Superfund liability maze, and the ABA is encouraged by the approach taken in the Administration's bill.

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[10] Statement of NFIB before the House Banking Subcommittee on Policy, Research and Insurance (July 10, 1991)

[11] Id.

Courts Have Misinterpreted Superfund

The ABA believes that Congressman LaFalce's bill or the changes suggested by H.R. 3800 would not fundamentally change CERCLA, but rather restore its original intent. The Association believes that it was the intent of the Congress to exclude innocent lenders from liability, but that certain court interpretations have totally undercut that intent.

One of the most dramatic decisions and one which spurred the EPA into action was United States v. Fleet Factors Corp., 901 F.2d 1150 (11th Cir. 1990), cert. denied, 111 S.Ct. 752 (1992).

As the Dallas Times Herald stated in an editorial in 1990:

> On May 23, a federal appellate court... ruled a bank, which had foreclosed on the property of a bankrupt firm and auctioned it off several months later, was liable for cleaning up the property though it had had no role in managing the company. The court held that secured creditors should be liable if they 'could effect hazardous waste disposal decisions,' whether or not they actually exercise a role in management or know anything about hazardous waste disposal.
>
> If these decisions stand, banks that routinely lend operating or expansion funds to small businesses, such as local gas stations, or large industries will have to close their lending windows to avoid liability for problems they had no hand in.

This decision sent shock waves through the lending community. This case held that, despite the explicit exclusion in the Superfund law for lenders who hold a security interest in property, it may be inferred from the nature of their financial relationship with their borrowers that such lenders are owners or operators of property and thus liable for clean-up.

Fleet Factors focused on the capacity of a lender to affect financial management, as contrasted with operational management. Prior to Fleet Factors, the courts had found secured creditors liable for Superfund costs only where the creditor actually owned or operated the contaminated facility. Creditors became owners only after foreclosure on the property. What has confounded the business community was Judge Kravitch's sweeping language in Fleet Factors that:

> [A] secured creditor may incur liability [as an "owner"], without being an operator, by participating in the financial management of a facility to a degree indicating a capacity to influence the corporation's treatment of hazardous waste. It is not necessary for the secured creditor actually to involve itself in the day-to-day operations of the facility in order to be liable -- although such conduct will certainly lead to a loss of the

protection of the statutory exemption. Nor is it necessary for the secured creditor to participate in management decisions relating to hazardous waste. Rather a secured creditor will be liable if its involvement with the management of the facility is sufficiently broad to support the inference that it could affect hazardous waste disposal decisions if it so chose. (Emphasis supplied.)

Mr. Chairman, the impact of Fleet Factors on the lending community was painfully obvious. The 11th Circuit sent a message that prudent lenders should not continue their time-honored efforts of being active in assisting a borrower during a troubled period because if they do they are liable for any pollution clean-up costs. Lenders were threatening to take a complete hands-off approach to their loans and ignoring their security interest in the facility or real estate that serves as collateral. Fortunately, the EPA rule explicitly rejected this incredible decision. That is now in jeopardy. Lenders are once again open to environmental liability for participating in financial aspects of the borrower's business that were not considered a basis for liability before Fleet.

Where we once had a bright-line test to guide lenders, the D.C. Court of Appeals decision returns us to a time of amorphous standards which makes it even more difficult to determine what a lender can safely do. In the Joint Brief of Intervenor in support of the EPA, we stated that "the Rule restores the ability of lenders to make rational decisions about risks..[and it provided]..clear guidance regarding the secured creditor exemption..". With the decision, prudent lenders will again cease lending to certain types of businesses. And, as before, those hardest hit will be small businesses. We have lost what has been described as "a reasonable interpretation of the statute that would have safeguarded "normal, prudent lending practices."

Without the EPA Rule the spectre of Fleet Factors will again loom over the lending community. The catastrophic nature of Superfund damages calls into question the use of what would otherwise be prudent lending practices. The overly-broad nature of that decision is again going to cause great harm to both lenders and borrowers. An issue the industry believed was settled has been revived. ABA believes that only a legislative solution can alleviate the environmental liability problem.

Other Laws Imposing Liability

While this statement focuses primarily on the lender and fiduciary problems associated with court interpretations of CERCLA, there are several other risks to lenders beyond Superfund.

As you know, Mr. Chairman, the Federal Resource Conservation and Recovery Act (RCRA) 42 U.S.C. § 6901 et. seq., requires the EPA to establish a comprehensive, "cradle-to-grave" hazardous waste management program.

Title 42 U.S.C. § 6991 regulates the majority of underground storage tanks. The regulations interpreting RCRA require owners of underground storage tanks (USTs) to register information about the tanks with state regulators and the regulations include a comprehensive regulatory scheme for financial responsibility and external release detection systems. Most older USTs have a life of 15 to 20 years. Some sources estimate that as many as 50 percent of current USTs leak. UST clean-ups generally involve groundwater contamination and can be more costly than a clean-up involving soil contamination. Leaking underground storage tanks are a major risk for lenders who extend credit without verifying the condition of USTs and the borrower's compliance with environmental laws. While lenders have focused primarily on their liability under CERCLA, we face the potential liability as innocent lenders under RCRA.

The decision in the Kelley case is likely to delay any regulatory solution to our concerns.

Economic Impact

The effect of the confusing liability on borrowers has been well documented, Mr. Chairman. Chairman LaFalce, stated:

"The real loser here is the small business community... well-run, credit worthy businesses that cannot obtain the financing they need to survive because their lenders are afraid of Superfund liability."

It is not simply one sector of the economy which will suffer. Many sites do not fit the scenario of rusting barrels oozing with noxious substances. The following is a partial list of potential problem businesses:

* Residential areas and developments may contain asbestos fill (a hazardous substance) or be located over former landfills;

* gas stations and other businesses with underground storage tanks, such as auto dealerships and fleet operators;

* auto repair shops;

* dry cleaners;

* tool and die shops;

* wood preserving facilities;

* scrap yards;

* railroad facilities;

* utilities;

* bottling and canning facilities;

* metal fabricating facilities;

* semiconductor plants;

* chemical manufacturers and distributors;

* fertilizer or pesticide producers and distributors.

The American Bankers Association also recognizes that agricultural community is at risk. A recent ABA publication, "Agricultural Lenders Guide to Environmental Liability," stated in the introduction:

> In recent years, we have seen the problems of environmental contamination transfer from the owner of a property to the lender who financed the property. While the charge-offs due to this transfer are still not commonplace in agricultural banks, they are increasing at an alarming rate. In addition, rural residents and consumers are focusing more and more attention on carryover and residues from the use of chemicals in agricultural enterprises.

The businesses affected in the agricultural community are extensive. Businesses such as feedlot operations, grain elevators, co-ops, fertilizer and chemical dealers and suppliers, poultry operations, meat packing and rendering facilities, cattle ranches, hog production facilities and traditional crop operations may generate, use or dispose of hazardous materials or generate other wastes which pose a risk to the environment.

Voluntary Clean-up

Mr. Chairman, the ABA would also like to add its voice to the many groups that have supported the concept of voluntary clean-up that are included in the Administration's bill and are patterned after your legislation (H.R. 2242). As we told Senator Lautenberg on June 17, 1993, when testifying on S. 773, the "Voluntary Environmental Clean-up and Economic Redevelopment Act of 1993" : "[a]ny program designed to clean-up more contamination, faster, without taxpayer money, is good for this country and good for banking." Bankers in jurisdictions where voluntary clean-up laws now exist are very aware of these successful programs and have urged enactment of a similar proposal at the federal level.

Conclusion

Mr. Chairman, the ABA has testified in every Congress since 1989 on the impending crisis in small business lending due to concern about environmental liability. Since that time, there has been a groundswell of support for restoring the Congressional intent to protect lenders. Business groups joined the effort, and

well over 300 members of the House have co-sponsored corrective legislation. The incredible decision last week to vacate the EPA lender rule dramatically raises the stakes for the U.S. economy.

CERCLA has become a trap for the lending community with widespread negative economic implications. It is not only lenders which face threats to their economic health. As noted above a wide range of businesses are paying -- and will continue to pay -- the cost of imposing environmental liability on lenders. If no relief is forthcoming, lenders will simply be forced to stop extending credit to those borrowers which create exposure to environmental liability either because of the type of business in which they are involved or because their balance sheet offers the lender little protection.

By removing the lender and fiduciary from liability (except in cases where they have caused or contributed to the release or threatened release of a hazardous substance), the liability can be placed on the party or parties actually responsible for the damage. More importantly, the tremendous negative impact on businesses, agriculture and, in some cases, individual consumers will be abated.

We look forward to working with the Administration to re-authorize Superfund and we urge the Congress to move as expeditiously as possible to enact legislation to reform this situation.

AMERICAN BANKERS ASSOCIATION

NEWS

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For Immediate Release
(94)

U.S. COURT DECISION ON ENVIRONMENTAL LIABILITY HAS CHILLING EFFECT ON LOANS, ABA SAYS

WASHINGTON, Feb. 4 -- The American Bankers Association said today that the U.S. Court of Appeals decision in the case of Frank J. Kelley, Attorney General of the State of Michigan, et. al. v. Environmental Protection Agency will, "have a chilling effect on banks' ability to make loans."

The decision sets back years of work on defining who pays for cleaning up contaminated property. "Almost two years ago the EPA provided banks with a magnifying glass to help them read the road map of environmental liability. Today the magnifying glass is gone and the ink is disappearing," ABA said. "Many businesses, particularly small businesses -- from dry cleaners to print shops -- will have trouble obtaining credit."

The court's decision is in direct contrast to President Clinton's Superfund Reauthorization bill, which was introduced yesterday. The bill contains provisions designed to protect lenders and trustees from skyrocketing liability costs due to recent court decisions. Under these decisions, lenders become liable for the cleanup costs on properties that had served as collateral on loans, even though the lender was in no way responsible for the environmental damage.

"The court seems to agree that lender liability is an issue, saying the 'EPA was responding to understandable clamor,'" ABA said. "However, the ruling states that the EPA does not have the authority to correct the situation."

A survey done by ABA in 1991 found that 60 percent of banks had refused to make an otherwise sound loan in the past several years because of the risk of potential environmental liability. "Now banks will have to go back to tiptoeing through the minefield of commercial lending," ABA said.

ABA will call for a rehearing by the full court and press for immediate legislation to permanently clarify banks' liabilities as lenders and trustees.

The ABA had filed a joint brief in support of the EPA Rule along with the American College of Real Estate Lawyers, the American Council of Life Insurance, the Commercial Finance Association, the Equipment Leasing Association of America, and the Mortgage Bankers Association of America.

# # #

NEWS

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FOR IMMEDIATE RELEASE
(94)

ABA CHEERS WHITE HOUSE SUPERFUND BILL

WASHINGTON, February 3 -- Six years of hard work garnered appreciable results for the banking industry today with the release of the Clinton Administration's Superfund Reauthorization bill, the American Bankers Association said.

The bill, which contains several provisions designed to protect lenders and trustees from the skyrocketing liability that has resulted from recent court decisions, restores balance to the business of lending in potentially hazardous environments. Under these decisions, lenders and trustees became legally responsible for any cleanup costs incurred by their borrowers, even if the institution acted prudently.

"Holding a bank liable for contamination is like blaming an airplane crash on the travel agent," said ABA Executive Vice President Donald G. Ogilvie. "The President's bill restores a healthy dose of common sense to this area of the law."

The White House initiative is almost certain to increase lending to dry cleaners, gas stations, farms and other businesses that handle potentially hazardous chemicals. A survey done by ABA in 1991 found that more than 60 percent of banks had refused to make an otherwise sound loan in the past several years because of the risk of potential environmental liability.

- more -

The bill goes a long way toward addressing the banking industry's concerns. By reaffirming the Environmental Protection Agency's (EPA) authority to make policy in this area, the bill affirms the agency's 1992 final rule on lender liability and should settle pending court challenges to the authority of EPA to issue that rule.

The EPA final rule reversed the decision reached in United States v. Fleet Factors, which suggested that the mere capacity of a lender to influence the borrower's treatment of hazardous substances constituted sufficient "participation in the management" of the property to hold the bank legally liable for the borrower's cleanup costs. "With the EPA's definition of 'participating in management,' lenders are provided with a reasonable interpretation of an ambiguous term," Ogilvie said. Upon passage of the bill, the EPA rule will become the law of the land.

The administration's legislation would also enable EPA to issue a rule clarifying a trustee's liability under Superfund; ABA supports this part of the legislation as well.

While it provides lenders with a certain level of comfort, the White House bill does not absolve lenders of responsibility for any contamination they actually cause. "Courts will continue to have a critically important role in applying the provisions of the EPA rule, and individual grievances will continue to be settled one at a time," Ogilvie said.

"This legislation would close an unfortunate chapter in the story of the 'credit crunch,'" Ogilvie concluded. "It would put behind us years of litigation, and set up clear and understandable guideposts for both lenders and businesses to follow."

# # #

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ENVIRONMENTAL LAW
TORT AND INSURANCE PRACTICE SECTION
SECTION OF NATURAL RESOURCES, ENERGY AND ENVIRONMENTAL LAW
BUSINESS LAW SECTION

RECOMMENDATION

The American Bar Association recommends that the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA" or "Superfund") be amended based on the following principles:

1. Allocation of Responsibility should be amended to reflect that:

A. New liability not be imposed retroactively on persons who at the time they acted reasonably did not know, or reasonably would not have known, that responsibility for cleanup would arise.

B. New strict liability not be imposed based on status.

C. Liability be allocated to responsible parties based on each party's contribution to the harm.

D. Responsibility be allocated prior to required payment through alternative methods of dispute resolution or other procedures that encourage prompt and efficient compliance.

E. Responsibility not feasibly or equitably allocated to liable parties be paid through broader-based financing approaches, including taxes which garner revenues from those who benefit or have benefited from activities which produced hazardous waste.

2. Cleanup Procedures should be amended to reflect that:

A. Sites be selected and cleanup conducted through rational and consistent determinations based on realistic estimates of risks posed to human health and to ecosystems.

B. Cleanup guidelines consider economic and technical feasibility and such factors as geography, geology, climate and land use, be specific enough to allow a voluntary cleanup to proceed with reasonable certainty that will satisfy appropriate requirements, yet be flexible enough to assure that remedies selected for a given site are appropriate for that site.

C. Elimination of unnecessary intergovernmental requirements and creation of incentives for States to hasten cleanup. Only one governmental entity should be responsible for any site. States should be authorized to obtain delegation of Superfund authorities, similar to existing environmental permit programs, and should be given the same flexibility in selecting applicable and appropriate standards that EPA presently has under Superfund.

D. Innovative public participation and shared decision-making models be encouraged.

E. Consideration of natural resource damages occur at the same time and in the same proceeding as other cleanup issues. Any damages recovered should be based solely on the reasonable costs of restoration, rehabilitation or replacement in kind of the resource and used only for those purposes. Damages imposed should not be punitive in effect.

REPORT

The Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA" or "Superfund") needs substantial revision when Congress revisits it this coming year. As presently written, interpreted and enforced, CERCLA results in massive, wasteful and unproductive litigation. In many instances, it has also resulted in imposition of liability grossly disproportionate to the conduct involved, perverting rather than implementing the polluters should pay principle. It has made environmental insurance largely unavailable. In many instances, it has not been cost-effective nor have the social benefits been equal to the costs imposed. Finally, in thirteen years after its enactment relatively few sites have been cleaned up.

These results are not surprising. The original statute reflected a hasty, incomplete compromise that left many policy issues unresolved by Congress. They were left to be resolved through the painful, time-consuming and inefficient process of case by case adjudication.

The time has come for Congress and the Administration to take charge and revise the Act to make it fair, cost-effective and efficient.

To do this, the states should be given a greater role in the overall process, both under federal and state law. Private persons should be encouraged to go forward by fair treatment and greater incentives to proceed with cleanups voluntarily. At the same time, the public should be given opportunity for greater, meaningful participation in this decision process, but in a way that facilitates, rather than delays, efficient, cost justified cleanup. Finally, litigation must become the exception and not the general rule to implementation of cleanup.

The American Bar Association should play a meaningful role in effecting these needed changes. We cannot stand by idly and profit from other people's misery. We believe that the Association can make a major contribution to overall reform of the system by focusing on key problem areas and adopting general principles that should guide needed reforms in them. We believe that the overriding goals that should govern substantial reform of CERCLA are, first, fairness, second, accelerated suitable cleanup of actual hazards, and third, overall cost effectiveness and cost benefit justification.

The proponents recommend substantial changes in two areas - allocation of responsibility and cleanup procedures. Through limitation of retroactive and strict liability, a requirement for early allocation of responsibility and provision for payment of

unallocated costs through broad-based funding the revisions enhance the fairness and efficiency of the system. Through risk-based selection of sites and cleanup standards, elimination of unnecessary intergovernmental requirements, incentives to States to hasten cleanup, and appropriate procedures for assessing and recovery of natural resource damages, the recommendation will advance the goal of speedy, efficient cleanup.

Where fairness and efficiency become the rule rather than the exception, then the heavy transaction costs that have characterized the current law will be substantially reduced.

ALLOCATION OF RESPONSIBILITY

Government should generally avoid imposition of retroactive liability: that legislation which creates a new obligation, imposes a new duty, or attaches a new disability, for past activities. Retroactive criminal legislation is barred by our Constitution. Retroactive civil legislation is contrary to the common law and unknown in the civil law. It is unfair and presents an additional major risk to business decisions because present activities which are legal may have uncertain future legal consequences. This added risk tends to discourage new investments.

If prior to the enactment of CERCLA, certain persons acted to dispose of wastes to avoid anticipated responsibility for its cleanup, imposition of retroactive CERCLA liability on this limited class might be justified on the ground that legislation along the lines of CERCLA was pending in Congress.

As a general rule, strict liability, based on conduct contributing to the harm, should be retained for wastes disposed of after the effective date of the Act.

Where multiple potentially responsible parties are involved at a site, allocation, based on each person's relative contribution to the harm, should be required. Thus the polluter would still pay, but only for his own pollution -- not that of others. To facilitate allocations and settlements based on them, absent extraordinary circumstances, EPA or any other CERCLA plaintiff should be required to proffer a settlement based on a preliminary allocation of liability proposal before commencement of any future action. A limited exception for joint and several liability would still exist, but, absent criminal conspiracy, only where the plaintiff could prove facts sufficient to come within the exceptional circumstances contemplated by the pre-CERCLA common law as reflected in Restatement, Second, of Torts.

Restricting strict liability and shifting to a general rule for early allocation of costs that fairly reflects relative

contribution to the harm remedied would remove any justification for special exemptions or preferences that now exist or have been proposed based solely on status. In the past, on some occasions, federal, state and local entities that were potentially responsible parties were treated differently from other private defendants with the result that a disproportionate share of cleanup costs was imposed on the private sector. To avoid that result, settlements with governmental entities should undergo court scrutiny and approval, with prior notice to other potentially responsible parties and opportunity for them to comment. Intra-governmental or inter-governmental settlements should be on terms that are equivalent to those with private parties.

Excessive transaction costs are caused by several aspects of the current CERCLA process. The large number of parties prolongs and complicates the proceedings. The process does not function efficiently when all parties involved do not have clearly defined roles. This leads to a lack of focus and confused priorities. Finally, misplaced incentives such as the recovery of private legal fees cause delay and inefficiency.

The focal points for correcting these problems should be the following:

1. Establishment of procedures for early allocation of responsibility and resolution of disputes, including appointment of allocation panels, to accomplish the following:

   (1) Identify all responsible parties;

   (2) Designate appropriate categories of parties, when appropriate, including substantial and minor participants;

   (3) Dispose of claims against minor parties; and

   (4) Determine appropriate measures for assessment and remediation, including mechanisms for interim funding.

2. Encouragement of prompt and efficient compliance and dispute resolution by:

   (1) Placing the primary responsibility for developing, implementing and managing cleanup on substantial participants;

   (2) Mandating meaningful schedules with deadlines for completion of critical stages of the process;

(3) Reducing wasteful duplication of effort, expertise and expense;

(4) Eliminating incentives for delay or inefficiency, including recovery of private attorney fees not otherwise recoverable under citizen's suit provisions of the statute;

(5) Reducing the frequency and scope of judicial review; and

(6) Providing that allocation decisions will be made early in any litigation.

The current Superfund cleanup is financed in two ways: (1) through imposing liability on "potentially responsible parties" or "PRPs"; and (2) by the Hazardous Substances Superfund. The Trust Fund is financed by a combination of six sources: a petroleum tax, a chemical feedstock tax, an imported chemical tax, an environmental income tax (EIT), interest from money in the Trust Fund, and general revenues.

The current Superfund liability system is essentially a pay as you go fundraising mechanism. Any modification of the current liability system to enhance fairness and efficiency might impose on the Hazardous Substances Superfund a larger share of cleanup costs, which would require an increase in the size of the fund. Therefore, it is essential to identify appropriate and satisfactory supplementary funding approaches for Superfund cleanups. Increased reliance upon tax-centered supplements to liability based fundraising would reduce transaction costs, while producing the certainty of quantifiable payments over time. Some of the alternative funding methods which have been or are being currently discussed include:

(1) Pollution Taxes

Taxes imposed on waste generation or waste disposal, tipping fees (the charge for disposing of waste at a landfill), carbon taxes, and similar fees, are probably the closest to a market-based solution to Superfund financing.

(2) Basket of Taxes -- Existing and Additional Taxes

One of the most commonly discussed approaches for financing an expanded trust fund would rely on increases in all the existing taxes, supplemented by additional new, earmarked taxes -- such as ones targeted to small businesses, property/casualty insurance industry, and the general treasury on behalf of municipalities. Such formulas are designed to gain contributions from parties who might be viewed as the financial beneficiaries of reform to the liability system.

(3) General Treasury Revenues

Since its very inception, many have argued that the Superfund cleanup of old waste sites should be conducted as part of a nationwide public works program financed from general treasury revenues. This concept is directly analogous to the Clean Water Act construction grants program for sewage treatment facilities, an enormously successful and popular program.

(4) Increase existing Superfund taxes

An increase of one or more of the four existing Superfund taxes could be used to finance any shortfall created by modifying the current liability system.

(5) Broad-Based Tax, Such as a VAT

Concern over the size of the Federal budget deficit has generated interest in the possibility of enactment of a consumption tax, in the form of a value added tax, or a business transfer tax. This in turn has led to discussions of using part of the proceeds from such a tax for cleanup of hazardous waste sites.

In evaluating which funding mechanism to use for supplementing amounts received from PRPs, the timing of the cleanup process must be a central consideration. Hazardous waste should be viewed as an inter-generational problem created and solved over longer periods of time. Viewed as such, it can be effectively addressed on an equitable and cost effective basis by evaluating a variety of funding mechanisms, including ones that are tax-based.

CLEANUP PROCEDURES

EPA should establish rational guidelines to decide what constitutes a hazardous substance, when a site requires cleanup, and when remediation is complete. Uncertainties about these issues increase transaction costs, slow down cleanup, and discourage voluntary remedial action. They divert economic development from older, potentially contaminated areas, such as the inner city, to pristine areas that might otherwise be preserved.

The current method for deciding what constitutes contribution to contamination makes no allowance for the concentration or amount for which a party is responsible. In practice <u>any</u> amount of hazardous substance can lead to liability for cleaning up an entire site. Avoiding such absurd outcomes requires the development of reasonable cutoff points based on both amount and concentration.

The current hazard ranking procedure for deciding which sites require cleanup varies from region to region and even from site to site. As an alternative, EPA should develop screening tools so any quantity below a certain level would mean further site assessment is not warranted; anything above would require further investigation. The triggers should derive from available scientific data and generic risk assessments based on reasonable and realistic assumptions.

Establishing appropriate cleanup levels also requires reasonable risk assessment, and a selection methodology and procedure that accounts consistently and understandably for factors that vary from site-to-site. Guidelines should be developed that are detailed enough to afford certainty for parties who rely upon them, but should not be mandatory for parties who wish to craft site-specific remedies.

To avoid the unwarranted costs associated with eliminating overstated risks, more reasonable assumptions, and actual data should take precedence over any assumptions.

The current requirement that cleanups conform to applicable or relevant and appropriate requirements ("ARARs") causes confusion and wastes resources on excessive remediation. Some aspects of ARARs should be retained, but CERCLA should be amended to delegate remedy selection to the states, with clear guidelines that account for different geography, geology, climate, land use, and other factors. The delegations should require states to allow parties flexibility to adopt measures not covered by the guidelines if they are adequately protective.

Amendments to CERCLA should require that EPA adopt baseline technological methods that have proven effective at cleaning up sites to acceptable levels. These methods should presumptively meet statutory requirements when used appropriately, but the statute should allow the use of innovative technologies.

The EPA should establish a level technological playing field so that parties may use any cost-effective technology capable of achieving target risk reduction levels. The existing CERCLA program has a statutory preference for so-called permanent technologies. By placing such an emphasis on permanence, the Agency encourages delay in cleaning up sites, and creates unnecessary cleanup costs.

Any CERCLA reform proposal would be incomplete without addressing voluntary cleanups. Many hazardous waste sites do not score high enough to make it onto the NPL but still pose a threat to human health and to ecosystems. Such sites also may suffer a stigma that prevents their sale or productive use or development.

Moreover, the concern that a governmental agency might, at some point in the future, "second guess" the remedy implemented during a voluntary cleanup prevents many parties from doing cleanup. The lack of reasonable guidance on cleanup levels makes it difficult to proceed without involving a governmental authority. Parties also fear that on-site remedial activities will trigger certain RCRA regulatory provisions.

As part of the delegation of remedy selection, state-administered programs to approve voluntary cleanups should be established. Parties seeking approvals for cleanup plans should compensate the States for the reasonable cost of evaluating technical submittals.

The CERCLA administrative cleanup program is a federal projects program rather than a cooperative federalism regulatory program. Unlike the various pollution control statutes (e.g., Clean Air Act, Clean Water Act, Resource Conservation and Recovery Act (RCRA)), the U.S. EPA has not delegated (and sometimes does not share) decision-making with its state counterparts. As a result, inevitably there has been friction between relevant federal and state agencies.

States need to have flexibility in setting standards and administering cleanup at all hazardous waste sites. For example, although RCRA was intended to apply primarily to active ongoing waste sites, once cleanup begins at an inactive (pre-RCRA) waste site, RCRA requirements may be triggered if the cleanup involved shipments of wastes off-site. Where this occurs, the standards applicable to cleanup may be much more stringent than those which would be applicable to Superfund NPL sites. This is because CERCLA Section 121 gives EPA the authority to waive certain Federal or State environmental standards and requirements (including those under RCRA) in selecting the "relevant and appropriate" cleanup standards (the so-called ARARs process). Also, the RCRA permit process is extraordinarily lengthy. At a minimum, states should have the same flexibility with respect to applicable and appropriate standards that EPA has under the present law.

States should be afforded the opportunity to exercise independent control over cleanup activities within their borders by obtaining delegated authority. Under such a system, states rather than EPA would select cleanup levels. Where states are granted the lead for a program or site, cleanup is more likely to be properly approached as a land use question bounded by public health considerations.

The requirement to assess and disclose potential environmental impacts of planned actions in a transparent process, open to the public is an intrinsic component of a democratic society and lies at the core of effective resolution

of environmental disputes.

Public participation, as set forth in various environmental statutes, is that part of the decision-making process through which responsible officials become aware of public attitudes by providing ample opportunity for interested and affected parties to communicate their views. According to these legal requirements, public participation includes providing access to the decision-making process, seeking input from and conducting dialogue with the public, assimilating public viewpoints and preferences, and demonstrating that those viewpoints and preferences have been considered by the decision-making official.

Leading commentators and participants in the public involvement/consensus-building field believe that the only way to avoid stalemate, reduce the need for litigation, and restore the credibility of government is to generate agreement among all stakeholders on how to handle the problems that face us. Citizens and affected stakeholders should be provided meaningful involvement in the Environmental Protection Agency's decisions regarding the investigation and remediation of Superfund sites; effective public involvement is a central element of credible agency remediation decisions or negotiated settlements. Early, effective and continuous involvement of affected citizens and stakeholders, including non-government organizations and PRPs, will ultimately reduce the need for litigation, reduce transaction costs and restore credibility to the CERCLA process.

Natural Resource Damages in CERCLA owes its legislative origin to international and national concerns over massive oil tanker spills. In CERCLA, Congress, borrowing from the common law concepts of public law and parens patriae, created federal and state trustees for natural resources and gave them authority to seek damages for injuries to public and tribal natural resources caused by releases of hazardous substances.

Although the Natural Resource Damages provisions of CERCLA have existed for 13 years, there has been very little experience with the actual assessment of natural resource damages. Their potential economic impacts are still largely speculative, except for the result that since awards are potentially so great insurance against them is unavailable.

The first principle, that damages should be restricted to the reasonable costs of restoration, rehabilitation or replacement in kind of the natural resource, rules out the recovery under CERCLA of inherently subjective damages such as those based on "existence," "contingent" or "non-use" valuations. Determining inherently subjective damages runs the heavy risk that damages may edge into punishment and thus become "punitive in effect," triggering constitutionally mandated procedures for the imposition of punitive sanctions. Also inherently

speculative damages are likely to be uninsurable. Thus, there is an inherent danger of overdeterrence of what may in general be socially desirable economic activity.

Another factor that supports limiting natural resource damages under CERCLA to the reasonable costs of restoration, rehabilitation or replacement in kind is the additional burden determination of more speculative values would impose on the federal courts. Long trials under CERCLA over inherently speculative natural resource damages would add to the burden of the already crowded civil dockets of our federal courts.

The concept of "reasonable" costs is taken from the National Environmental Policy Act. It includes the concepts of "cost effectiveness" and "cost/benefits." Thus it recognizes that, in the name of saving or restoring natural resources, we should not incur a net social loss in the overall result. It is also intended to avoid excessive costs or excessive awards that could be punitive in effect. This limitation of reasonable costs is also recognized in the Proposed Directive on Liability for Wastes of the European Community, which provides that where "the costs substantially exceed the benefit arising for the environment from such restoration and other alternative measures . . . may be taken at a substantially lower cost" recovery is limited to those alternatives. Thus, consideration of international competitiveness reinforces common sense economics.

The second principle focuses on the fact that CERCLA is intended to be primarily a remedial statute. Cleanup issues are directly related to whether the hazard or threat of hazard being remedied under CERCLA has also damaged natural resources and if so how those resources can or should be restored, rehabilitated or replaced in kind. As a general rule all those related issues should be resolved in the same proceedings.

The third principle is designed to preclude the diversion of any funds recovered as natural resource damages, to other governmental purposes, including without limitation, reimbursement of administrative, overhead, enforcement, legal or other transactional costs.

Finally, we note that Congress intended that CERCLA's present natural resource damages provision, CERCLA 107(f)(1), not be applied retroactively. Nevertheless, some natural resource trustees have focused on the word "wholly" in the last sentence of that section to argue for the recovery of damages that were incurred years before the effective date of the Act. The Act should be clarified to avoid imposition of any such retroactive liability.

Respectfully submitted,

David S. Baker, Chair
Standing Committee on Environmental Law

Dudley Oldham, Chair
Section of Tort and Insurance Practice

Frank Erisman, Chair
Section of Natural Resources, Energy and Environmental Law

Richard M. Phillips, Chair
Business Law Section

JENNIFER M. BELCHER

Commissioner of Public Lands
State of Washington

Mr. Chairman, members of the subcommittee. Thank you for allowing me this opportunity to comment on Superfund Reauthorization.

Let me tell you first that, as elected Commissioner of Public Lands for Washington State, I am responsible for overseeing the management of 5.2 million acres of lands, including 2.2 million acres of submerged lands. Washington State, like other states, received these submerged lands under the equal footing doctrine from the federal government who held these lands in trust for the citizens of the emerging state. As sovereign, the state continues to hold these lands in trust for the people of the state for the purposes of navigation, commerce, fishing, recreation and for their intrinsic environmental value.

The waterways of Washington State, similar to most other states, have been an integral part of Washington's economic growth by providing natural resources such as fish and shellfish and by providing a key transportation link for navigation and commerce. Unfortunately, over the past one hundred years, these submerged lands have also been the recipient of contamination. Everything flows downhill, and no urban waterfront in the nation has escaped the problems of contaminated sediments.

We are understandably concerned about sediment contamination and its potential effects on human health and the environment. The state has a very strong interest in having these sources of pollution stopped and in having the aquatic environment cleaned up. The state will be the landowner and steward of these lands forever. While potentially responsible parties will be interested in the cheapest clean up and the enforcement agencies will be interested in quickly cleaning up an area and moving on to other areas, the state, as natural resource trustee and landowner, is interested in the best long term solution because we will forever live with the decisions made and actions taken.

As you know, Superfund's liability scheme is joint, strict, several and retroactive and can result in the landowner becoming a potentially liable party if contamination comes to reside upon their land. In an aquatic environment subject to tidal and hydrographic influences, contamination flows onto and then settles into the sediments in the low areas regardless of where the source of the contamination is. Often these low areas are on the sovereign lands held in trust by the state. So in addition to being a natural resource trustee by virtue of our submerged land ownership, the state may also become a potentially responsible party solely by virtue of land ownership.

Congress recognized this potential problem in the Superfund Amendments and Reauthorization Act of 1986 (SARA) and provided an exclusion from liability for states that acquired land as sovereign as long as the state did not cause or contribute to the contamination. While this seems to provide an appropriate exclusion, there is no guidance or case law to help the states or the Environmental Protection Agency (EPA) to implement this provision, nor has EPA developed guidance documents or rules on this subject.

The reason there is no case law in this area is two-fold. First, Superfund cleanup activities have moved into the aquatic environment only fairly recently and the science, technology, land ownership patterns, and remediation solutions are completely different than upland Superfund sites. Second, the EPA only recently began naming states as landowner at Superfund sites encompassing contaminated sediments. As a matter of fact, of the 69 Records of Decision that include contaminated sediments, the only state to ever be named as a potentially responsible party in its sole capacity as sovereign land owner is the State of Washington.

Washington State has a strong track record as a leader in the area of sediment management. We were the first state to adopt sediment management standards to help guide our cleanup and management of sediments. We have a unique and successful partnership with the EPA and the Army Corps of Engineers to manage dredge spoils through a joint siting and environmental monitoring process called the Puget Sound Dredge Disposal Analysis Program. Our nationally recognized Puget Sound Water Quality Plan addresses sediment as well as water quality. And our stewardship of the state's submerged lands reflects one of the strongest proprietary programs for managing sovereign lands in the country.

Yet there are areas where additional guidance would be helpful as we work with the EPA to cleanup submerged lands. Four areas in particular would aid not only Washington State but other states who hold submerged lands as sovereign.

1) We need guidance and criteria on when a state has or has not caused or contributed to contamination of its sovereign land and therefore is or is not eligible for the exemption from owner liability under Superfund.

2) We need guidance on de minimis settlements with states as sovereign owners of submerged lands similar to the guidance on landowner de minimis settlements.

3) We need to identify ways to implement the Clean Water Act and Superfund without making the submerged landowner liable for contamination resulting from a third party National Pollution Discharge Elimination System (NPDES) permitted discharge.

4) We need to identify the impact of EPA's proposed national strategy on contaminated sediments on states as the owners of these sediments and the managers of the sovereign lands.

If EPA were to work in conjunction with the states on developing this guidance, we would be better situated to set priorities for the scarce public funds available. In the Puget Sound region, a single National Priority List Superfund site that involves contaminated sediments can cost upwards of 50 million dollars to clean up. The states should be partners with EPA on these clean ups, each bringing their unique roles and abilities to the mutual goal of cleaning up our aquatic environment.

I fully support the President's efforts to reform CERCLA (Superfund) through a proposal that reduces the time and costs needed to clean up sites and provides more fairness and efficiency to the liability scheme. I hope that the role of the states as sovereign landowner is not forgotten in the efforts to revitalize Superfund. In the next two years more than one dozen Superfund clean up actions will affect state-owned submerged lands in Washington State. We look forward to working together as partners toward our common goal of a clean and healthy aquatic environment.

Bunker Hill Superfund Task Force

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March 21, 1994

Congressman Al Swift
Subcommittee, Chair, Transportation & Hazardous Materials
Ford House Office Bldg.
3rd & D Street, SW
Washington, DC 20151

Dear Congressman Swift:

I am writing as Chairman of the Bunker Hill Superfund Task Force. My purpose is to provide comments on the reauthorization of the Superfund Program. The Task Force is an eight member group of citizens and local elected officials who serve as liaison between the community and the state and federal staffs at the Bunker Hill Superfund site. Our site is one of the largest and most complex projects in the country. It was added to the National Priorities List (NPL) in 1983.

After nearly a decade of first hand experience dealing with the Superfund process, the Task Force would recommend the Following:

1. Above all else, shorten the process. Considering the potential for adverse health effects from exposure to hazardous materials and the crippling effect of joint and several liability on site residents, ten years of studying a problem is simply unacceptable.

The same concern has been reafirmed at over one hundred and fifty community meetings that have been held at our site.

2. Don't re-invent the wheel at each site. Hundreds of superfund sites have been studied over the past fifteen years. This information should be used to develop templates for use at new sites. While each site is somewhat different and must be characterized on its own merits, the approach and technology developed to solve problems in one place can be used to shorten the study process and control cost at another.

3. Consider changing the process for dealing with mining sites. The current law is not effective in dealing with extremely large sites that often encompass square miles instead of a few acres. Many mine sites include one or more entire towns. The time required to complete projects of this size threaten the health of site residents and put an unfair burden on local property owners. The effects of joint and several liability on an entire community over many years is devastating.

4. Continue to support active involvement of site residents. The Community relations program at our site has been very effective. Many of our successes are a direct result of the team approach that has been developed between the community and project staff. The program has been enhanced by allowing for state lead for community relations and utilizing local residents to direct the program. Text book EPA outreach from hundreds of miles away doesn't work.

5. Reduce the need for attorney involvement. As long as Superfund operates as a lawsuit, timely progress can't be made. Convert the process to a construction or public works driven program. The end product should be a clean site in a reasonable time frame.

6. Control contractors as well as the attorneys. Make contractors accountable for recommending the types of studies to be done, the time frames for doing them and the costs encountered during clean ups. Often times, similar studies are repeated as site contractors come and go, therefore the final cost of clean up is many times greater than originally proposed. By shortening the process, the need for continuing the parade of different contractors through the same site could be eliminated and accountability increased.

7. Deal with the lender liability issue. At the Bunker Hill site local residents are adversely impacted each day by the uncertainties of lender liability. Again large mine sites suffer more under the current program. A two acre site on the outskirts of a large city presents a problem for the property owner and maybe its closest neighbor. At our site all of the property owners in four cities and a number of unincorporated communities are being held hostage to something they have no control over. At our site the impacts are even more severe and the need for relief is greater. Since the Bunker Hill Company and a number of other mines have closed, we have lost over seven thousand jobs. The assessed valuation of Shoshone County has dropped from 1.3 billion dollars in the early 1980's to approximately four hundred million dollars today. Our current unemployment rate is over twenty five percent.

In an attempt to create jobs and re-establish a tax base the City of Kellogg has obtained and invested more than twenty million dollars into its Silver Mountain Ski area. In 1988 Kellogg residents voted by 82.5% majority to tax themselves two million dollars to assist in the project. The constant threat of lender liability is making the revitalization effort very difficult.

8. Reduce the match required by States for fund lead projects and allow the same formula to apply to long term operation and maintenance (O & M) costs. States should not have to pay the full cost of operations and maintenance.

This is especially important at the Bunker Hill site. Over the past years the federal government has allowed the sites largest responsible party to move over a hundred and fifty million dollars in cash out of the country and then go bankrupt. This bankruptcy will also adversely affect the retirement and medical benefits of over one thousand individuals. Much of the clean-up and O & M costs will now be passed on to the state and locals. With only a million people in the

entire state of Idaho and only fifteen thousand in our county, we can ill afford to be held responsible for tens of millions of dollars in clean-up costs.

9. Encourage the use of the emergency removal program. After ten years on this project, the largest source of contamination still stands. The lead Smelter remains as a daily reminder that the process doesn't work. As the most contaminated portion of the site, it should have been demolished years ago!

Thank you for requesting our comments and we wish you every success in the reauthorization effort. If you have any questions, please feel free to contact me at (208) 752-1202. Because a picture is worth a thousand words, should you or a delegation from your sub-committee wish to visit our site and view first hand some of our successes and failures, please let us know. The Task Force would be glad to host a site tour.

Sincerely,

Duane E. Little

Duane E. Little
Chairman

Enclosure (1)

Bunker Hill Superfund Task Force

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January 19, 1994

Governor Cecil Andrus
State Capital 2nd Floor
Boise, ID 83720

Dear Governor Andrus:

We are writing to express our needs and concerns with recent developments at the Bunker Hill Superfund Site and the Consent Decree that has been negotiated with ASARCO, Hecla, and Sunshine Mining Company. As proposed, the clean up will be much different than what was promised at the beginning of Consent Decree negotiations! We no longer have viable Potentially Responsible Parties (PRPs) to conduct and pay for the entire project and provide maintenance and operation of the clean up alternatives selected.

Based on current information, we don't think what is being proposed is the best approach but it may be the best that can be expected. While we still have grave concerns about future funding for worker pension and medical benefits and natural resource issues associated with the Smelterville flats, we do believe that the Consent Decree will provide expedited protection for the health of site residents and a continued ability to sell our homes.

If this approach is to be used, there are a number of items that must be incorporated into the project if we expect to make the community whole. They include:

- Full funding of a site wide Institutional Control Program (ICP)
- Future development included in the ICP
- Rapid and safe removal of the smelter complexes and abandoned buildings in the Mine Operation Area (MOA). Continued dust control activities for the Central Impoundment Area (CIA) and other large sources.
- Flooding associated with Milo Creek
- Future treatment of water from the Bunker Hill mine
- Removal of heavy metals from storm water

1. Full Funding of the ICP Site Wide: As you well know Shoshone County and especially those cities within the Superfund Site have suffered tremendous losses in both jobs and tax base since the Bunker Hill Company closed. You are also aware of our investment of over 20 million dollars in the Kellogg Gondola Project and attempts to diversify the local economy. To date, all of these efforts have been based on both promised and provided services associated with health intervention and assistance in gaining approvals for bank loans during real estate transactions. To not fund the ICP site wide will limit health intervention activities and eliminate our ability to sell property. Those areas not included under the ICP umbrella will be effectively blacklisted. This aspect of the clean up is well documented and understood by lending institutions and the State Department of Commerce, who have tracked our progress.

2. Future Development: The amount of developable land valley wide and especially within the Bunker Hill Site is very limited. Those few hundred acres available will be critical to the future growth and development of Shoshone County. Unless those areas are included in the ICP, purchasers or developers won't be able to quantify their cost or risk. Without ICP assurances, property owners will not be able to sell their ground and development will be stifled.

3. Rapid and Safe Removal of the Smelter Complexes: One thing that we have heard loud and clear for the past 8 years and whole heartedly agree with is that the Smelter Complexes must come down and the sooner, the better. Demolition of the Smelter and clean up of the mine operations area must begin this year and continue uninterrupted until it's completed. Dust control for the CIA and other large sources must also be continued. These potent sources of contamination must be eliminated if the health of the community is to be protected and large scale future development is to occur.

4. Flooding Associated With Milo Creek: Before additional property along Milo Creek is remediated it is imperative that an element of the project deal with what will be done to restore those properties when it floods. To date, over 35 properties adjacent to Milo Creek have been remediated. If emergency assistance organizations are not going to restore soil barriers, progress in reducing blood lead levels in these areas will be reversed and affected properties will be adversely affected by the ICP. Again, those properties not approvable via the ICP will not be marketable.

5. Future Treatment of Water From the Bunker Hill Mine: We realize that the mine is currently in operation and mine water is being diverted into the underground workings; however, things are likely to change. When the mine begins discharging, the ability of the current owner to treat it into perpetuity is in question. With this in mind we want to be assured that the discharge will be controlled by the State or EPA and not fall to the local community.

6. Heavy Metal removal from storm water. EPA is currently promulgating regulations to address storm water collection and treatment for municipalities. It is only a matter of time before these regulations apply to small towns. The program will likely include a limit on heavy

metal concentrations in the discharge. If the clean-up falls short of allowing us to meet the removal requirements, additional treatment will be required. Should this happen, we want to be assured that financial assistance will be available for the additional cost associated with metals removal.

In addition to what are believe to be the minimum required elements of the project, we would also recommend the following:

-The State should aggressively review those elements of the Record of Decision (ROD) associated with the Non-Populated Area of the site. Remediation costs should be re-evaluated and the long term costs associated with operation and maintenance should be kept to a minimum.

-Considering long term liability and O & M costs associated with the tall stacks, they should be removed. If they remain, maintenance costs must not be passed on to Shoshone County or the City of Kellogg.

-An evaluation of impacts to the community if natural resource issues are not resolved.

Remember:

-The Bunker Hill project deserves special consideration! At one time all of the resources necessary to complete the clean up were available from Gulf USA. Since the late 1980's the federal government has allowed over 100 million dollars of Gulf's assets to disappear.

The State and local community have worked very hard with EPA to provide a cooperative problem solving approach to this project. Blood lead levels in area children have been reduced to the national average, public and residential properties have been remediated, fugitive dust sources have been controlled, hillsides planted and a variety of control activities have occurred at the Smelter Complex. The States efforts in the populated areas resulted in a ROD being completed a year ahead of the rest of the site and provided the back drop for expediting the completion of a ROD in the Non-populated areas.

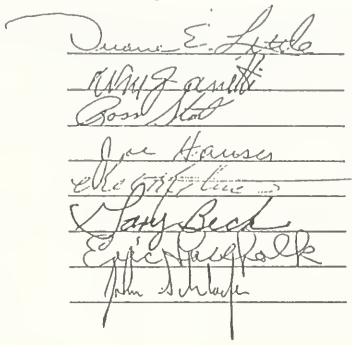
In any event the State and local community should not have to pay because the federal government was unable to meet its responsibility to control Gulf's assets.

The Task Force has worked very hard with all parties during the past eight years to get to this point. As local citizens and for a number of us, as past and current local elected officials we encourage everyone to do what needs to be done to resolve problems and proceed with the final clean up of the site. The health and future of our community is at stake.

We want to acknowledge your strong support for the project and commend you

and your staffs dedication towards resolving a number of complex issues. We continue to offer you our support and assistance in these difficult times. It is our hope that we can bring this project to a timely and positive conclusion for all concerned.

Sincerely,



Duane Little, Chairman

Bill Zanetti

Ross Stout

Joe Hauser

Chuck Peterson

Gary Beck

Eric Lassfolk

John Schlaefer

MAR 24 1994

City of Kellogg, Idaho
323 Main Street 83837 (208) 786-9131 "Home of the Silver Mountain Resort"

March 18, 1994

Congressman Al Swift
Subcommittee Chair, Transportation & Hazardous Materials
Ford House Office Building
3rd & D Street S.W.
Washington, DC 20515

Attention: Mr. Len Barson

Your honorable Congressman Swift:

I am writing to provide comments for the up coming hearings on the re-authorization of Superfund. I am writing as the Mayor of the City of Kellogg. Kellogg and a number of surrounding communities were added to the National Properties List (NPL) in late 1983. Site activities have been underway since mid 1985. Based on nine years of activities involving in the Superfund process, I have the following comments:

1. While community relation activities and sincere efforts to accommodate the needs of local residents have been more than adequate, the process simply takes to long. The number one complaint that we hear at every meeting held and from virtually everyone who stops me on the street to comment is that "they need to quite studying and start cleaning up."

2. The only way the process will be shortened is to change the approach from that of a lawsuit to a construction oriented project where the goal is to produce a product. Reduce the need for attorney involvement.

3. Release the strangle hold Superfund has on lenders who were not involved in creating the problem. While efforts to deal with this issue have been quite successful at our site, no community can conduct business as usual and grow under the Superfund "mark of the beast." A decade of uncertainties is unacceptable.

4. In our case, it appears as though the State of Idaho is going to become a significant payer in the clean-up process. Considering the fact that the federal government allowed the major Potentially Responsible Party (PRP) at this site to move over a hundred million dollars in cash out of the country and then go bankrupt is criminal. Costs passed on to the state get passed on to the locals. As a community of twenty five hundred people we can not play in the high stakes game of Superfund.

5. After nine years of Superfund activities in our town, the source of the problem still stands. Four hundred acres of smelting complexes remains as a daily reminder that the process does not work. As the most contaminated portion of the site they should have been cleaned up years ago.

I hope the comments I have provided will help you in your efforts to re-structure the Superfund process. If you need any additional information please fell free to contact me at any time.

Very truly yours,

Mervin Hill, Mayor
City of Kellogg

MH/jc

National Paint & Coatings Association

January 25, 1994

Dear Interested Party:

Over the past two months, in meetings and over the phone, we have been asked by the White House, EPA, and House and Senate majority and minority staff to attempt to meld a voluntary, expedited ("non-binding") settlements approach, along the lines we have supported, with the more formal ("binding") Administrative Law Judge (ALJ) process recommended by the Chemical Manufacturers Association, and in substantial part by the National Superfund Commission.

We are pleased to provide what we hope is a good proposed marriage of these two ideas for substantially improving Superfund's liability and settlements' system. Simply, it filters settlements. Through rulemaking, EPA would be charged with developing a well-founded "Final Allocation of Responsibility (FAR)" issued at the time of the Record of Decision. PRPs would then have 165 days in which to settle with EPA based on their fair-share according to the FAR.

Only those PRPs with (in their view) meritorious disputes with EPA's allocation of responsibility are referred to an ALJ process. In this way, coupled with certain built-in procedural safeguards, such as the right for parties to cross-examine in the ALJ process, due process considerations are met. Conversely, possible disincentives for those with more unfounded contentions regarding their apportioned responsibility, such as paying the costs of the ALJ process, or facing joint and several liability, could discourage abuse of process.

Realizing that Superfund reform remains a complex and fluid proposition, we urge you to consider this blend of ideas as one possible consensus-gathering proposal. As always, we are prepared and pleased to discuss this approach with your office further.

Sincerely,

Tom Graves

Thomas J. Graves, Esq.
Director, Federal Affairs

Enclosures

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National Paint & Coatings Association

Summary of a Revised New Section 122:
Settlement Agreements' Process
(January 25, 1994)

I. The Environmental Protection Agency (EPA)'s General Authority to Settle with PRPs.

EPA is now explicitly given the authority to settle with any potentially responsible party (PRP) via a binding consent order or decree according to its determined fair percentage share of response costs. Settlements shall include both a covenant not to sue for future liability and third-party contribution action protection. The government is permitted to finance a mixed funding agreement of up to 35% of total response costs to cover the appropriate share of viable PRPs that do not settle, and is responsible to pay for the entire orphan share (i.e., nonviable parties' liabilities). Those PRPs willing to undertake voluntary remedial action themselves shall be entitled to do so and receive a covenant not to sue and contribution protection, so long as they agree to fund at least 65% of the remedy as an aggregate of their respective individual share contributions.

II. Special Settlements for De Minimis PRPs.

EPA shall expedite cash settlements with de minimis PRPs, and provide full releases for any further or attendant liability, if the amount of the hazardous substances contributed is one (1)% or less by volume, and their effects and remedy costs are not atypical. Each EPA Regional Office shall foster and promote de minimis settlements, based on a uniform premium schedule, set by rulemaking.

III. Procedures for EPA's Issuing a Settlements Foundation, a "Final Allocation of Responsibility (FAR)."

After the effective date of the new law, any site already proposed for listing on the National Priority List shall first require EPA to provide key preliminary information in the Federal Register giving a comprehensive list of all known PRPs, a preliminary inventory of all records at the site, a description of the site's history, and all responses to a section 104(e) information request.

For sites listed after the new law, at the time a site is proposed in the Federal Register for listing on the NPL, EPA must publish an Advanced Notice of Proposed Rulemaking (ANPR), with the same above-stated information, plus a preliminary allocation among PRPs of response costs for the site.

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At the time it approves the remedial investigation and feasibility study (RI/FS Work Plan), EPA shall also propose in the Federal Register a Final Allocation Report (FAR) for allocating shares of the response costs at the site. The FAR shall include an evaluation and proposed findings on the orphan share and de minimis shares, as necessary.

(At any site listed on the NPL and an RI/FS has already been issued before the effective date of the new law, EPA shall propose a FAR at least 60 days before issuing the Record of Decision (ROD)).

The proposed FAR shall include, among other things, the extent to which the harm is divisible or can be apportioned among PRPs, a ranking by volume of substances contributed by PRPs, and a non-binding allocation, according to pro rated shares of response costs, among all identified PRPs. The FAR shall be adopted as final by EPA, formally, no later than the date it adopts the Record of Decision. It forms the factual basis for the majority of expedited settlements with PRPs at a site.

IV. Settlement Negotiations and Procedures.

After issuing the final FAR, there shall be a 165 day period for PRPs to enter settlements, without facing enforcement, except for EPA unilateral administrative 106 orders to abate an emergency. EPA is compelled to enter into a settlement agreement with any PRP offering to pay its percentage share, according to the FAR, of past and future response costs, or enter into a de minimis consent degree based on the terms set for de minimis PRPs.

In the alternative, and where the situation is applicable, PRPs shall have 45 days to make a "good faith" offer to undertake remedial action, and to reimburse EPA for any past applicable response costs, if their settlement offers (in the aggregate) constitute at least 65% of the total remedial costs, with each PRP funding at least its apportioned responsibility according to the FAR.

V. Binding Allocation of Responsibility set by an Administrative Law Judge (ALJ) Process; Subsequent Adjudication Rights.

Any PRP who does not enter into a settlement agreement within the prescribed 165-day negotiation period shall have its liability adjudicated by an EPA ALJ. No case given to the ALJ may go to adjudication, however, unless it first goes through a special settlement conference intended to produce a settlement where practical.

For the non-recalcitrant, practical experience reveals that fact-specific allocation disputes remaining after settlement efforts have been explored are usually significant, with major dollar amounts at stake. These should be addressed in an adequate adjudicatory forum, not in a "quasi-adjudicatory" proceeding, i.e., an ALJ process without sufficient rules of evidence and procedure protections for participants. Successful allocation is, foremost, a fact-gathering business; fact-gathering and analysis are tasks the Agency has the expertise to perform and that are most readily accomplished through detailed section 104(e) requests followed by rulemaking. ALJs, on the other hand, are not equipped to gather facts or to undertake analyses, as some suggested schemes demand. But where the facts remain in serious dispute after expert rulemaking and settlement efforts have been pursued, adjudication is sometimes necessary -- something ALJs are equipped to do so long as there is a moving and an opposing party, and proper procedures provided.

Serious factual issues as to a person's liability or damages where millions of dollars are at stake deserve the serious attention of a serious fact-finding forum that is equipped to find the truth. (Wigmore said, "Cross-examination is the best engine for the test of truth every devised by man.") Due process is best achieved in court, but it can be achieved in a truly adjudicatory ALJ proceeding. Therefore, Congress should require an ALJ proceeding, but only one that is protective of the rights of companies.

In summary, the attached combined settlements/ALJ approach recognizes, that, indeed, factual and legal disputes exist at Superfund sites and that, sometimes, they can be so intense and financially important for some PRPs that they cannot be resolved readily. These disputants should have the right to a fair hearing before an ALJ. In the interest of fundamental fairness, it is far better to allow the few difficult cases to be fully litigated than to require every case to be tried halfway. However, for the thousands of rank and file cases, a reliable, well-founded government Final Allocation of Responsibility, or FAR, with sufficient time and incentives for settlement, will provide a systematic cost-effective means to garner fair-shares of response costs expeditiously.

National Paint & Coatings Association

January 25, 1994

A REVISED NEW SECTION 122
AN EFFICIENT SYSTEM FOR SUPERFUND SETTLEMENTS:
A DISCUSSION OF ITS PRACTICAL BASIS AND CORE ADVANTAGES

Despite differences, proponents of Superfund reform all believe that the current system is too slow, too costly, and too unfair. It would seem that for the great majority of PRPs, and for EPA, as well, the indispensable centerpiece of reform is enactment of an improved settlements system. PRPs entangled in the current Superfund system know that allowing them to settle for their "fair share" will open the floodgates to PRP-organized site cleanups and voluntary reimbursements of EPA response costs. It will greatly accelerate the pace of site cleanups and significantly staunch the flow of hundreds of millions (potentially, billions of dollars) of transaction costs.

Further, as President Clinton has expressed, experience shows that the Superfund process is far too lawyer-centered and lawyer-dominated. Lawyer-dominance contributes to extraordinary delay and exorbitant transaction costs; it arises from two factors: (1) the necessity of PRPs at every site, confronted with EPA's ready, arbitrary reliance on joint and several liability, to fight with EPA and among themselves in hopes of fairly apportioning the cost of settlement or in pursuit of favorable judicial judgments on liability; and (2) the necessity of PRPs at almost every site, confronted with EPA's all-too-frequent resort to wasteful remedial costs, to fight (using lawyers and technical consultants) with the Agency over response costs and remedy selection.

On the liability point, the sine qua non of reform is to compel EPA to administer the liability scheme in a more constructive, economically responsible manner by providing PRPs the opportunity to settle for an apportioned share of the total liability. If there is to be a liability scheme, the obvious point of correction is to diminish, not intensify, the necessity of depending on lawyers and lawyer-dominated procedures in order to reach settlement, consistent with the requirements of fundamental fairness and due process.

In reality, most liability and allocation problems can be settled "out of court" and most Superfund sites can be the subject of efficient agreements for voluntary cleanup if CERCLA is amended to address two settlement problems: (1) building a credible foundation for allocation consensus and settlement, and (2) building credible procedures for efficiently, fairly resolving allocation disputes. The majority of good faith PRPs at most

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sites encounter great inefficiency in developing their own "fair share" global allocation analysis and compelling other PRPs to accept it; this dilemma is compounded by EPA's demands that they pay for essentially all of the cleanup costs, notwithstanding their "fair share" analysis, i.e., demands to finance and subsidize the shares of all other PRPs, including orphan shares, non-participants, and not-yet-identified PRPs.

First, reform should concentrate on building allocation consensus to enable the majority of PRPs at each site to rely on a just allocation determination to achieve a fair settlement with EPA. EPA through fact-finding and via a rulemaking process can issue a well-founded allocation of responsibility (a "Final Allocation of Responsibility (FAR)") on which the great majority of PRPs can rely to settle with the Agency expeditiously for their fair share contribution(s) only.

Secondly, the system should address in a rational, fair manner the concerns of the legitimate minority, those PRPs, like the majority, who also wish to settle with EPA and are not recalcitrant. For the legitimate minority, the voluntary allocation process has been unable to resolve what for them are significant factual disputes as to their liability or their share.

Third, it seems unwise to force all PRPs in all sites to adjudicate liability and apportionment, when at most sites the large majority of PRPs is not interested in fighting over these issues. It seems prudent, recognizing that most PRPs in most sites will settle if provided a reasonable data base, to simply require EPA to provide the necessary information. The attached settlements scheme does that. Only those PRPs who disagree with EPA's Final Allocation of Responsibility, after being given 165 days to enter settlements, go through a binding EPA Administrative Law Judge (ALJ) process.

Also, it seems unwise to allow the truly recalcitrant PRP to hold hostage all other PRPs. Yet some reform proposals would actually aggravate that problem by empowering the recalcitrant PRP in every case to force every PRP that is intent on settlement to go through a lengthy, costly adjudicatory proceeding before any settlement could be achieved with any PRP. It seems especially unwise to empower the recalcitrant PRP, thereafter, still to go to court. By contrast, the enclosed settlement approach would enable the vast majority of settlement-oriented PRPs to settle promptly while the EPA could isolate recalcitrants and prosecute its liability claims against them using joint and several liability (where it is truly appropriate). The settlers would not be hostage to the recalcitrants.

If a settlement does not occur, the ALJ must conduct a hearing de novo as to the liability and allocation of responsibility for non-settling PRPs. The ALJ hearing will adhere to procedural due process requirements, including discovery, a right to call witnesses, and a right of cross-examination. EPA has the discretion to have the FAR admitted into evidence with its evidentiary weight decided by the ALJ.

The ALJ's final decision shall be binding and can include, as appropriate, joint and several liability for any response cost not already paid or otherwise settled, or set an apportioned share based on the so-called Gore factors (e.g. volume, toxicity, degree of cooperation with the government). (A challenging PRP may also be held liable to pay for the cost of the ALJ proceeding itself should the challenge be unmeritorious.) The decision is only reviewable by EPA's Environmental Appeals Board, based on error of law or unsupported by the substantial weight of the evidence. The EAB decision may, in turn, by reviewed by the appropriate U.S. Court of Appeals based on an error of law/arbitrary and capricious standard.

VI. Interim Funding Requirements.

Any PRP entering into a settlement agreement will be required to assure, through a suitable financial mechanism (e.g. letter of credit), future funding as required under the agreement. Every PRP pursuing its claim through the ALJ procedures shall also provide interim funding, according to its share set forth in the FAR.

VII. Releases from Liability; Contribution Protection.

Any settling party subject to a consent decree or administrative order shall receive from the government a covenant not to sue for future liability, based on factors including the effectiveness and reliability of the remedy.

No third party actions seeking claims for contribution shall be allowed regarding matters addressed in the settlement.

VIII. Cost Accounting and Moratorium on Mixed Funding and Orphan Share Contribution by the Fund.

If, at the program's half-way mark, a mandated government audit reveals that the overall average costs from the Fund and to EPA under the new system is twenty (20) percent or more higher in comparison to the average cost per site for the previous 200 NPL sites remedied, then the Fund shall not pay out for a period of six months for mixed funding or to pay the orphan share(s) at any site. If Congress fails to

act in the interim, however, then this moratorium lifts automatically.

IX. Clearinghouse of Information.

A sophisticated, accessible data transmission network to be used by EPA, its regional offices, PRPs, public officials, and public interest groups shall be established to keep all stakeholders equally informed and able to analyze and utilize such pertinent materials as RI/FS documents, records of decisions, consent decrees, decisions by ALJ's, and a roster of qualified facilitators, mediators, and arbitrators to assist settlements.

New Sec. 122: Settlement Agreements
With Potentially Responsible Parties

(a) AUTHORITY TO ENTER INTO AGREEMENTS. — If the President determines that voluntary response action will be done properly or that voluntary reimbursement of the Fund will be adequate, the President shall enter into an agreement with any person who is a potentially responsible party (PRP) under this Act for remedial or response costs or damages to natural resources, to perform any response, remedial or abatement action described in sections 104 or 106 or to reimburse the Fund for response costs.

(b) KINDS OF SETTLEMENT AGREEMENTS. —

(1) SETTLEMENTS TO PERFORM REMEDIAL ACTION; MIXED FUNDING AND ORPHAN SHARE. — An agreement to perform remedial action shall:

(A) provide that the President will finance from the Fund as the orphan share any portion of liability which the President determines is the responsibility of a party (i) who no longer exists and whose liabilities have not been assumed by another person, or (ii) who is not solvent or is unidentified, or is similarly unavailable or otherwise not legally responsible;

(B) provide that the President will finance from the Fund mixed funding of any appropriate portion, up to 35%, to cover an aliquot share of viable PRPs that do not participate in the settlement agreement; and

(C) provide a covenant not to sue those PRPs that agree to reimburse the Administrator for the Agency's past response costs, to implement the remedial action approved by the Administrator, and to fund at least 65% of the cost of said remedy with said parties contributing in the aggregate an amount that is equal to the Administrator's assessment of their fair share contribution to the damages as reflected in the Final Allocation Report (FAR).

(2) FAIR SHARE SETTLEMENTS TO PAY RESPONSE COSTS. — An agreement under this section shall provide for a covenant not to sue any PRP that enters into a binding consent order or decree by which it must fund its percentage share, according to the Administrator's Final Allocation Report, of those past and future response costs covered by said report, including orphan share.

(3) CASH SETTLEMENTS WITH *DE MINIMIS* PRPS. — An agreement under paragraph (b)(2) of this section shall provide for a final settlement with, and a release under sections 106, 107 and 113 from all response cost, natural

resources damage, and contribution liability for, any PRP whose contribution to the facility is *de minimis,* if:

(A) The amount of the hazardous substances contributed by the party to the facility is minimal (e.g. one (1)% by volume) in comparison to the total hazardous substances causing or contributing to the problem; and

(B) The hazardous effects and remedy costs attributable thereto caused by the substances contributed by that party are not significantly greater than those of other hazardous substances at the facility.

(C) The President organizes settlements and facilitates. The President shall provide a facilitator in each Regional Office responsible for fostering and promoting *de minimis* settlements and shall provide notice of the opportunity to settle as a *de minimis* party as soon as practicable.

(D) Premium schedule. The President, through rulemaking with formal notice and comment, shall set a premium schedule as guidance for *de minimis* settlements based on, but not exclusively, these criteria: the point in the process settlement is offered, the outstanding risks and uncertainties at the site, the extent of the release offered by the President.

(c) PROCEDURES AND INFORMATION FOUNDATION FOR ALLOCATION. —

(1) SITES LISTED ON THE NATIONAL PRIORITY LIST (NPL) AFTER ENACTMENT OF THIS ACT. — After the effective date of this act no site can be proposed for listing on the National Priority List (NPL), unless the Administrator has already compiled, provided Federal Register notice of, and made publicly available the following:

(A) a comprehensive, preliminary list of all the PRPs identified to date, separately identifying owners/operators, generators and transporters;

(B) a comprehensive, preliminary inventory of all the records of site use available to date;

(C) a detailed description of the site's operational history and the environmental conditions known or threatened that are of concern;

(D) all responses to a section 104(e) request (which shall consist of comprehensive interrogatories and document production requests accompanied by a subpoena) made of each PRP known to the Agency, separately identifying each PRP that appears not to have responded completely to any said request; and

(E) the response of all known site owners and operators, transporters and state regulatory agencies to a subpoena issued by the Agency for the production of all documents identifying PRPs or describing site use activity.

(2) SITES LISTED ON THE NPL AFTER ENACTMENT OF THIS ACT. — At the time a site is proposed (in the Federal Register) for listing on the NPL, EPA must publish an Advanced Notice of Proposed Rulemaking (ANPR), based on the above-stated information, describing the Agency's preliminary and tentative views on an allocation among PRPs of response costs for the site and inviting written public comment on those views as well as on alternative allocation approaches. Said public comment period on the ANPR shall be kept open and commensurate with the Agency's comment period on the proposed NPL listing for the site.

(3) After the effective date of this act, in approving an RI/FS Work Plan and a final RI/FS, the Agency shall:

(A) assure that the RI/FS investigates and evaluates the operational history of the site; the nature, locations, and causes of environmental damage at the site; and the question of remedy causation as these and other technical factors may bear on the issue of divisibility of harm and response cost allocation;

(B) make available to the identified PRPs the final RI/FS as well as periodic interim reports on the status and data developed during the progress of the RI/FS.

(4) As to any site or operable unit of a site for which the RI/FS was not initiated prior to the effective date of this act, EPA shall, at the time it approves the RI/FS Work Plan, propose in the Federal Register and take written comment from the PRPs on a preliminary Final Allocation Report (FAR) for allocating the response costs incurred and to be incurred for the site or for any appropriate operable unit or other divisible portion of the site. The PRP comment period on the preliminary FAR shall remain open until 60 days after the final RI/FS is approved and has been made publicly available.

(5) SITES LISTED ON NPL PRIOR TO ENACTMENT OF THIS ACT. — As to any site or operable unit of a site for which a Record of Decision has not been issued but for which the RI/FS was initiated prior to the effective date of this act, at least 60 days before issuance of the ROD, the Administrator shall propose and take written comment from the potentially responsible parties on a preliminary FAR for allocating the response costs incurred and to be incurred for the site or for any appropriate operable unit or divisible portion of the site.

(6) The FAR shall include an evaluation and proposed findings on the orphan share and *de minimis* share as necessary to enter into the settlements required by subsection (b) hereunder. The FAR shall not include a proposed allocated share of responsibility for, but shall define as jointly and severally liable, any PRP that fails to respond completely to any request for information or documents under section 104(e). The FAR shall contain information concerning the following:

(A) The identity of other notice recipients, including those parties which may be unknown, insolvent, or immune from liability pursuant to this section or any other provision of the Act.

(B) The volume and nature of hazardous substances contributed by each potentially responsible party identified at the facility, to the extent such information is available, including, but not limited to, toxicity and mobility of the identified hazardous substances and their remedy causation, i.e., the relationship between identified hazardous substances and the necessity of incurring response costs.

(C) The extent to which the harm is divisible or can be reasonably apportioned among PRPs because contributions to the discharge, release, or disposal of a hazardous substance or the response costs can be distinguished; and/or because of the degree of involvement by the PRPs in the generation, transportation, treatment, storage, or disposal of the hazardous substance; and/or because of the degree of care exercised by the PRPs with respect to the hazardous substances concerned, taking into account the characteristics of such hazardous substance; and/or because of the degree of cooperation by the PRPs with Federal, State, or local officials to prevent harm to public health or the environment.

(D) A ranking by volume of the substances contributed by identified potentially responsible persons, including the orphan share based on the volume of substances contributed by persons that are unidentified, insolvent or similarly unavailable.

(E) A non-binding allocation, according to pro rata shares of response costs, among all identified PRPs that have complied fully with all requests for information hereunder.

(7) The Final Allocation Report shall be adopted and made available no later than the date on which EPA adopts the Record of Decision. EPA shall publish in the Federal Register notice of the availability of the FAR. The FAR shall be subject to judicial review only in accordance with subsection (e) hereunder.

(d) NEGOTIATION, ARBITRATION AND SETTLEMENT PROCEDURES. —

(1) MORATORIUM. For 165 days after issuance of the FAR, the Administrator may not commence enforcement action against any PRP assigned a share of responsibility therein, except that unilateral administrative orders under section 106 may be issued by the Administrator to abate an emergency.

(2) FAIR SHARE SETTLEMENTS TO PAY RESPONSE COSTS. — The Administrator shall enter into a settlement of liability with respect to any PRP that --

(A) enters into a binding consent order or decree by which it must pay its percentage share, according to the FAR, of past and future response costs; or

(B) enters into a *de minimis* consent decree.

(3) SETTLEMENT PROPOSALS TO PERFORM REMEDIAL ACTION. — PRPs shall have 45 days from the date of notice of the FAR to make a "good faith" offer to reimburse the Agency for any past response costs and to undertake remedial action. If a "good faith" offer is received by EPA there will be a 120-day negotiation period, unless the offer is tendered by fewer than ten PRPs, in which case there shall commence a 60-day negotiation period.

(4) The Administrator shall enter into a Settlement to Perform Remedial Action with those PRPs that agree to reimburse the Agency for past response costs, to implement the future remedial action approved by the Administrator, and to provide payment of at least 65% of the said past response costs and future remedial action, with each settling PRP funding an amount equal to its apportioned responsibility according to the FAR.

(e) ADDITIONAL POTENTIALLY RESPONSIBLE PARTIES. — If an additional potentially responsible party is identified during the FAR process, or the negotiation period, or after an agreement has been entered into, the Administrator may where timely and not prejudicial to other settling PRPs invite the additional party into the allocation process or the settlement negotiation, or where appropriate to encourage settlements, enter into a separate agreement with such person.

(f) BINDING ALLOCATION OF RESPONSIBILITY; ADMINISTRATIVE LAW JUDGE (ALJ) SETTLEMENT CONFERENCE AND ADJUDICATION. —

(1) Every PRP who does not enter into a settlement agreement with the United States within 165 days from the date of notice of the FAR shall have its liability adjudicated by an Administrative Law Judge (ALJ) hereunder.

(2) No case assigned to ALJ adjudication may go to adjudication unless it has gone through a special settlement conference in which the ALJ:

(i) having reviewed the FAR and any objections to the same filed by any non-settling PRP, has discussed with each non-settling PRP and EPA the ALJ's preliminary views on their objections and respective positions; and

(ii) otherwise fostered and facilitated settlement efforts on issues of liability and response cost allocation.

(3) Procedural and Substantive Requirements of ALJ Adjudicatory Proceedings.

(i) At the Agency's discretion, the FAR may be admitted into evidence and become part of the ALJ adjudicatory hearing record but its evidentiary weight as to any objecting non-settling PRP is to be determined by the ALJ.

(ii) The ALJ must conduct a hearing de novo on the record as to the liability and allocation of responsibility for non-settling PRPs.

(iii) The ALJ hearing must provide for procedural due process, including discovery, a right to call witnesses and a right of cross-examination.

(iv) In the ALJ proceeding, EPA shall bear the burden of proof on liability and on the issue of orphan share. If EPA alleges joint and several liability, EPA shall have the burden of going forward to demonstrate that the harm is indivisible and not reasonably capable of apportionment. Each non-settling PRP has the burden of proof on any divisibility of harm defense.

(v) The final decision of the ALJ shall contain findings of law and fact as to the liability, the scope of liability, and the share of response cost to be allocated to each non-settling PRP and as to the orphan share of liability to be paid by the Fund.

(vi) The ALJ's final decision shall be binding unless it is appealed to EPA's Environmental Appeals Board (EAB).

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The EAB shall affirm the ALJ unless there is an error of law or the ALJ decision is not supported by the substantial weight of the evidence. The EAB decision may be reviewed by the U.S. Court of Appeals based on error of law/arbitrary and capricious standard.

(vii) Every non-settling PRP shall be obliged to pay its liability as determined by the ALJ. Said determination may include as appropriate (a) joint and several liability for any response cost not already paid or to be paid pursuant to a settlement hereunder, or (b) an apportioned share of response costs based on a divisibility of harm defense or the "Gore factors". Where the ALJ's final determination results in a joint and several liability judgment against any non-settling PRP(s) or a liability judgment for an apportioned share that exceeds the share of responsibility assigned to said PRP(s) in the FAR, said PRP(s) shall also be liable to pay for the cost of the ALJ proceeding, EPA's enforcement cost to initiate and complete said proceeding, and each said PRP's aliquot share of the orphan share.

(g) **FUNDING REQUIREMENTS.** —

(1) The Administrator shall require parties entering any settlement agreement to post a performance bond, letter(s) of credit, establish a trust account, or execute other suitable surety agreement, to assure future funding of response action as required under said agreement.

(2) In order to reimburse the Fund for EPA's past response costs and to assist in funding any on-going remedial action, pending the completion of adjudication before the ALJ and appeals therefrom, each PRP participating in the adjudication procedures under this section shall provide interim funding based on the allocation of responsibility set forth in the FAR, with appropriate crediting of any overpayments after final judgment.

(h) **FORM AND EFFECT OF SETTLEMENT AGREEMENTS WITH POTENTIALLY RESPONSIBLE PARTIES.** —

(1) FORM. — Settlement agreements with PRPs shall take the form of a consent decree subject to approval by the Attorney General, if required by this section, and entered in the appropriate United States district court; an administrative consent order issued by the President; and a covenant not to sue binding on the United States. The President need not make any finding regarding

an imminent and substantial endangerment to the public health or the environment in connection with any such agreement or consent decree.

(2) EFFECT. —

(A) Any settlement agreement under this section shall be enforceable under the Act by the parties thereto in the United States district court for the district in which the release or threatened release occurs. Any party who violates the requirements of such a settlement agreement shall be liable for a civil penalty in an amount not to exceed $25,000 for each day of violation.

(B) Neither a settlement agreement, an attempt to reach such agreement, nor participation in a settlement agreement shall be considered an admission of liability for any purpose or admissible in any judicial or administrative proceeding, except in a proceeding by a party to the agreement to enforce such settlement agreement.

(C) If an agreement has been entered into under this section, the President may take any action under this Act against any person who is not a party to the agreement, once the period for submitting a proposal under this subsection has expired.

(D) Nothing in this subsection shall --

(i) limit the President's authority to undertake response action regarding an imminent threat to public health or the environment, or

(ii) limit the liability of any person under this Act with respect to any costs or damages which are not covered in a settlement agreement under this section, or

(iii) limit the authority of the President to maintain an action under this Act against any person who is not a party to a settlement agreement.

(i) RELEASES FROM LIABILITY. —

(1) COVENANTS NOT TO SUE. —

(A) The President shall, according to the factors set forth herein, provide any person with a covenant not to sue under this and any other federal Acts for any future liability that may arise out of or be related to a release or threatened release of a hazardous substance addressed by a voluntary remedial action if (a) The covenant not to sue would expedite response action consistent

with the National Contingency Plan under section 105 of this Act and (b) the person is subject to a consent decree requiring response, remedial or abatement action under this Act that has been approved by the President and is consistent with National Contingency Plan.

(B) Factors. In assessing the appropriateness of a covenant not to sue for future liability, the President shall consider whether the covenant is in the public interest on the basis of such factors as the following:

(i) The effectiveness and reliability of the remedy, in light of the other alternative remedies considered for the facility concerned.

(ii) The nature of the risks remaining at the facility.

(iii) The extent to which performance standards are included in the consent decree.

(iv) The extent to which the voluntary response action provides a complete remedy for the facility, including a reduction in the hazardous nature of the substances at the facility.

(v) Whether the Fund or other sources of funding, including any premiums paid to the President by persons obtaining covenants under this section, would be available for any future remedial actions that might eventually be necessary at the facility.

(j) CONTRIBUTION: PROTECTION AND DISCHARGE. —

(1) COST RECOVERY. — Except as provided in this section, no party alleged or held to be liable in an action under section 106 or 107 may bring an action for cost recovery under section 107 and may only bring an action for contribution or indemnity under section 113 (f) against any other person liable or potentially liable. In any such action in a court of the United States the Federal Rules of Civil Procedure shall apply. Except as provided in paragraph (2) of this subsection, this subsection shall not impair any right of contribution or indemnity under existing law.

(2) CLAIMS FOR CONTRIBUTION. — When a party has resolved its liability to the United States in a judicially approved good-faith settlement or in a consent order with the Administrator, such person shall not be liable for claims for contribution, indemnity or cost recovery regarding matters addressed in the

settlement. Such settlement does not discharge any of the other parties unless its terms so provide, but it reduces the claim against the others to the extent of any amount stipulated by the settlement.

Nothing in this subsection shall affect or modify in any way the rights the United States, a State, or any person that has resolved its liability to the United States or a State in a good-faith settlement, to seek contribution or indemnification against any persons who are not party to a settlement under this section. Any contribution action brought under this subsection shall be governed by Federal law. In any such action under this subsection for contribution the rights of a State and person shall be subordinated to the rights of the United States.

(k) COST ACCOUNTING; MORATORIUM ON MIXED FUNDING AND ORPHAN SHARE CONTRIBUTION BY THE FUND. —

(1) ACCOUNTING OF ALL COSTS. — The Inspector General of the Agency shall keep an accounting of all its costs, including prorated administrative costs, expenses, and charges, for two years (24 months) after the effective date of this Act.

(2) REPORT TO CONGRESS. — Based on the findings and conclusions of the Inspector General, the President shall prepare and present a report to Congress on the status and costs to date of all remedial and enforcement actions undertaken during this period no later than 30 months of the effective date of this Act.

(3) MORATORIUM. — If according to the findings supported in the Report, the overall average (mean) costs from the Fund and to EPA is twenty percent higher in comparison to the average cost per site accounted to the previous 200 sites fully remedied on the National Priorities List, as determined by the Inspector General of the Agency, a moratorium shall be put on the use of mixed funding, and/or orphan shares under the program.

(4) GUIDANCE FROM CONGRESS. — In submitting this report to Congress, the President shall ask for further guidance on using the Fund to pay for mixed funding and/or orphan shares in the future, in the event a moratorium has been triggered.

(5) EFFECT OF NO ACTION BY CONGRESS. — Unless Congress acts to the contrary within six months (180 days) of its receipt of this Report, any moratorium triggered under this subsection shall be lifted automatically.

(l) CLEARINGHOUSE OF INFORMATION. —

(1) CURRENT CLEARINGHOUSE. — The President shall establish, maintain, and make available to the public, interested parties, and its regional offices a current clearinghouse of information on settlement agreements, observing confidentiality in all matters; including rosters of qualified facilitators, mediators, and arbiters; consent decrees and releases; model cleanup agreements; and other pertinent information.

(2) PUBLIC INFORMATION AVAILABILITY. — Public information regarding successful agreements entered into between the Agency and PRPs shall be compiled no later than one-year after the effective date of this Act, and updated on a quarterly basis thereafter.

(3) DATA TRANSMISSION NETWORK. — A data transmission network shall be established that is compatible with common computer technology used by the regional offices, potentially responsible parties, public officials, and public interest groups, and shall be accessible for daily access to pertinent information.

TH93D4

State of New Jersey
Department of Environmental Protection and Energy
Site Remediation Program
CN 028
Trenton, NJ 08625-0028
Tel. # 609-292-1250
Fax # 609-633-2360

Jeanne M. Fox
Acting Commissioner

Lance R. Miller
Assistant Commissioner

January 19, 1994

Honorable Frank Pallone, Jr.
5th District
540 Broadway
Suite 118
Long Branch, NJ 07740

Dear Congressman Pallone:

RE: CERCLA Reauthorization - Personal Liability

As a result of discussions with Gina Cioffi of your office, First Assistant State Environmental Prosecutor Charles Licata and myself have considered the possibility of imposing liability on individuals involved in the improper disposal of hazardous waste that may be useful to you during the CERCLA reauthorization discussions that are currently ongoing.

New Jersey's companion statute, the Spill Compensation and Control Act, provides that a broadly defined person who is "in any way responsible" for the discharge of a hazardous substance is liable for the costs of the cleanup. We have now successfully used this statutory language, in conjunction with the extensive legislative history that surrounds it, to pursue individuals when corporate entities have proven unavailable (either owing to dissolutionment, bankruptcy or other reasons) for recovering cleanup costs incurred by the state or, alternatively, for requiring these individuals to implement cleanups on their own.

While CERCLA does include a broad-based joint and several liability scheme, along with the language that individuals can be held liable, our experience in this matter has been that this is rarely pursued. It is my belief that a strong statement during reauthorization, accompanied with the appropriate legislative statements in the record regarding Congress' intent that EPA pursue individuals who are responsible for hazardous waste discharges would go a long way in persuading EPA to utilize this important tool.

I am advised by my lawyers that this matter is complicated owing to our legal system's lengthy history of deference to corporate entities, but that Congress is in a position to make itself clear in this regard. In our experience, this has been particularly true in smaller, closely held corporations where often management of the company is intimately involved in the manufacturing and waste disposal activities. It is in these situations, in particular, that we have found the availability of pursuing individuals to be especially useful. This is primarily the case because these companies have the propensity for availing themselves to the protection of the Bankruptcy Code and tend to have corporations that are under capitalized, thus being unable to cover the cost that may be incurred in a large scale cleanup. While there is no guarantee that the individual's assets would be anymore available, or that the individual would not avail themselves of protection of the Bankruptcy Code, our experience is that cooperation is much more forthcoming when individuals and individual assets are pursued aggressively.

In summary, CERCLA could have a broadened liability standard that would clarify that individual liability is an available option for EPA in those situations where an individual can be tied to the discharge or, alternatively, the legislative history could be "beefed up" to make clear to EPA that it is the policy of the Congress that individuals be pursued vigorously in order to assure that taxpayers do not foot the bill for hazardous waste cleanups when other alternative payment sources are available.

In the event I can provide additional information or assistance to your during the CERCLA reauthorizations, please do not hesitate to contact me.

Sincerely,

Lance R. Miller
Assistant Commissioner

kaw
c: Charles A. Licata, First Assistant State
Environmental Prosecutor

ALTERNATIVE DISPUTE RESOLUTION IS NEEDED FOR SUPERFUND REMEDIES

By Bradford F. Whitman

NEED FOR REFORM

It is time for the reformers of EPA's Superfund Program to address the remedy selection and review process and to consider the use of Alternative Dispute Resolution ("ADR") techniques as means of resolving remedy challenges. So far, most of the focus of Superfund reform has been on the liability and apportionment phases of cost recovery litigation under the Comprenensive Environmental Response, Compensation and Liability Act ("CERCLA"). The Environmental Protection Agency initially attempted to blunt criticism of CERCLA by bringing some elements of "fairness" into the joint and several liability scheme through the early identification of de minimis parties and the expanded use of investigative techniques to ensnare all persons who may have generated hazardous substances. Recently, EPA has adopted the concept of "presumptive remedies," a set of standardized clean-up methods that have been proven effective at certain types of sites and that could be implemented without extensive study. BNA Environment Reporter, Current Developments, Vol. 24, No. 29 (November 19, 1993). However, the fact remains that many Superfund remedy disputes are already in the district courts and

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Mr. Whitman is a partner in Reed Smith Shaw and McClay in Philadelphia, Pennsylvania. Before entering private practice, he was a trial lawyer and Assistant Chief of the Pollution Control (now Environmental Enforcement) Section in the U.S. Department of Justice in Washington, D.C.

EPA has refused to reconsider these remedies despite huge $100-to-$300 million clean-up costs and no commensurate benefits to the environment or public health. These cases will not be settled and private clean-ups will not go forward until methods are found to bring science and cost-effectiveness back into the decision-making and remedy review process.

BRINGING SCIENCE INTO THE DECISION-MAKING

CERCLA ROD's adopting clean-up remedies are issued by EPA Regional Administrators, not by panels of scientific experts. These appointees, by and large, have no scientific training and are sensitive primarily to policy concerns. Putting aside political influence as a factor that skews decision-making, we are still confronted with a flawed system that divorces science from the ultimate selection process. EPA has abdicated to outside contractors the role of performing the critical site investigation, risk assessment, and feasibility study duties, but in the end these contractors do not actually select remedies. The contractors are under instructions only to screen remedies for EPA's selection. When private parties criticize the remedies, EPA farms out the critiques for response to the same contractors who screened the remedies in the first place. The EPA contractors usually defend their screening process and reject criticisms from competing engineering firms. EPA provides no "check-and-balance" on its contractors because it does not have the in-house technical capability to assess which expert is right. This is a very different situation from that in other EPA programs where, for

example, air, water and pesticides regulators have knowledge and training in the area or obtain back-up from EPA technical experts in Triangle Park or at other EPA facilities.

One solution to this problem is to bring science back into the decision-making process by allowing "peer review" of the scientific reports by a standing committee of experts similar to EPA's Science Advisory Board. The Science Advisory Board provides peer review with respect to toxic substances, pesticides and in other technical areas. The Board could be strengthened with experts in the relevant CERCLA disciplines such as hydrogeology. Overall, EPA would be much better able to make informed decisions if it had the institutional experience from technical review of Superfund cases across the country.

An example of EPA's remedy selection gone awry is one recent landfill case in Region II where the "offsite" component of the remedy cost increased from the ROD estimate of $20 million to $50-75 million. (This was in addition to a $50 million "onsite" remedy.) EPA had decided to dig up a marsh, a lake and portions of two streams that were downgradient from the landfill. After the ROD, EPA collected new data to assist in the design of the remedy. The PRP's and EPA disputed the consequences of the new data. Contaminant levels in many areas decreased but EPA decided to double the size of the soil excavation. Despite the magnitude of the changes, EPA maintained that the remedy was not sufficiently altered to warrant a new analysis of alternatives or even a new risk assessment based on the new data. The PRP's experts showed that no excavation was needed to achieve EPA's 10^{-6}

risk levels. Ultimately, the Agency countered the PRP's petition for a new ROD by issuing a Section 106 Administrative Order directing the PRP alone to perform the entire remedy, under threat of treble damages and penalties. Unwilling to risk the expense and outcome of further litigation, the company decided to accede to EPA's request and to abandon its remedy challenge.

The outcome of this case seems a perversion of Superfund. A single private company was forced to spend up to $75 million (in addition to the onsite landfill clean-up of $50 million) for what appeared to be an unnecessary remedy, and the company was effectively deprived of any objective review of EPA's action.

REMEDY REVIEW

In view of the large number of CERCLA actions filed by EPA, we find it significant that only a handful have proceeded to a trial of the remedy claims. The courts and EPA have struggled mightily to avoid having to litigate a PRP's objections to an EPA remedy. The district courts, on their part, have been very hesitant to devote the amounts of time needed to review the lengthy and complex administrative records. Certainly part of this reluctance is understandable, given the tremendous workloads, civil and criminal, facing most district judges where CERCLA matters are pending. The review of CERCLA remedies is more akin to the function of an appellate court faced with a lengthy record on appeal. But not all judges have shied away from a complex CERCLA remedy review. There have been two highly-publicized

opinions reversing EPA's selection of remedies, the first in a Section 106 injunctive action and the second in a Section 107 cost recovery action: U.S. v. Hardage, ("Hardage II") 750 F. Supp. 1460, 21 Envtl. L. Rep. 20721, (W.D. Okla., Aug. 1990, amended, Oct. 16, 1990) and In the Matter of Bell Petroleum Services, Inc., 3 F.3d 889, 1993 U.S. App. LEXIS 24892 (5th Cir. 1993).

Judge Phillips in Hardage "reverse bifurcated" an injunctive action so that remedy was tried before liability; he completed trial of the remedy phase in only 11 days. The streamlined non-jury trial included the submission of witness affidavits in lieu of direct examination on most points. The parties were allowed an opportunity to present both supplemental direct examination and full cross-examination. The court reviewed the testimony of all 45 trial witnesses and more than 8,000 pages of affidavits and deposition transcripts, 250 pages of stipulations and more than 470 exhibits. There is no question that Judge Phillips provided meaningful judicial review of EPA's Hardage remedy.

However, one should not overlook the enormous consumption of time, effort, and resources that preceded Judge Phillips' ruling. The first Hardage lawsuit was filed on behalf of EPA in 1980 before a different judge. See, U.S. v. Hardage ("Hardage I"), 1982 WL 170983, 18 Env't Rep. Cas. (BNA) 1687 (W.D. Okla. 1982). The second Hardage suit was filed in 1986 against certain generators and transporters. In Hardage II, EPA sought injunctive relief under Section 7003 of RCRA and 106(a) of CERCLA, 42 U.S.C. 6973 and 42 U.S.C § 9606(a) to require the defendants to

clean-up the site; also, EPA sought recovery of costs under Section 107 of CERCLA, 42 U.S.C. § 9607. The Hardage remedy trial was conducted de novo because the case was originally instituted as an injunctive proceeding. (EPA later completed its ROD and attempted, unsuccessfully, to limit review to the administrative record and to invoke the arbitrary and capricious standard of review.) However, the court emphasized that the outcome would have been the same "under any standard of review." A special master had been appointed by the court for pretrial and settlement matters, but he played no role in the remedy trial. Mediation efforts by the master had failed.

The Hardage II opinion dismembered EPA's excavation remedy. In the court's words, the "government's proposed remedy changed so many times during the course of this litigation, and in such drastic measures, that the court lost confidence in the deliberative process underlying the government's final proposal." 750 F. Supp. at 1475. Excavation was selected, according to the court, without adequate consideration of site characteristics and based on incomplete information and incorrect assumptions about feasibility, effectiveness, benefits, cost, risk to workers and "compatibility" with other remedy components and the views of the state. Id. at 1481. The court concluded that a slightly modified version of the defendants' containment-and-groundwater pumping remedy was adequately protective of public health and the environment.

The most recent remedy review decision is the Bell Petroleum case, a Section 107 cost recovery action. The Fifth

Circuit reviewed, on the record, an EPA ROD requiring the extension of a public water supply. EPA, as usual, pleaded for "deference" to its expertise. However, the court characterized EPA's position as a request for a "blank check in conducting response actions," which the court declined to give. At the heart of the opinion was a finding that no persons were actually consuming chromium-contaminated water and therefore no one would benefit from the water supply line.

There are many other Superfund cases now pending in which litigation is expected to continue for years. Elaborate "settlement protocols" have been adopted by several courts as structures for effectuating a negotiated settlement. None of these protocols satisfactorily addresses the basic issue of how to resolve remedy disputes.

REPORTED USE OF ADR

There have been very few reported CERCLA decisions describing the use of ADR. In one New Jersey case, the district court approved a settlement that provided for the allocation of PRP shares by an arbitrator. The intervenors opposed the decree on the grounds that they believed allocation should be based only on volume of waste, not on all of the other equitable factors. See, U.S. v. Acton Corp., 733 F. Supp. 869 (D.N.J. 1990) (Lone Pine Landfill). The Acton case did not involve ADR with respect to the EPA remedy.

Another court has compelled arbitration of a CERCLA cost recovery claim by a buyer against a seller where the agreement of

sale provided for binding arbitration of all disputes. The court found that there was no statutory provision in CERCLA that prevented the use of binding arbitration between private parties. The government was not a party to this case. See, Disston Co. v. Sandvik, Inc., 750 F. Supp. 745, 749 (W.D. Va. 1990). Finally, the U.S. District Court for the Eastern District of Wisconsin has referred a private cost recovery action to a mediator pursuant to local court rules. See, Sauk Cty. v. Grede Foundries, Inc., 145 F.R.D. 88, 91 (E.D. Wis. 1992).

CERCLA itself does contain one provision that specifically authorizes binding arbitration, but only where total response costs do not exceed $500,000. CERCLA § 122(h)(2), 42 U.S.C. § 9622(h)(2). This provision, which became law in 1986, appears to have been of no real use since the average cost for a remedial investigation/feasibility study alone at a Superfund site exceeds $500,000. CERCLA neither authorizes nor bars the use of non-binding ADR for remedy disputes.

There is precedent for the mandatory use of ADR in the Pennsylvania Hazardous Sites Cleanup Act of 1988 ("HSCA"), 35 P.S. § 6020.700. HSCA requires the Pennsylvania Department of Environmental Resources in all cases where there are multiple PRP's to select and conduct one form of ADR to determine the parties' proportionate shares of response costs and the "appropriate response action to be taken." If no agreement is reached through ADR, the parties are free to resort to litigation. HSCA imposes a moratorium on litigation by PADER until the ADR is completed. PADER's track record to date in using ADR under HSCA

is weak, partly because of the difficulty of performing the allocations of responsibility among multiple parties. Because HSCA specifies a joint ADR on both the allocation issues and the remedy issues, the Pennsylvania experience will not be a good model for the remedies mini-trial we recommend under CERCLA. Although we recognize that ADR may be helpful to resolve allocation issues, we advocate mini-trials in this paper for resolving remedy disputes.

ADVANTAGES OF MINI-TRIALS

Before exploring the appropriateness of ADR, we should make clear at the outset that our recommendation should not be perceived as favoring one side or the other in Superfund cases. In fact, both EPA, as protector of the environment and human health, and the PRP's seeking cost-effective solutions stand to gain from the use of ADR to resolve remedy challenges. At the present time, huge sums of money are being diverted away from clean-up to "transaction costs." In addition, there are enormous delays resulting from the cumbersome civil litigation process. Private parties are not willing to take over remedies because they have been alienated from the remedy selection process. Many of these problems could have been avoided if a mechanism had been in place for EPA to reevaluate realistically its own remedy selection and to have the benefit of an objective, independent appraisal. ADR can provide this opportunity. If ADR succeeds as we expect that it would, there would be many more private party clean-ups,

and the pace of these actions would undoubtedly be a lot faster than in government-contracted remediation.

The concept of ADR in environmental enforcement cases was first explored by EPA itself in 1987. See, Environmental Protection Agency, Office of Enforcement and Compliance Monitoring, Guidance on the Use of Administrative Dispute Resolutions Techniques in EPA Enforcement Cases, Dir. No. 9834.12 (Aug. 14, 1987). EPA's Guidance encouraged the use of ADR techniques in enforcement cases where the following circumstances are present:

1. An impasse in negotiations between the government and private parties;

2. A large number of parties with conflicting interests;

3. The existence of difficult technical issues that may "benefit from independent analysis;"

4. An unwillingness on the part of the court to enter into complex matters; and

5. A "high visibility" making it difficult for the parties to settle.

All of these factors are present in the Superfund cases where there are major remedy disputes.

The Guidance defines four types of ADR: mediation, arbitration, fact-finding and mini-trials. Mediation has certainly been the most often-attempted form of ADR in Superfund cases, either through the efforts of the U.S. District Judge or Magistrate Judge or through submission of information to private remediation consultants selected by the parties and approved by

the court. Mediation, however, has been of very limited value in challenges to EPA's remedies.

Mediation was used by a Magistrate Judge in one of the earliest and most celebrated cases in New Jersey: U.S. v. Charles Price, et al., 523 F. Supp. 1055 (D.N.J. 1981). In this case, the Magistrate Judge first attempted to mediate a dispute between EPA and the PRP's as to the nature and extent of the remedy at the site, but he soon concluded that mediation with EPA as to the type of remedy was impossible. EPA took the position that its remedy selection was sacrosanct. Fortunately, when the issue was shifted to the monetary amount demanded by the Government, the parties were able to arrive at a compromise and then to allocate the settlement payment among the PRP's.

Price holds two lessons for us: first, that EPA has great difficulty perceiving the weaknesses in its favored remedies and second, that mediation works where the amount in controversy is manageable ($17 million in that case) and there is a sufficient number of PRP's to pay the bill. Today, the average remedy cost is $30 million. Mini-trials have a much better chance of succeeding where mediation fails because, through a mini-trial, both sides are forced to hear first-hand the evidence and to recognize the weaknesses in their remedy cases and also because the ADR, as we propose it, would be conducted before high-level principals who do not have a vested personal or political interest in the ROD.

Of the four forms of ADR discussed by EPA in the Guidance, "mini-trial" appears most promising for resolving

remedies challenges. A mini-trial is an abbreviated flexible form of hearing that is held without the constraints of the Rules of Evidence. Instead of taking weeks for a full trial, a mini-trial is typically held over a couple of days. The mini-trial is presided over by principals from both of the two sides and a third-party neutral appointed by them. In the case of a Superfund remedy challenge, the government and the PRP's would present their case to a vice-president or other management official and to a senior EPA representative. It is vital that the principals not be the decision-makers or persons who have already committed themselves with respect to the remedial decision. The neutral third-party, who would serve as an adviser to the principals, would probably have technical expertise that would be relevant to the remedy selection. This individual could have training in the field of toxicology, engineering, or hydrogeology. Some lawyers have practiced sufficiently in the area to have become qualified as neutrals for the purpose of such a mini-trial.

Each side in the mini-trial would be required to present its case in a day or two by using summary expert testimony, exhibits and visual aids, and well-prepared argument. One of the great advantages of the mini-trial would be that it would force both sides to understand the facts and conclusions of the experts regarding the remedies. Many remedy impasses are caused by one or both sides not having taken the time to become familiar with the basic record and critical facts regarding the nature of the contamination, the exposure pathways, the actual or potential

risks presented by the contaminants, and the cost and feasibility of different remedial alternatives.

At the end of the mini-trial presentation, each of the principals would formulate an opinion as to the likelihood of success on the merits of the different arguments. In some mini-trials the principals prefer to exchange their reactions first, before hearing from the neutral party. In this fashion, the principals may be encouraged to settle the case without having the balance upset by the neutral favoring one side or the other. The neutral can continue to play a role afterwards by mediating a compromise between the two sides.

An initial question is when should a mini-trial of an EPA remedy be made available to the parties. Under CERCLA in its present form, the parties are prevented from "pre-enforcement" challenges to EPA's remedy selection. See, Section 113(h), 42 U.S.C. § 9613(h). There may be a significant delay between EPA's adoption of a remedy and a ROD and the filing of an enforcement action. Furthermore, even when an enforcement action has been filed, EPA typically moves the court to enter a case management order that would postpone remedy review until after liability has been established and even until after allocation of shares has been determined among the PRP's. If this course is followed, the litigation will be prolonged and global settlement efforts will fail.

Since remedy issues are often driving the parties to take the positions they do in litigation, it stands to reason that an early review of the critical remedy issues, even by non-binding

mini-trial, would promote a more rapid settlement of the cases. Hypothetically, we would envision that CERCLA be amended to provide for ADR as soon as a ROD is issued and the parties have reached an impasse in negotiations. There is no reason to postpone a remedy mini-trial until the filing of an enforcement action if the major PRP's are already known and there is a fundamental dispute regarding the nature and cost of the clean-up remedy.

Of course, a mini-trial is not binding on the parties. Experience has shown in many areas that this form of ADR is successful in bringing adversaries to a compromise. Mini-trials have received high praise from general litigators because they save substantial costs, allow parties to feel that they have had their day in "court," are flexible and can be structured in different ways to suit the situation and the personalities, are non-binding, preserve confidentiality, and take the dispute out of the public arena, thereby fostering candor and a spirit of compromise. See, L.J. Fox, Mini-Trials, in 19 Litigation, No. 4, 36 (Summer 1993).

One year after the EPA Guidance on ADR was issued, an article was written by a commentator strongly advocating the increased use of ADR by EPA, especially in Superfund cases. See, R. Mays, Alternative Dispute Resolution and Environmental Enforcement: A Nobel Experiment or a Lost Cause?, Envtl. L. Rep, News & Analysis, Vol. XVIII (March 1988). Mays warned of disincentives on the part of the Department of Justice and other government attorneys to employ ADR. This reluctance springs from

the fact that government attorneys are generally insensitive to the cost of litigation and the enormous amounts of wasted time and resources. In fact, government lawyers see these burdens as weapons they can use against private companies. Also, the government is reluctant to enter into ADR because it worries that its image may be tarnished with suspicions of "backroom" deals. These attitudes are most unfortunate since, as mentioned above, there is much to gain for both sides. Perhaps the attitudes would be different if EPA and DOJ staff had their performance measured by the successful completion of clean-ups.

As far as the issue of public participation is concerned, it is true that in order to succeed, mini-trials have to be conducted outside of the public arena, like any settlement proceeding, in a manner that allows each side to make concessions. However, a mini-trial would not frustrate the public participation mandate of CERCLA since a fundamental change in a ROD remedy resulting from a mini-trial cannot be effected without a new remedial action plan, public notice, opportunity for a hearing, review and comment by the affected state, and ultimately the issuance of a ROD amendment. Furthermore, a settlement with the PRP's takes the form of a court consent decree, entered after public notice and comment. See, Sections 117, 121, and 122 of CERCLA, 42 U.S.C. §§ 9617, 9621 and 9622.

The historic reluctance of government attorneys to use ADR is all the more reason why Congress needs to declare that ADR is in the national interest as a means of resolving Superfund disputes, expediting clean-ups, clearing court congestion,

conserving resources, and refocusing attention on real environmental risks. Congress has taken one step in the right direction in 1990 by enacting the Administrative Dispute Resolution Act ("ADRA"), 5 U.S.C. § 581, et seq. ADRA expressly encourages federal agencies to utilize ADR at the administrative level. Mini-trials are expressly included as one form of ADR, and the statute authorizes agencies to select neutrals from the private sector without running afoul of the doctrine against "unlawful delegation" of statutory duties. ADRA also recognizes the importance of confidentiality of ADR proceedings. All forms of ADR under the Act are to be used only when all parties consent. Finally, ADR proceedings do not become precedent and cannot be cited.

CONCLUSION

EPA should bring science back into the Superfund remedy selection process by employing peer review of remedies through the Science Advisory Board or a comparable standing committee of scientists. EPA Headquarters should amplify its Guidance to the Regions by encouraging the use of ADR, specifically mini-trials, in CERCLA remedy disputes. Regions should be directed to enter into ADR in all cases where remedy negotiations have reached an impasse and where the major PRP's have requested ADR. EPA Headquarters concurrence should be required for all decisions denying ADR.

Congress should amend CERCLA to mandate the use of non-binding ADR in remedy dispute cases where any party requests ADR

and where the cases meet the criteria stated in EPA's 1987 Guidance. Section 113 of CERCLA should be amended to permit ADR after ROD's are issued but before enforcement actions are instituted. The costs of ADR should be borne equally by both sides. Congress should prevent ADR resolutions from being used or cited as precedent by any person in any proceeding for or against EPA.

SUPERFUND PROGRAM

Remedy Selection Process

THURSDAY, FEBRUARY 24, 1994

HOUSE OF REPRESENTATIVES,
COMMITTEE ON ENERGY AND COMMERCE,
SUBCOMMITTEE ON TRANSPORTATION
AND HAZARDOUS MATERIALS,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:11 a.m., in room 2123, Rayburn House Office Building, Hon. Al Swift (chairman) presiding.

Mr. SWIFT. The subcommittee will come to order. Good morning—that's a lie. Welcome. This is the third legislative hearing to be held by the Subcommittee on Transportation and Hazardous Materials on H.R. 3800, the Clinton administration's Superfund Reauthorization Bill. Today's hearing will focus on the administration's proposals to improve the Superfund remedy selection process.

Remedy selection is at the heart of Superfund. It is also in the view of many, the key to the success of Superfund reform in the 103rd Congress. Much has been said during the past year about the problems in the Superfund cleanup process. I have said a lot of those things myself. I think based upon my reading of what's in the legislation before us today that the administration was listening, particularly to the concerns industry has raised about the cumbersome and unduly expensive nature of remedy selection under the current law.

Some of the improvements that I see that the administration has made in response to industry concerns include a more explicit role for cost in remedy selection, limitation of preference for treatment to hot spots instead of just across the board, explicit recognition of the appropriateness of containment remedies, limitation of State cleanup standards to legally applicable standards that are designed specifically for Superfund type remedial action situations, and to factor land use considerations into the remedy selection process.

The administration bill in my view represents a genuine effort to make the Superfund remedy selection process more fair, more flexible, more efficient and ultimately, more protective of human health and the environment than under the current law. It's not a perfect proposal by any means, but let's keep in mind the old saw about perfect being the enemy of the good, and let's get something good accomplished for this program and for the communities that count on its success in this Congress.

In July of last year Chairman Dingell and I wrote a letter to EPA, requesting that they initiate a comprehensive data gathering effort for the Superfund program. Today, I would like to enter into the record the EPA's response along with the results of the data survey. Without objection, that will be done.

I am happy to yield to the gentleman from Ohio, the ranking Republican on the subcommittee, for an opening statement.

Mr. OXLEY. Thank you, Mr. Chairman. Happy traffic to you. We are glad to have you here. Superfund is badly in need of reform, and I welcome the efforts of the chairman and the administration to move forward on Superfund legislation in this Congress.

Throughout the Superfund debate we have sought changes to the statute that would reduce the cost of cleanup, because our hearing record clearly indicates that less costly remedial actions would protect human health and the environment. The administration's cost analysis of H.R. 3800 confirms this point. This cost analysis shows that over the next 5 years EPA will save $100 to $160 million in cleanup costs alone. Private industry will save $200 to $220 million, and Federal agencies will save $1 to $1.3 billion of the taxpayers' money. This represents a 20 to 25 percent overall savings and still protects human health and the environment.

As we move towards subcommittee markup of this legislation and as the chairman develops his markup vehicle, I would like to work with the chairman to ensure that at least this level of savings is fully realized. I further believe that more savings are possible, while still protecting human health and the environment.

To accomplish further savings we should simply ensure that Superfund addresses real and significant risks with resources that are proportional to the actual level of risk. The first step is to understand the risks. In the 1991 report the National Academy of Science stated that there was insufficient evidence on actual human exposure to conclude whether Superfund was actually addressing risks to human health. Accordingly, our major source of information about risk to health is EPA's assessment of risk at Superfund sites.

This morning I brought an example of the kind of perspective that would be useful in understanding EPA's risk assessments. My staff has prepared a chart that reflects some of the work of Dr. Lois Gold and a group of scientists at Lawrence Berkeley Laboratory. The results, Mr. Chairman, are very informative.

Superfund often requires tremendous expenditures to address risks of cancer that are less than one in 10,000. The chart which is attached to my written statement indicates that EPA's one in 10,000 lifetime risk of cancer would be the equivalent risk from eating the caffeic acid in 1 head of lettuce every 2 years or eating the mix of hydrazines in an average of 4 mushrooms a year over a lifetime. Drinking the ethyl alcohol in 1 beer ever 2 years as an adult also produces a theoretical 1 in 10,000 risk.

Other values are listed for substances in wine, coffee, orange juice, carrots, celery, potatoes, parsnips, brown mustard and peanut butter sandwiches. Did I mention coffee, Mr. Chairman?

Mr. SWIFT. No, but you mentioned parsnips. I hate parsnips.

Mr. OXLEY. I want to caution that EPA's own guidance states that rodent tests are not fully reliable, and the cancer risks for the

foods above or of Superfund site may be zero. I want to caution, these are Dr. Gold's data, not EPA's. There may be a small difference in exactly how EPA would calculate the numbers.

The basic point remains, however, I would like EPA to provide some meaningful perspective on the risk numbers. I, for one, do not want to authorize spending millions or billions of dollars on theoretical risks which may be zero and, at worst, are less than the risks from a salad bar.

With that understanding let me turn to H.R. 3800. On balance, the bill appears to take a number of positive steps. I am pleased, for example, with the proposal for a protocol to provide realistic assumptions. I would like to see this protocol expanded to include measures to communicate risk information in an unbiased and informative way to community work groups, the public, and State and Federal officials. This would be consistent with my efforts in sponsoring H.R. 2910, the Risk Communication Act.

There are also sections of H.R. 3800 which appear to be counterproductive. For example, Title V appears to restrict the use of site specific risk information, which is inconsistent with the objective of realistically assessing risks. I am also concerned about use of statutory language, suggesting that treatment remedies must be used unless costs are disproportionate. This language is very unclear, and may mean continued unreasonable expenditures.

I hope to better understand these and related issues over the coming weeks, and work with the chairman and the administration to address them. I thank the chairman, and look forward to hearing the witnesses today.

Mr. SWIFT. I thank the gentleman. I recognize the gentleman from Colorado, for an opening statement.

Mr. SCHAEFER. Thank you, Mr. Chairman. I will be very brief. As we begin studying remedy selection provision of this piece of legislation I want to reiterate my concerns about the State and local community involvement in the proposed selection process.

I have stated in the past that I believe local residents and individual States have a better idea of what is needed in Superfund cleanups than bureaucrats in Washington. Therefore, significant State and community participation in the remedy selection process is crucial to the smooth operation of any Superfund program.

I do have serious concerns about how the administration's package will guarantee a substantive State and local role even when their goals may conflict with those of the Federal Government. I am especially concerned about how this interaction would play out at Federal facilities.

I look forward to the testimony of the witnesses. I yield back my time.

Mr. SWIFT. We are happy to welcome again to the committee as our first witness, Elliot Laws, who is Assistant Administrator for Solid Waste and Emergency Response of the EPA. Elliot, welcome. I am going to ask unanimous consent that all of our witnesses' prepared statements be automatically made a part of the record so that they can proceed to summarize in each instance. Without objection, so ordered.

That having been done, if you would indicate the gentleman who is with you we would be happy to have you proceed with your opening statement.

STATEMENTS OF ELLIOTT LAWS, ASSISTANT ADMINISTRATOR FOR SOLID WASTE AND EMERGENCY RESPONSE, ENVIRONMENTAL PROTECTION AGENCY

Mr. LAWS. Mr. Chairman, Mr. Oxley and Mr. Schaefer, it's a pleasure to be here to discuss the administration's proposed reforms to the Superfund law dealing with remedy selection.

In our view, the Superfund Reform Act will reform and streamline the remedy selection process in numerous ways. We are proposing to improve the remedy selection process with some of the following changes, which I will discuss in more detail.

Establishment of national goals: Establishment of national generic cleanup levels; Increased use of generic remedies; Modification of the ARAR's mandate; Narrowing the preference for treatment to treatment of "hot spots"; Increased timeliness and involvement of communities in the entire Superfund process; and Broadening the consideration of cost in remedy selection.

The administration's proposal requires the promulgation of national goals. These goals will be premised on the principle that all communities are entitled to receive equivalent and consistent protection from carcinogenic and noncarcinogenic human health risks. Establishing national generic cleanup levels is at the core of achieving this goal.

Superfund presently does not specify a standard level of cleanup nationwide. The administration proposal increases the predictability and consistency in determining cleanup levels through the development of these national generic cleanup levels. The cleanup levels would reflect different exposures that are associated with different land uses, and the national cleanup levels would represent a threshold level below which a response action would not be required.

In determining site-specific cleanup levels, the proposal establishes national cleanup levels with fixed opportunities to consider certain site-specific parameters. When generic cleanup levels are not developed or otherwise are not appropriate, site-specific risk assessment provisions would be used to determine cleanup levels. A newly developed national risk protocol for conducting risk assessment would be used in this instance.

One added benefit of this change is the facilitation of voluntary cleanup actions by the private sector, by providing some of the certainty which so far has been lacking. This reform in conjunction with our proposed prospective purchase or liability exemptions could spur economic redevelopment of sites by removing current disincentives to redevelopment and cleanup of contaminated properties.

With respect to remedy selection itself, the administration has worked to streamline the process. The administration proposal continues to mandate that all remedies be protective of human health and the environment. Most importantly, however, the proposed changes address those factors which have been identified as affect-

ing the cost and pace of remediation—ARAR's, the mandate for permanence and the preference for treatment.

The administration proposal would modify ARAR's, eliminate the mandate for permanence, limit preference for treatment to hot spots, and support development of generic remedies. The modification of the ARAR's provision requires compliance with Federal standards that are suitable for application and more stringent State standards that are promulgated to address remediation.

A statutory mandate for permanent remedies would be eliminated and replaced by the concept of long-term reliability. Long-term reliability would not restrict the Agency from considering other factors such as community acceptance of the remedy, the reasonableness of its costs, and the availability of other treatment technologies. The current statutory preference for treatment would be limited to hot spots to ensure that the most highly contaminated areas at sites receive treatment.

Under the proposal the appropriate remedial approach would be determined on a site-specific basis by applying five remedy selection criteria. An appropriate remedy that is protective of human health and the environment would be determined by considering the remedy's effectiveness, its long-term reliability or capability to achieve protection of human health and the environment over the long term, risks posed by the remedy to the community, cleanup workers and the environment, acceptability of the remedy to the affected community and the reasonableness of costs in relation to the other factors just mentioned.

The restructured criteria for remedy selection are designed to streamline the decisionmaking process and provide broader consideration for the role of cost. Cost is balanced with other factors like effectiveness, community acceptance, long-term reliability and short-term implementation concerns.

The new approach also endorses the development of cost effective generic remedies. The generic remedies for categories of sites will be established, taking into account the new remedy selection criteria. Expedited procedures that include community involvement will be developed for selecting generic remedies at individual sites. This will speed remedy selection and will allow selection of generic remedies to occur without further consideration of alternatives.

With regard to community involvement and land use, the administration proposal achieves greater involvement of communities that live near sites in the Superfund decision-making processes, and removes impediments to economic redevelopment of contaminated properties. Communities must be involved in the cleanup process from the time a site is discovered to the time that it is finally cleaned up.

Specific changes are—early input in identifying remedial alternatives; elevated significance of community acceptance of a remedy; and increased involvement of land use in remedy selections.

Community Working Groups will be formed as advisory bodies at Superfund sites. Their advice and preferences would be solicited at each significant step in the remedy selection process. The community's involvement will be enhanced by the opportunity to obtain technical assistance grants early in the process, again, prior to NPL listing. The remedy selection process will also require the con-

sideration of the community's acceptance of a remedial alternative during the evaluation of alternatives.

The remedy selection changes provide for consideration of what the community regards as reasonably anticipated future use. Community working groups would assist in establishing future land use expectations more reliably, and in obtaining greater community support for remedial decisions. The community's preference with respect to land use would be given significant weight in the development of remedial alternatives at the site.

In conclusion, Mr. Chairman, we believe the administration's Superfund reforms greatly enhance the current remedy selection process. The development of national generic cleanup levels, the development of generic remedies, the increased opportunity for community involvement and the reduction in costs, all serve to provide the American people with a Superfund that is truly fairer, faster, more efficient and most importantly protective of human health and the environment.

We at EPA are committed to the implementation of these reforms. Again, Mr. Chairman, I want to thank the subcommittee for the opportunity to present the administration's position on remedy selection. I will be happy to answer any questions that you might have.

[The prepared statement of Mr. Laws follows:]

STATEMENT OF ELLIOTT P. LAWS

Mr. Chairman and members of the subcommittee, thank you for the opportunity to appear before you today to discuss the administration's proposal to improve the Superfund remedy selection process under the Comprehensive Environmental Response, Compensation, and Liability Act, commonly referred to as Superfund. On February 10, 1994, I testified before this committee about the administration's proposed liability reforms, which significantly increase the fairness of the law and reduce transaction cost. This morning I will discuss equally significant remedy selection reforms to address the pace and cost of cleanup.

The remedy selection process refers to the way the Environmental Protection Agency defines the contamination problem to be addressed through remedial action, develops and evaluates alternative cleanup approaches, and decides which solution is most appropriate for a given site. The statutory provisions of Superfund pertaining to remedy selection prescribe a mix of mandates, goals and preferences. Absent from the mix, however, despite preferences for permanence and cost-effective remedies, is a standard level of cleanup nationwide. Under the present vast and complex cleanup framework applicable or relevant and appropriate State and Federal requirements (ARAR's) often drive cleanup levels on a site-by-site basis. This individual site determination slows down remedy selection and limits the Agency's ability to draw on the last 13 years of experience determining appropriate remedies.

The administration proposal, "The Superfund Reform Act of 1994", will reform and streamline the remedy selection process so that the Superfund program can achieve its fullest potential. We are proposing to improve the remedy selection process with the following changes:

—Establishment of National Goals;
—Establishment of national generic cleanup levels;
—Increased use of generic remedies;
—Modification of the ARAR's mandate;
—Narrowing the preference for treatment to "hot spots";
—Increased timeliness and involvement of communities in the process; and
—Broadens consideration of cost in remedy selection.

Before addressing each of these changes in turn, let me summarize the cleanup accomplishments of the Superfund program.

While some may dispute the actual risk caused by Superfund sites, the number of people potentially affected by Superfund sites is large with 4.5 million people residing within a 1-mile radius and 73 million people within 4 miles from the 1,287

National Priority List sites. The problems and stigmas associated with these sites are very real for these communities.

While change is needed to improve the efficiency of the remedial process, much has been accomplished to date. Immediate risk reduction has been accomplished for nearly 2,800 sites through removal activities, and 225 NPL sites have been completely cleaned up. Three quarters of the NPL sites have remedies selected and over 60 percent of the sites on the NPL have cleanup activity underway.

These cleanup activities have resulted in the treatment of over 340 million gallons of liquid waste; some 36 million cubic yards of contaminated soils and other solid waste, a volume which would cover a football field almost 3 miles high; over 330 million gallons of surface water, or more than one gallon for every person in the United States; and approximately 75 billion gallons of groundwater.

Foremost among the reforms presented in the administration's proposal is the commitment to a new Superfund that protects human health and the environment more quickly, more fairly, and with greater efficiency. To achieve this purpose, the bill requires the promulgation of national goals to be applied at all facilities subject to remedial actions under the statute. These goals will be premised on the principle that all communities are entitled to receive consistent protection from carcinogenic and non-carcinogenic human health risks. Establishing national generic cleanup levels is at the core of achieving this goal. We believe achievement of this goal will result in reduced cleanup costs through the elimination or reduction of inefficient site-by-site decisionmaking, wherever possible. In addition, we anticipate that national generic cleanup levels will encourage voluntary cleanups and use of generic remedies.

Superfund presently does not specify a standard level of cleanup nationwide. Instead it establishes a complex framework under which applicable or relevant and appropriate State and Federal standards, as well as other factors, are used to set site-specific cleanup levels. As a consequence, cleanup levels, remedies and costs have differed from site to site contributing to increased uncertainty regarding the appropriate level of protection, protracted site-by-site evaluations, debate over cleanup levels and higher cleanup costs.

The administration proposal would increase the predictability and consistency in determining cleanup levels through the development of national generic cleanup levels for specific contaminants most often found at Superfund sites. These cleanup levels would reflect different exposures associated with different land uses. Site-specific variability would be allowed for parameters that are known to vary on a site specific basis, such as Ph and depth to groundwater. These national generic cleanup levels would represent a threshold level below which a response action would not be required.

In determining site-specific cleanup levels, we recognize that there are tradeoffs between providing sufficient flexibility to consider site-specific conditions and predictability and consistency for communities and the private sector. The proposal strikes a reasonable balance between these legitimate but competing objectives. The proposal establishes national cleanup levels with opportunities to consider site-specific parameters. When generic cleanup levels are not developed or otherwise not appropriate, site-specific risk assessment procedures would be used to determine cleanup levels when deemed appropriate by the Administrator. A national risk protocol for conducting risk assessment would be used in this instance.

One benefit of this change is the facilitation of voluntary cleanup actions by the private sector. The present reluctance to voluntarily clean up sites is due, in part, to the uncertainty that cleanups may require regulatory action in the future. We believe that this reform, in conjunction with our proposed prospective purchaser liability exemptions, could spur economic redevelopment of sites by removing current disincentives to redevelopment and cleanup of contaminated properties.

Remedies would have to comply with the substantive requirements of any Federal environmental law that is suitable for application to a remedial action at the site. Remedies would also comply with any State requirement that is promulgated through a public process, specifically addresses remedial action, is based on the best scientific information at the time, and is more stringent than any Federal requirement, unless waivers are invoked.

With respect to remedy selection itself, the administration has worked to streamline the process by both simplifying and expediting the selection of remedies. Under the current statute, remedy selection is based on two threshold criteria—protectiveness of human health and the environment and compliance with applicable or relevant and appropriate requirements (ARAR's). Meeting these criteria, remedies are further evaluated for among other things, permanence, treatment, short-term risk, and cost. The administration proposal continues to mandate that all remedies be protective of human health and the environment. Most importantly however, the

proposed changes by the administration address those factors which affect the cost and pace of remediation—ARAR's, the mandate for permanence and the preference for treatment.

The administration proposal would modify ARAR's, eliminate the mandate for permanence, limit preference for treatment to hot spots, and support development of generic remedies.

The modification of ARAR's requires compliance with Federal standards that are suitable for application and more stringent State standards that are promulgated to address remediation. The result is an elimination of requirements often found to result in the imposition of inappropriate conditions on Superfund remedies.

The statutory mandate for permanent remedies would be eliminated in the administration proposal and replaced by the concept of long-term reliability. Long-term reliability would provide EPA with an impetus to select durable remedies, but it would not restrict the Agency from considering other factors such as community acceptance of the remedy, the reasonableness of its cost, and the availability of other treatment technologies. The current statutory preference for treatment would be limited to hot spots and would ensure that the most highly contaminated areas at sites receive treatment.

Under the proposal, the appropriate remedial approach would be determined on a site-specific basis by applying five remedy selection criteria. An appropriate remedy that is protective of human health and the environment would be determined by considering the remedy's effectiveness, its long-term reliability or capability to achieve protection of human health and the environment over the long term, risk posed by the remedy to the community, cleanup workers and the environment, acceptability of the remedy to the affected community, and the reasonableness of cost in relation to the other factors just mentioned.

The restructured criteria for remedy selection are designed to streamline the decisionmaking process and provide broader consideration for the role of cost. While requiring all remedies to meet national goals to achieve protectiveness, this approach recognizes the relationship between various site-specific factors that affect the cost of a remedy. As a result, cost is balanced with other factors like effectiveness, community acceptance, long-term reliability and short-term implementation concerns. Under the administration's proposal, both cost and community acceptance would have a greater role in remedy selection than they do under current law.

The new approach also endorses the development of cost-effective generic remedies. Generic remedies for categories of sites will be established taking into account the new remedy selection criteria. Expedited procedures that include community involvement win also be developed for selecting generic remedies at individual sites. This will speed remedy selection and will allow selection of generic remedies to occur without further consideration of alternatives.

The development of the administration proposal was motivated by a desire to achieve greater involvement of communities that live near sites in the Superfund decisiomnaking process and to remove impediments to economic redevelopment of contaminated properties. These objectives were very important and become two of the fundamental building blocks of our reform proposal.

Many communities near Superfund sites, including low income, minority, and Native American communities, have not been provided with the opportunity to participate as fully as they should in the Superfund process. The administration proposal is based on the principle that communities must be involved in the cleanup process from the time a site is discovered to the time it is finally cleaned up. Several innovative mechanisms have been included in our proposal to achieve this purpose. The specific changes that affect remedy selection are early input in identifying remedial alternatives; elevated significance of community acceptance of a remedy; and increased involvement in land use recommendations.

Community Working Groups would be formed as advisory bodies at Superfund sites. These advisory groups would reflect the composition of the community. Their advice and preferences would be solicited at each significant stage of the cleanup process. In terms of early input into the identification of remedial alternatives, the community's views and preferences on investigations and cleanup would also be solicited earlier, prior to the NPL listing, providing an up-front opportunity to participate much earlier in the cleanup process than is mandated under current law. The community's involvement will be enhanced by the opportunity to obtain Technical Assistant Grants (TAG) earlier in the process, again, prior to NPL listing. TAG grants are the only available funding mechanism for community groups to assist their understanding of the appropriate cleanup level. The remedy selection process has also been modified to explicitly require the consideration of the community's acceptance of a remedial alternative, during the evaluation of alternatives.

The remedy selection process, as proposed, would include consideration of what the community regards as the reasonably anticipated future land use. In particular, the Community Working Groups would assist in establishing future land use expectations more reliably, and in obtaining greater community support for remedial decisions affecting future land use. The community's preference with respect to land use would be considered in the development of remedial alternatives for the site. A Community Working Group's recommendations would be given substantial weight in remedy selection. In this way, the opportunity for community input is made more meaningful because it occurs prior to the proposal of a preferred remedial action plan by the government. Where the Community Working Group, for example, recommends that the most productive use of the land is industrial, clean up to residential levels would no longer be appropriate. Working with communities to design cleanups that meet their needs may reverses in many instances, the trend of businesses using pristine land for industrial purposes (turning green fields into brown fields) by stimulating economic redevelopment in areas which previously may not have been returned to productive use.

In conclusion, we believe the administration's Superfund reforms greatly enhance the current remedy selection process. The development of National generic cleanup levels, the development of generic remedies, the increased opportunity for community involvement and the reduction in costs all serve to provide the American people with a Superfund that is truly fairer, faster and more efficient. We at EPA are committed to the implementation of reforms that provide a Superfund that continues to protect public health and the environment and that provides equivalent protection for all communities.

Mr. Chairman, thank you for this opportunity to address this subcommittee and I will be pleased to answer any questions that you might have.

Mr. SWIFT. Thank you, very much. I have a number of questions. What we might do is take a round, and then see if we need to take a second round.

The administration's proposal would amend section 121(d), to require the Administrator to promulgate national goals to be applied to all facilities subject to Superfund cleanup. Let's just start with a very basic question. What does the term "national goals" mean, in the context of the administration's bill?

Mr. LAWS. Very simply, a national goal is an acceptable cancer risk or risk range and a finding as to what a proper level would be to achieve no adverse health effects for noncarcinogens.

Mr. SWIFT. This is kind of a complicated question. Therefore, would the national goals be a regulatory qualification of what it means to achieve statutory requirement of protection of human health and the environment?

Mr. LAWS. I think so, yes.

Mr. SWIFT. What I am getting at is, you have the national goals out here and that means a certain thing. Is it a qualification, *a change* or *modification* of what it means to achieve the statutory requirement of protection of the human health and environment.

Mr. LAWS. I don't think it's a modification. I think it's a specific statement with regard to carcinogens and noncarcinogens.

Mr. SWIFT. A characterization of it.

Mr. LAWS. It's not intended to modify or lessen that statutory mandate, but to give us the ability to set specific numbers in order to achieve what those goals are.

Mr. SWIFT. Would the use then of the term national goals allow cleanup to meet a risk range rather than a single risk level?

Mr. LAWS. Currently, that is what the Agency's practice is. We know that there has been a lot of debate through this process regarding achievement of a single number as opposed to a risk range. What the statute contemplates is an open, inclusive consensus building process, to determine exactly what the national goals

should be. I think either option could come out of that consensus building process.

The administration is not pre-disposed to either one.

Mr. SWIFT. Do you think the Superfund program would operate more fairly and be perceived as operating more fairly, if any given community could count on a cleanup resulting in their area as being equivalent to levels of protection that other communities might have under the statute?

Mr. LAWS. I think so. I think part of the perception has been that certain communities have been receiving cleanup's that are somehow less protective than those that other communities have received.

The direction in this law is that all communities receive equivalent and consistent protection. The remedies that are implemented to achieve that protection could be different. I think what we want to have is a program where we can say with complete certainty that no matter what remedy is selected the level of protection a community is receiving is equal across the country.

Mr. SWIFT. Another definition. The administration's proposal would require the EPA to establish generic cleanup levels. Could you define "generic cleanup levels" for me, please?

Mr. LAWS. Generic clean up levels are the numbers that are utilized to attain the national goals. I think that the Administrator when she testified described it as the parts per billion aspect—the actual cleanup numbers that we are striving to achieve. These levels would also, however, allow for certain site-specific variables to be taken into account. Certain issues such as depth to groundwater Ph levels, and things of that nature which are easily identifiable but would clearly vary from site to site, are more properly factored in site specifically as opposed to trying to decide them up front.

Mr. SWIFT. Would some type of a formula be applied to the numbers?

Mr. LAWS. We initially were looking at a matrix approach. You would look at what your site land use was, and then you would go find a number in the matrix for that particular site. The National Superfund Commission adopted a formulaic approach. As the administration went through its process we picked up some of the variables that the Commission used in their approach. That was one of the reasons that we now have the site-specific variables included in our national generic approach.

We have moved a little closer to a formula. I think we would not describe the approach that we have in the bill as a formula at this point. We are open to further discussion, as to exactly what this would look like. I think that right now we are probably still a little closer to a matrix with some sort of formulaic approach on site specific issues.

Mr. SWIFT. As we all get used to some new concepts and certainly new terminology, we are probably all going to require some clarification. One would be, how can a cleanup level be both generic and site specific?

Mr. LAWS. The generic levels get us a lot further along the process. Currently, we basically start from scratch at every site. That's where a lot of the costs come in. That's where a lot of the disputes as to exactly what level we are going to apply would be raised.

Using the generic cleanup levels, hopefully we will have taken care of 75 to 90 percent of the up-front work that has to be done to set up a site-specific cleanup level. We would then factor in these pre-identified site-specific factors, and then we would have our cleanup levels for that site.

The generic aspect of it is to try and identify those characteristics of the site which would normally be common to any type of site no matter where it is, and then specify what the site-specific variables would be to complete the cleanup level setting process.

Mr. SWIFT. What's the timeframe that EPA would contemplate for setting up these cleanup levels?

Mr. LAWS. We have done a lot of the up-front work on some of our soil screening levels, and we would certainly plan on using a lot of that work as the basis. We would like to use a consensus building negotiated rulemaking, if that's an appropriate approach.

Generally, rulemaking's take from 1½ to 3 years. We would certainly hope to be able to use as a foundation the work that we have already done in this area along with a broad consensus building approach. I think a lot of the reauthorization work shows that we would be able to cut down time significantly.

Mr. SWIFT. Thank you. I have some other questions, but I think we will go to a second round for that. I recognize at this time the gentleman from Ohio.

Mr. OXLEY. Thank you, Mr. Chairman. Mr. Laws, the analysis of H.R. 3800, which I referred to in my opening statement, forecasts a savings to EPA and the States of between $100 and $160 million for less expensive remedies. This savings as I understand, would be offset by increases in the orphan share costs and administrative costs, for a net increase to EPA and the States of $330 to $400 million.

Are the remedy selection reforms that reduce the cost of fund cleanup's by that $100 to $160 million a critical element of the administrative proposal, and is this a savings that must be achieved by the legislation that we send to the President?

Mr. LAWS. Yes. The remedy selection changes of 25 percent factor in not only the private sector costs but the costs to the Federal Government—which in fact is the largest PRP in the Nation. We are looking at upwards of $1.7 billion a year in savings as a result of the changes that we are proposing to remedy selection.

The cost factoring that you refer to was based on achieving around the same level of cost reduction. If we have significant changes in the remedy selection pieces then those numbers could change. It depends on what we ultimately end up with.

Mr. OXLEY. Essentially, our goal is to send a bill to the President that locks in those savings. I think that's our mutual goal; is that correct?

Mr. LAWS. Yes, certainly. Clearly, one of the largest criticisms of the program has been its expense. Our aim in some of these changes has been to reduce the amount of costs associated with the program.

Mr. OXLEY. I would like to ask you a question. This is a long question, but I would like to get it on the record. You are aware, of course, of Clean Sites. I am sure that all of the panel is. The group has representation by environmental, industry and commu-

nity groups. It has been working on Superfund issues for years. The board of directors of Clean Sites recently issued a set of recommendations. Some of these recommendations are reflected in H.R. 3800.

Clean Sites specifically recommends that EPA make the greatest possible use of site specific measurement on exposure, bioaccumulation, chemical fate and transport to ensure that site specific information is based on actual rather than hypothetical values.

H.R. 3800 appears to move in the other direction. For example, the bill leaves it to the discretion of EPA whether to consider site specific risk information and discourage a site specific assessment where there is a national cleanup standard for a given chemical.

Doesn't this proposal mean less realistic information and work against a primary objective of Superfund reauthorization, to ensure money is spent wisely on actual and not hypothetical risks to health. How would that provision work, and isn't there an inherent conflict between those two concepts?

Mr. LAWS. Again, one of the major criticisms of the program was that we are doing site specific risk assessments at virtually every site and the time and expense that is associated with that. I think what our proposal does with the generic cleanup level is eliminate that portion of the work which is repeated and is virtually identical from site to site. We still allow for the site-specific variables which might change what the cleanup level would be.

The law still provides for the ability to do a site-specific risk assessment if a generic cleanup level doesn't exist or for some other reason it's inappropriate to use a generic cleanup level. Clearly, the agency retains the discretion to do a site-specific risk assessment at any other time.

A PRP would be free to either request the Agency to do a site-specific risk assessment, or conduct a site specific risk assessment on its own which the Agency would have to consider before making a remedial decision.

What we are trying to do is, in the appropriate circumstances, eliminate the need for site-specific risk assessments when it is in fact wasteful both in terms of time and cost. We still want to provide for site-specific risk assessment when that is the appropriate way to proceed.

Mr. OXLEY. What if you have a situation where the PRP requests that the Administrator go forward with the site specific issue and the Administrator for whatever reason says no. Does the PRP have any ability to litigate or to appeal that process, or are they simply locked in to the Administrator's decision?

As I read the bill, talking about nationally approved generic remedies under subsection (b)4 of this section, the Administrator may, as appropriate, rely on a site specific risk assessment to determine the proper level of cleanup at a facility based on the national goals established in Paragraph 1, et cetera.

What happens in that situation, as you envision it, under this bill?

Mr. LAWS. The Administrator would retain the sole decisionmaking authority as to what to base a remedy for a particular site on—whether it would be based on national cleanup levels or whether

we would do a site specific risk assessment. I would think that if a PRP had good reasons why a national generic cleanup level was inappropriate, that information would be presented to the Administrator. If it were valid and we agreed with them, then they could go ahead.

If, for whatever reason we disagreed and felt that the generic cleanup level was appropriate, we would proceed on that fact. That would not preclude PRP's from going ahead with a site specific risk assessment. If in fact that risk assessment came up with different results, the Administrator would have to consider that and explain why that was inappropriate before making the final remedy selection for that site.

Mr. OXLEY. Is that part of the bill? I am not sure I am familiar with that part.

Mr. LAWS. Basically, that's just part of the regular process. When a remedy decision is made and is put out for comment, the PRP's are allowed to put comments in as to what is appropriate, whether they agree or disagree. If they had conducted a site specific risk assessment I would assume they would provide that. We, of course, would have to deal with whatever results came from that assessment.

Mr. OXLEY. Under your explanation, the PRP would have the ability to provide site specific information and remedial recommendations under that process.

Mr. LAWS. Sure. There would be no requirement for the administration to agree with that or to use that as a basis for the decision. But if that information were provided we certainly would not be able to just ignore it. We would have to explain why we are going in a different direction.

Mr. OXLEY. Would you oppose modifying that language so that we could provide the PRP's with the legal right to follow that process?

Mr. LAWS. I think the right is already there. I would be concerned about putting anything more specific in the statute, because I think we would inadvertently be getting into the situation where we are just delaying these cleanup's as we get into fights over whether we are going to go site specific or generic.

I think, again, the clear aim of this provision is to eliminate the need in most circumstances to have to do full blown site-specific risk assessments. As I said, we allow for certain site-specific variables. I would hope that the current language is clear, and that the ability of PRP's to conduct their own site-specific risk assessment, is clear. If it is not, we would certainly be willing to look at some very limited language to make it clear that they could do that, while making it clear that the administration would not be bound to follow that approach if we had good reason to apply the generic cleanup levels.

Mr. OXLEY. I appreciate your comments. One of the reasons we wanted to get that as part of the legislative record was to establish that fact. I appreciate your answer. Mr. Chairman, one more question if I may, on this round.

Am I correct, that the national risk protocol on realistic assumptions is intended to apply to the setting of national standards and not just site specific risk assessment. If not, why not?

Mr. LAWS. The national risk protocol is intended to provide guidance as to how a risk assessment would be performed. I don't think it would be appropriate to be applied to the national goals. When a site specific risk assessment is done, it should be clear as to what the procedures are and what assumptions should be used, so that we don't have a situation that was demonstrated by your chart, Mr. Oxley, where it appears that the Agency is conducting risk assessments which result in cleanup levels that are probably either too stringent or not stringent enough for the particular conditions at the site.

The purpose of the risk protocol is to identify the risks at a site and it is not to determine what the overall cleanup goals are to be protective of human health and the environment.

Mr. OXLEY. Should we apply the protocol to the hazard ranking system?

Mr. LAWS. I think the hazard ranking system is intended to be conservative. It's intended to identify sites that require a closer look. Over 35,000 sites in the country that have been identified as having hazardous substances at the site. The application of the hazardous ranking system—35,000 have been looked at. Only 1,900 of those have been placed on the NPL as a result of the hazard ranking system.

I don't think the hazard ranking system is a problem. It is intended to be conservative. It is intended to cast a relatively wide net, and then allow us to look more specifically to see if in fact any cleanup is necessary.

Mr. OXLEY. Thank you. Thank you, Mr. Chairman.

Mr. SWIFT. I would like to welcome my colleague from Washington State, Mr. Kreidler, who is a member of the full committee. We will recognize you for some questions after the members of the subcommittee have all had a chance. I am glad that you are here.

I recognize the gentleman from Colorado.

Mr. SCHAEFER. Thank you, Mr. Chairman. Mr. Laws, I want to follow up a little bit on the question here by my friend from Ohio on the site specific remedy selection, where the generic cleanup levels have not been established to account for particular characteristics of a facility and its surroundings.

I would like to know how you would view mining sites? As a general rule, would you say that these types of sites do not fit the models to be used in development of the generic cleanup on mining sites?

Mr. LAWS. A generic remedy, or establishing a generic——

Mr. SCHAEFER. The generic cleanup levels.

Mr. LAWS. The generic cleanup levels are going to be chemical or substance specific. I would think that there would likely be certain levels which would apply to mining sites and there might be some that wouldn't.

Mr. SCHAEFER. The language, "to account for characteristics of a facility or its surroundings", what does that mean?

Mr. LAWS. That is basically to account for site specific variables that are either so rare or so different from the factors that went into the setting of the generic cleanup level, that it would be useless to apply the generic cleanup level because it wouldn't achieve the protections that we are trying to achieve.

I don't think I can say as a blanket matter that mining sites would fall into that category. There clearly could be mining sites in parts of the country where our generic cleanup levels would not apply, and we would have to look at site-specific characteristics.

Mr. SCHAEFER. In other words, they are off the norm. They are not the same. They can present all kinds of different problems, geographic, soil content, all of these types of things.

Mr. LAWS. Sure. That's correct.

Mr. SCHAEFER. These would be viewed then more individually?

Mr. LAWS. If in fact they vary so much and the site specific variables that we are factoring into the generic levels can't take that into account, then we would have to do a site specific risk assessment.

Mr. SCHAEFER. I recall this committee's consideration of the RCRA statute, we were even talking about the oil and gas waste, and the difference between a site in Louisiana and a site in Texas or a site in Colorado, depending on the makeup of the soil and percolation, all kinds of things required that we look at each one of them individually.

Mr. LAWS. Certainly.

Mr. SCHAEFER. In Colorado, we have sites in Leadville and Aspen which have lead in the soils. EPA estimates would predict that there are high blood levels in these areas. But the actual data on the residents indicate that the blood levels are well below the national averages.

The residents of communities in the vicinity of these sites do not want intrusive treatment or removal remedies. I am afraid that the administration's provision on hot spots would be counterproductive at these types of sites. We all know that lead is highly toxic if ingested. However no one, to my knowledge, has ingested the lead in the soils near these sites. How would hot spot provisions work in these particular situations? Similar situations exist outside the State of Colorado, we know that.

Mr. LAWS. We would only get to a hot spot if it met the definition of the hot spot in the statute, which is that is highly toxic or highly mobile, could not be reliably contained, and that unacceptable risk would result if exposure were to occur. If in fact we have a situation where those factors don't apply, then we wouldn't have to worry about a hot spot.

Another point in evaluating a remedy in general is that we are now required to consider acceptability of the remedy to the community. That's not something that we have done in the past. We are trying to avoid a situation of violent community opposition which we have at some of those sites and which we have in some of the other sites around the country, by being able to factor in community views.

Under these provisions, we would be able to work with the community a lot earlier in the process to identify what our concerns are with regard to the health risk and what their concerns are with regard to their fears about what the exposure actually is. Working with the community under the new community participation process, I would hope that we wouldn't get to situations that we are dealing with in Colorado. Under the amendments, we would have worked with the community throughout the process and we would

each have a better understanding of what we are trying to accomplish and come up with a remedy that is acceptable to both.

Mr. SCHAEFER. I keep coming back to this point. We are talking about blood levels that are below the national average here. How are we going to apply this specifically to Leadville? How would you do this?

Mr. LAWS. I am not familiar with the specific facts. Just in general, I know that the Agency is in the process of reviewing what we are doing about lead sites. They vary, clearly, in terms of what communities want. There are certain questions as to what the appropriate levels are.

The Agency has a number of efforts going on, both in terms of lead paint contaminated waste and lead screening levels that we are currently reviewing to make sure that we are making the appropriate decisions. I would be more than happy to have somebody look specifically at the conditions at the Leadville site or other sites in Colorado.

Mr. SCHAEFER. Right. We have a situation—and I am sure it's not the only place in the country—where we have hot spots, but people are not being exposed. On page 112 of the legislation, on lines 13, 14 and 15, it says substances that are highly toxic or highly mobile cannot be reliably contained, and present a significant risk to human health or the environment should exposure occur.

How would this apply at these sites I am talking about?

Mr. LAWS. Again, I am not familiar with the sites. Another part of the definition of hot spots which wasn't addressed is that we are not looking at the hot spot provisions to swallow up entire sites.

If we get into a situation where the entire site would reach the level of a hot spot, then during the regular remedy selection we would probably have taken that into account. If in fact containment was not available at those particular sites, then some other treatment or mix of treatment would be selected.

If you look at the discreet nature of the hot spot along with those factors, then there should be a limited number of sites. It's basically making a policy decision, that there are certain types of substances that should be treated. That's the call that the administration is making here, that we cannot even with the permanent containment remedy, if there is enough question with a certain types of substances as to what would happen if they were to be released into the environment, that we would need to treat those.

Mr. SCHAEFER. In this particular case, and I don't want beat a dead horse here, this has been a site for many, many years, and it's still below the national standard. I just want to make sure that these things would be taken into consideration.

Mr. LAWS. I will look specifically at those sites that you mentioned, and we will get back to you.

Mr. SCHAEFER. One other question. The language in your new proposed section 121(d)(5)(b) on page 107, on lines 3 through 12—I will give you a chance to look at that—do they in any way in your estimation, affect the 10th Circuit Decision in the Rocky Mountain Arsenal Case?

It's page 107, section 121(d)(5)(b), lines 3 through 12. Are you familiar with the 10th Circuit's decision?

Mr. LAWS. Yes. I think this is a restatement of the current exemption for procedural requirements. I don't think this is intended to address the 10th Circuit decision.

Mr. SCHAEFER. So, the 10th Circuit would stand?

Mr. LAWS. It's not affected by this provision.

Mr. SCHAEFER. All right. While we are on it, how about the provisions of section 504(c)(2) and 504(d) on page 115, line 8 through 23. Would they in any way affect the decision in this case? Would you rather give an answer to that in writing? I would appreciate it very much.

Mr. LAWS. We will look at it in more detail and respond to you in writing. The answer is that no it would not affect the Rocky Mount Arsenal decision.

Mr. SCHAEFER. It would not, all right. That's really great. I appreciate that, because we have been fighting that battle out there for years. We finally got a decision in favor of the State of Colorado, and our Attorney General is very concerned about this, as I am, and as all members of the delegation are, that we don't want to get something into law here that is going to disrupt a decision that we have been wanting for many years.

You are saying there is no effect anywhere in the language of this particular piece of legislation that will overturn the 10th Circuit decision.

Mr. LAWS. What I will do, Mr. Schaefer, is get an answer back to you as to the specific provisions you have inquired about as well as whether there is anything else in the statute that might affect the court decision.

Mr. SCHAEFER. I appreciate that. If you could review that for me, I would appreciate getting an answer in writing on that. Thank you, very much.

Mr. SWIFT. I thank the gentleman. I think that the questions the gentleman raises are of sufficient importance, that they deserve more than an off the top of the head kind of response. I would ask unanimous consent that the Assistant Administrator be able to supplement his answer in writing, should he choose to do so.

Mr. LAWS. Thank you, Mr. Chairman.

Mr. SWIFT. Also, without objection, I would like to enter into the record the OMB analysis of the cost of H.R. 3800, without objection. I would recognize the gentleman from New Jersey.

Mr. PALLONE. Thank you, Mr. Chairman. I just arrived, so I don't know if some of this has already been asked. My concern is about provisions or this idea that the preference under current law for permanent treatments as opposed to mere containment might change. Let me give you an example.

I have a number of Superfund sites in my district, and one of them is called the Chemical Insecticide Site in Edison, which is my large municipality. We have had a terrible time with the EPA, because they essentially have put in place a temporary cap for the site to prevent groundwater and other contamination from flowing from the site. They have stressed that it's temporary, and ultimately there will be a permanent solution adopted.

Residents are very fearful that the temporary cap might become a permanent cap, and that there won't be a permanent solution. I don't fear that, because I believe that when the EPA says they are

going to do it they are going to do it. It just kind of brings to mind the whole issue to me of permanent solutions versus containment.

One of the reasons that I was not supportive of the Penny-Kasich Amendment when it came up on the Floor of the House was because there was language in that amendment that I interpreted to be just that. In other words, it suggested that it wasn't necessary to permanently clean up a site but we could just do containment in temporary solutions.

I just wanted your opinion on that. I mean, to what extent is that a concern? I wouldn't want to see a change that allowed temporary cleanup's or caps as opposed to permanent solutions and permanent cleanup. That is something that I don't think the public is going to accept. Certainly we, as representatives, have to be concerned about public sentiment. I don't like it myself.

Mr. LAWS. Mr. Pallone, our aim in that situation was to respond to the criticism that the Agency has received of treating for treatment's sake—where in fact it doesn't provide any added benefit. That was why we wanted to narrow the preference for treatment to hot spots. In terms of the regular remedy selection, I fully expect that we are going to continue to have treatment remedies. They are going to be factored in along with containment remedies and remedies that utilize both treatment and containment at sites.

For numerous reasons I think that we will continue to have treatment, but we will avoid situations where the Agency was criticized for directing treatment at a site when in fact it wasn't necessary.

Mr. PALLONE. Mr. Laws, is this suggestion of changing this preference under current law for permanent treatment in all situations, is that linked in any way to the future use of the land, or that has nothing to do with that? In other words, is the suggestion that somehow we won't have to do permanent treatment, we can just do containment dependent upon the future use of the land, or am I mixing two concepts that are not related?

Mr. LAWS. Future land use will in fact play a role in what the ultimate remedy decision is, as will what the community wants and its acceptance of the remedy, as will what the relative risks posed by the remedy that we are trying to implement are. Land use will be a factor. It's not going to be the driving factor necessarily, but it's going to be one of the five criteria that the Administrator must consider before making a decision for a specific remedy at a site.

Mr. PALLONE. I realize that you are aware, obviously, that these are very sensitive issues. I just wanted you to be aware that I have to deal with that on a regular basis in specific cases in my district, as I am sure that many people on this committee do.

People are concerned. They don't want containment or temporary solutions instead of permanent ones. They are concerned about this change in the law that looks to the ultimate use of the land because depending on what that use is, it may be less of a cleanup. If you are in a residential area in particular even if that use may ultimately be industrial in a place like New Jersey—I am sure in many other States—residential versus industrial uses of land often impinge upon each other and have a direct impact back and forth.

That's a concern. That's all I wanted to—that was the point that I was trying to make. Thank you.

Mr. SWIFT. I recognize the gentleman from Michigan.

Mr. UPTON. Thank you. Thank you, Mr. Laws, again, for coming before our subcommittee. I know you and I are going to get together next week, and I look forward to that one on one meeting. Michigan, as you may know, has usually higher standards in a lot of things, even hot dogs. We have higher standards and we have a bottle bill as well, which we hope the rest of the Nation will follow our lead.

I have a particular site in my district that doesn't quite sound as bad as the chemical insecticide site in New Jersey, Mr. Pallone's district. It's called the Auto Ion Site. In fact, the remedy selection process has resulted in a situation where EPA has a different standard, much lower I might add, than what our State DNR standard has had.

Quite frankly, the citizens in the area are very alarmed, as they begin to look at the cleanup costs and the remedy selection that has been picked. I guess you would have to say that the upshot of this is that the Auto Ion site, if it follows the standards that EPA wants, it will still be labeled as a hazardous waste site under the Michigan Act 307 statute.

I noted in your testimony on page four where you indicate that the administration bill establishes a complex framework under which applicable or relevant and appropriate State and Federal standards as well as other factors are used to set site specific cleanup levels. I guess my question has to be somewhat in a generic sense. When the state and local folks, particularly those on the scene, want a particular remedy site and EPA has agreed to spend in essence millions of dollars to clean up this site, at what point do we actually get some discussions and solutions in terms of how to approach the best way to cleaning up this site.

I know this is somewhat site specific, but I think that it's a good example for the rest of the country as well.

Mr. LAWS. Generally under the reforms that we are proposing, the community would be involved from the beginning, from site identification to discussions with the Agency on contaminants at the site, and what the options would be. As I said to Mr. Schaefer earlier, we are looking at having more of a partnership with the community where we explain what we are doing, where they explain what their desires are for the site and what the anticipated future uses are going to be.

Hopefully, when we come to the point where we are actually making a remedy decision there has been enough consensus building that we can come up with a remedy that is acceptable to both the government and the parties conducting the remedy in the State as well as the local community.

In terms of the more stringent requirements, I am not familiar with the Auto Ion Site. Under the new provision, we would look for whether this particular law is State applicable, whether it was adopted in a public process and whether it was designed to be a medial type standard, and whether it was based on the best available scientific evidence. If in fact that was the case, that would be an applicable standard that would need to be met.

It would, of course, be subject to the list of waivers very similar to ones that are in the current law. If, for whatever reason it was

not deemed to be applicable, it could still be imposed by the State. It would just have to be paid for by the State as opposed to the fund or PRP's, if it was a PRP lead site.

Mr. UPTON. I look forward to working with you. I will yield back the balance of my time.

Mr. LAWS. Thank you.

Mr. PALLONE. Mr. Kreidler.

STATEMENT OF HON. MIKE KREIDLER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WASHINGTON

Mr. KREIDLER. Thank you, Mr. Chairman. I very much appreciate the opportunity to be able to sit in on these hearings. H.R. 3800 is legislation that many of us have been looking forward to seeing before the Congress.

I might point out that there's a bill that I introduced, H.R. 2709 that bears a great deal in common with H.R. 3800. I would like to say first, Mr. Laws, that I appreciate you being here and presenting this bill.

My first question is regarding future land use. I support factoring future land use into the remedy selection equation, but I want to ensure that regulators do not drop the ball later if the site is going to be used for something else.

How would H.R. 3800 ensure that cleanup standards are selected only for the next future use of the land? In other words, if the land is not being used as intended, are there ways for regulators to re-evaluate the cleanup and suggest additional remediation?

Mr. LAWS. The question whether we have the authority to impose institutional controls basically to lock in land use or lock in certain conditions at a site once a remedy has been selected that anticipates a certain site, a certain type of land use, is one that we have looked at briefly. We can impose certain institutional controls on a site to ensure that the remedy designed to address a certain future land use in fact will do that, and that the land use won't change.

To some extent that's going to be a bit of a burden on the local community as well as on the local government. That is one of the reasons we want to make sure that communities are fully involved in the decision and if possible, we give significant weight to that decision.

After that process is done, we have authority to place within the remedy selection document certain institutional controls to ensure that the land use that was anticipated does in fact continue.

Mr. KREIDLER. I am reminded of a specific example in my home State that relates to this issue. It has to do with a site in Clark County in the State of Washington, which had been a metal plating business. This site became a Superfund site, and they found that there was some groundwater contamination. They could essentially get a 90 plus percent cleanup with $1 or $2 million or they could get a 99 percent cleanup spending an additional $12 or $13 million.

It was in an industrial area where future use could have played a significant role. The groundwater was never going to be used for any human purpose. The question was, would it ever migrate to the Columbia River? There was a very high probability that even if you spent all the extra money, the potential for the migration would have changed very little.

At the same time you always wanted to make sure that the standard of cleanup was one that gave you the flexibility to go with the lower standard given the future use. This was an industrial area. I am glad that the legislation in front of us would move in the direction of giving that kind of flexibility to the EPA.

I have another question related to future use—if a prospective purchaser undertakes a voluntary cleanup it seems to me that they would do so with a specific use for the site in mind. Would that purchaser also be able to consider future land use in developing their cleanup plan? If so, would that future use be determined by a community working group or a prospective purchaser, or perhaps a combination of the two?

Mr. LAWS. What we are anticipating is that most of the voluntary cleanup programs that are established will be run by the State. The Agency wants to ensure that if we do have a voluntary cleanup program and it's certified by EPA, sites that go into that program will be cleaned to satisfactory standards.

Whether across the board, we are going to require community involvement to the extent of a community working group is up in the air. We are going to require that there be sufficient community involvement so that these decisions can be made properly. But whether in fact we are going to require the exact strictures that are going to be in the Federal program is probably highly unlikely.

We are not going to be approving programs where communities have no say whatsoever. There will have to be community involvement—the exact extent of which is going to vary from State-to-State depending on the State programs under which these voluntary cleanup programs operate. I think that land use would have to be a factor because the generic cleanup levels we are hoping are going to be used to facilitate these cleanups will be used. They will be geared, of course, to what a reasonably expected future land use will be.

Mr. KREIDLER. I can imagine that in some cases, community groups might actually encourage regulators to undertake a particular standard for a particular use of property, because it may mean that cleanup would happen sooner where otherwise it might wind up being protracted in litigation.

Mr. LAWS. Exactly. In general we are finding at the Agency as industry has already found is that the earlier we involve communities in what we are doing at a site the better and more smoothly those sites proceed to cleanup. The worst thing we can do is just show up with men in white suits doing cleanup without having any involvement of the community.

We immediately engender fear and mistrust. What we are trying to do is eliminate that, by ensuring that as a requirement of cleanup we go in and explain to the community what we are doing and work with them, to ensure that the cleanup is going to address their legitimate health as well as future land use needs. I think you are exactly correct in that.

Mr. KREIDLER. It's kind of along the same line here, just kind of switching the question a little bit, is the question of State versus Federal cleanup requirements right now. I know that the proposal requires the cleanup to meet the applicable Federal and State requirements.

If Federal and State requirements on cleanup levels conflict as they often do, is there a simple way under the proposal to decide which requirements the cleanup should meet?

Mr. LAWS. There are the waiver provisions the President has the authority to exercise if we are in conflict.

Mr. SWIFT. If I could just jump in and suggest to the gentleman, we are going to have a second round. I have neglected to notice the ranking member of the full committee. I would always recognize the chairman and the ranking member of the full committee out of order. I didn't notice that you had come in, and I apologize for that. I am happy to recognize you now.

Mr. MOORHEAD. That's perfectly all right. I was very interested in the testimony. Mr. Laws, with respect to generic remedies like at municipal landfill I read your proposal to set up a separate process for selecting generic remedies, one which would additional factors in choosing the remedy.

Can you give us your views on how this new process might work?

Mr. LAWS. We are currently in the process of trying to identify generic remedies for certain categories of sites. There are certain sites that are relatively similar, municipal landfills, wood-treater sites and things of that ilk, where based on experience we know that the remedy that we are going to impose on those sites is relatively consistent.

Under this proposal, we would allow PRP's to basically select early on whether a generic remedy would be more appropriate, and then allow them to go ahead and select the generic remedy without necessarily having to consider other alternatives at the site.

I would caution, that just the selection of a generic remedy isn't the end of it. The mandate that these remedies be protective of human health and the environment is paramount. Even in utilizing a generic remedy we would have to make sure that its application at this particular site achieved that goal.

Mr. MOORHEAD. Under the hot spots provision does the term "containable" include consideration of institutional controls or just walls around the soil?

Mr. LAWS. We do not consider institutional controls to be contained.

Mr. MOORHEAD. How does this provision apply to groundwater? That's a very important thing out in my area.

Mr. LAWS. The administration's position is that we treat groundwater where we can see a future use of a drinking water aquifer. We then address our cleanup towards that use. Our provision is not intended to change the way we are currently addressing groundwater.

Mr. MOORHEAD. I had one question that may not be quite that relevant to today's hearing, but it's very close to it. That's about municipal liability. I am in an area where municipalities own some of these sites and even operate them.

I notice the owners are liable to the extent of their ability to pay. When a city owns a trash dump basically for the benefit of the community not to make a profit, how do you determine their ability to pay?

Mr. LAWS. The statute sets forth a laundry list of information that the municipality would have to show to demonstrate its ability

to pay. Generally, a municipalities debt obligations and how this would impact its ability to provide essential services are the types of things that would be provided by the municipality to the agency. Then, we would make a determination based as to its ability to pay. We would also be able to consider in-kind types of services as opposed to cash payments.

I think there are about seven or eight factors which are specifically listed in the municipal liability provision that we would have to consider. There is a catchall provision. If there is something that is specific to a particular municipality that is not captured by the specific showings that are required, it could be brought to the administration's attention as well.

Mr. MOORHEAD. Those are things that can swing pretty far to either side, depending upon the determiner of facts, aren't they?

Mr. LAWS. I am sorry, sir?

Mr. MOORHEAD. Those are things that can have a wide range of where the determiner of facts could come down, aren't they?

Mr. LAWS. Yes. I guess they could. What we are trying to do is capture the fact that there are a lot of different circumstances out there and we are trying to be as inclusive as possible, so that we can capture as many different circumstances as might be necessary to make sure that we are providing some sort of relief to owner/operators, which we believe are in a slightly different circumstance than just municipal generators and transporters.

Mr. MOORHEAD. Thank you, very much.

Mr. SWIFT. We will begin a second round, for those of us who still have some questions. The administration's proposal establishes "the reasonableness of the cost" as a factor for the EPA to consider in choosing among alternative needs. I would like you to define that, and tell me how that would work. What is the difference between that and the cost effectiveness evaluation, for example?

Mr. LAWS. Our intent was to put costs on an equal footing with the other factors. Currently, we look at cost effectiveness after we have taken into account preferences for treatment and permanence. One of the criticisms has been that our cost effectiveness has been viewed as not looking at the full range of options available.

By moving costs up in the process we are hoping to give it an equal footing with some of these other considerations. The reasonableness of the cost is to be viewed in relation with the other factors, the effectiveness of the remedy, its long term reliability, acceptability to the community and the risk posed by the remedy to the environment.

Mr. SWIFT. Is it weighted against each of those other factors?

Mr. LAWS. Yes, it is.

Mr. SWIFT. Would you also explain the role of cost in development of the national goals and the generic cleanup levels.

Mr. LAWS. Cost is not intended to play a role in either the development of national goals or generic cleanup levels. The national goals are to be developed based solely on a determination of what is protective of human health and the environment. The cleanup levels are intended to achieve that goal. We have limited the consideration of costs to site-specific remedy selection where we think it is most appropriate.

Mr. SWIFT. The administration's proposal seems to have two concepts in mind relating to appropriate containment remedies at Superfund sites. There's the interim containment and there's permanent containment. Could you explain how this specific statutory reference to containment remedies changes the standing that containment remedies have in this remedy selection process under current law?

Mr. LAWS. The change is that permanent containment is elevated to the point where it will now be considered with treatment. The current statute with its preference for treatment in some circumstances may have consciously or unconsciously resulted in containment not being considered along with certain other types of treatment remedies.

Now in our remedy selection process we will look at all alternatives. We will look at treatment, we will look at containment, we will look at a combination of treatment and containment, as an appropriate remedy.

Interim containment is in our innovative remedies provision, where we make a determination that an otherwise acceptable treatment remedy is only available at a disproportionate cost, but there is a more cost effective treatment remedy which will be available in a reasonable period of time. We will allow interim containment for a short period of time, to see if that treatment remedy does in fact develop.

We are looking at the determination of a reasonable period of time as probably up to 5 years at a maximum.

Mr. SWIFT. There is some concern that with the definition of hot spots in the bill from the standpoint that it's too broad and that it needs to be tightened up, even though I might note that contrasted with current law, it's much tighter than current law.

To those who might raise that concern, do you share it? What observation do you have on that particular criticism?

Mr. LAWS. Some of the other criticisms that we have are that it was not broad enough. We actually looked at both of those considerations. I mean, we are condemned at one end, in that we are treating everything, whether it needs to be treated or not. Then, we are condemned at the other end, that we are not going to be treating anything.

I think that the hot spot language that we have selected is quite reasonable. It gets to the point. It acknowledges the fact that we can have permanent containment, but that there is a certain category of waste that we just can't run the risk of leaving there. It needs to be treated and we are going to treat it. We have tried to limit the language so that it doesn't swallow up entire sites. Hot spots are limited to a definition of discreet areas.

There are certain criteria before an area can be categorized as a hot spot. I think that the language that we have come up with addresses it fairly well. It allows for treatment in those circumstances where treatment is in fact the appropriate response, but at the same time allows for permanent containment to be selected as a remedy if that is in fact appropriate.

Mr. SWIFT. One of Swift's laws is that when people stop complaining about the problem they start complaining about the solu-

tion. The problem as perceived was that we had a preference for treatment for everything in current law; is that correct?

Mr. LAWS. Exactly.

Mr. SWIFT. What we now have is a preference for treatment for hot spots.

Mr. LAWS. Correct.

Mr. SWIFT. Which would seem to be a substantial movement away from the current broad net the captures everything and has a preference for treatment for all of it. The debate here is between those who way we have gone too far away from a preference for treatment for everything to those who say we haven't gone far enough.

Mr. LAWS. Exactly.

Mr. SWIFT. The fact is, we have moved significantly from current law in that regard.

Mr. LAWS. I think that's correct, Mr. Chairman.

Mr. SWIFT. Something that seems to be missing from my reading of the administration's proposal is specific rules on how the new remedy selection process would apply to existing NPL sites. They don't seem to be any very specific transition provisions.

First of all, am I correct in that observation? If so, do you think there needs to be some specific transition provisions written into the bill?

Mr. LAWS. I am not sure if they need to be written into the bill. We are currently looking at transition issues. We have two concerns. We have concerns as to what happens when the bill is finally enacted. We also have concerns about our current time period where we have a program to run and have sites in the queue. We don't want to see a drop off in activity.

I think we can address these concerns administratively. I think the administrative improvements that we have underway will address this interim period. We are showing a lot more flexibility in trying to implement a lot of the changes fairly consistently with what we hope comes up in the current bill. We are working on a transition policy as to what might be necessary for implementation once the law is passed.

Mr. SWIFT. Thank you, very much. I recognize the gentleman from Ohio.

Mr. OXLEY. Thank you, Mr. Chairman. If I could just pursue your line of questioning in regard to preference. How does the term "disproportionate cost" relate to the term "reasonableness of cost" which is part of the five criteria in section 121?

Mr. LAWS. The reasonableness of cost is going to be compared against the other criteria. It is our view that we could come up with a remedy that we could classify the cost as reasonable in light of the benefits that are accrued, in light of the effectiveness of the remedy and its long term reliability.

That aside, there could still be a disproportionate cost in implementing that remedy. This would be addressed because a treatment remedy may be coming down the pipe within a reasonable period of time. I think that the disproportionate cost language in the innovative remedy section is provided to accomplish two things. It ensures that development of technology continues, so that we are

not rushing either to contain or to treat using very expensive remedies when a new treatment remedy might be available.

It also takes into account the fact that we could in fact have a situation where costs are so out of proportion that it makes sense to wait a little while and see if something better comes along.

Mr. OXLEY. Do you see any situation where disproportionate costs could mean unreasonable costs? Is that a term of art? Is disproportionate a term of art, or are we talking about trying to quantify what might be in fact unreasonable or unreasonable, under the circumstances?

Mr. LAWS. I don't want to get into a semantic game. I think that clearly we want a disproportionate cost to be some sort of higher threshold than the reasonableness of cost that was in the actual remedy selection process.

Whether it's unreasonable or disproportionate, clearly, what we were looking for was a comparison of cost to the other factors considered so that it makes sense to go with a particular treatment. If in fact those costs are disproportionate in terms of what might be available within a reasonable period of time then we could go to an interim containment remedy and see if in fact a more cost effective treatment might become available.

Mr. OXLEY. The section I referred to States, if an appropriate treatment remedy becomes available within that period of time that remedy shall be required. Is there any limitation on what is a reasonable period of time? In other words, does a PRP know that after a date certain EPA cannot come back and require the implementation of a treatment technology, or can EPA require treatment technology whenever it becomes available?

Mr. LAWS. I think for this section to apply there has to be more than just a glimmer of hope that a new treatment remedy will become available. There has to be something on the horizon that probably has already been involved in some sort of small scale testing, and we are waiting to see if in fact it can be applied to a site.

What we are looking at, quite honestly, is probably a term of up to 5 years. What we are planning on doing is put in place interim containment and at the 5-year review of the site, we would then make another determination.

Mr. OXLEY. Obviously, that would be important from a business standpoint, to determine the costs and capital outlay and all of those different factors.

Mr. LAWS. Certainly.

Mr. OXLEY. It's very important to be able to get a handle on that.

Mr. LAWS. This entire provision is intended to save some money. We won't go to more expensive remedies when we can do a less expensive interim containment with proper monitoring, and hope that a less expensive remedy will be along fairly quickly.

Mr. OXLEY. I thought it was interesting that the title of that particular provision is "Innovative Remedies." Is it your goal to stimulate the use of innovative remedies? Is that really what that provision is all about?

Mr. LAWS. It clearly was part of it. Quite honestly, Mr. Oxley, because the original title caused so much confusion as to what we were trying to accomplish, we came up with something else. It was initially entitled "Interim Containment." We then held a lot of dis-

cussions as to whether that title gave the message that interim containment was the only type of containment contemplated under the provision.

Since our actual purpose was to ensure that technologies in this area continued to develop, we thought that innovative remedies would more accurately convey what we were trying to accomplish.

Mr. OXLEY. Thank you. Thank you, Mr. Chairman.

Mr. SWIFT. I recognize the gentleman from Colorado.

Mr. SCHAEFER. Very briefly, Mr. Chairman, just to follow up on the gentleman from Ohio's questioning. If we have a site that has identified hot spots and also on the same site is contamination but not defined as a hot spot, and the remedy selection would be to remove the hot spot areas—either incinerate or do something with it—and to contain the remainder and this is what would be agreed upon, would this then take the people responsible off the hook once this remedy is—in other words, what I am saying is, just containment, will containment ever allow a PRP not to be a PRP?

Mr. LAWS. Sure. You are talking about participation in the allocation process and settling out liability with the United States. If that was the remedy that was selected and the PRP participated in the allocation process and settled with the United States based upon the allocator's report, then the PRP could get a complete release for that site.

Mr. SCHAEFER. I am referring specifically to the Rocky Mountain Arsenal, again. In the remedy that they are looking at there we know that it's very heavily contaminated in some areas, and removal is going to be necessary but in other areas not. If that remedy was agreed to and it was done, even though there is still some parts that are contained, would the PRP be off the hook?

Mr. LAWS. Again, not knowing the specifics. In the context, yes.

Mr. SCHAEFER. They could get off the PRP?

Mr. LAWS. Sure. If the liability provisions that must be met in order for the complete release to apply were in fact met, then a PRP could get a complete release even if there was less than a permanent remedy.

Mr. SCHAEFER. You are right, just containment. That's all I had, Mr. Chairman.

Mr. SWIFT. Thank you, very much. Elliot, thank you, very much. Mr. Clifford, we very much appreciate your again assisting the committee, and look forward to working with you as we try to resolve this.

Mr. LAWS. Thank you, Mr. Chairman.

Mr. SWIFT. Our next panel, I particularly want to welcome. I want to thank all of the members of the next panel, particularly their CEO's of major corporations. They are extremely busy, and have made time to be with us. The inconvenience is further exacerbated by the traffic and the late start of the committee meeting. With that, with great thanks.

We welcome to the panel Mr. Frank Popoff, Mr. Donald Annett, Mr. Roger Hirl, and Mr. Richard Barth. We know the special effort that you have made in order to be here and assist the committee, and we thank you for that. As you will recall, we have already asked unanimous consent that your prepared materials be made part of the record, and each of you may proceed as you wish in

summary. I am happy to recognize first, Mr. Frank Popoff, chairman and CEO of the Dow Chemical Company.

STATEMENTS OF FRANK POPOFF, ON BEHALF OF THE BUSINESS ROUNDTABLE; J. DONALD ANNETT, ON BEHALF OF THE AMERICAN PETROLEUM INSTITUTE; J. ROGER HIRL, ON BEHALF OF THE CHEMICAL MANUFACTURERS ASSOCIATION; AND RICHARD A. BARTH, CHAIRMAN, CIBA-GEIGY CORP.

Mr. POPOFF. Mr. Chairman and members of the subcommittee, thank you very much. I am Frank Popoff, chairman and CEO of the Dow Chemical Company. I am also chairman of the Environment Task Force of the Business Roundtable, an association of chief executive officers of more than 200 major U.S. corporations, to examine public policy issues affecting the economy.

The Roundtable is committed to comprehensive reform of Superfund for reform of remedy selection, reliability in funding and program administration. Thank you for unanimous consent, and the inclusion of not only my comments but our recently issued recommendations for reform of funding and liability.

Let me begin today by stating that the Business Roundtable applauds the efforts of the administration toward reform of Superfund. Superfund is fundamentally flawed and it's in need of total reform, to accelerate remediation of national priority list sites, to enhance public health and environmental protection, and to significantly reduce wasteful and unproductive expenditures.

The Roundtable is pleased that numerous concepts embodied in our address to reform are reflected in the administration's Superfund proposal, and we applaud the President for inviting input from a wide group of constituencies.

We believe that the administration's proposal represents an excellent point of departure, from which to begin the legislative process. Toward that end, Mr. Chairman, we compliment you for introducing H.R. 3800 and for your leadership in scheduling these hearings. The Roundtable stands ready to assist in any way in advancing the meaningful and bipartisan Superfund Reform Bill.

The recommendations which we present today are supplemental to the administration's proposal, and are designed to achieve enhanced health and environmental protection from risks associated with NPL sites in a significantly more cost effective manner.

First, the Roundtable supports and recommends that the purposes and objectives set forth in section 501 be amended, to mandate a national risk reduction range of 10 to the minus 4 to 10 to the minus 6. Furthermore, a clearly stated program objective emphasizing cost effective remedies is highly appropriate, given Superfund's past record of unproductive spending.

Second, the Roundtable supports and recommends allowance for the maximum use and consideration of site specific factors when determining national generic cleanup levels for specific substances. These site specific factors should allow for consideration of actual and planned land, groundwater and surface water uses, and other factors which determine the likelihood of exposure. Additionally, many sites provide PRP's an opportunity to utilize site specific risk

assessment as an alternative to establishing standards when developing an appropriate remedy.

The Roundtable recommends that this option be incorporated into the proposed legislation, such that a PRP has an option to implement either a remedy based upon a national generic cleanup level, an appropriate generic remedy, or a site specific risk assessment. Third, we applaud the recognition of containment as an appropriate remedy.

We support the concept of treatment of hot spots. However, the Roundtable recommends that the definition of hot spots be tightened, to assure that only those sites or portions of those sites which are truly hot spots will be subject to preference for treatment.

Mr. Chairman, just as business and government need to get on with the task of cleaning up toxic waste sites, so surely the task of cleaning up Superfund and initiating its reform is in everyone's considered best interest. It is an enormously wasteful spending, and with only marginal benefit to human health and environment.

We have a unique opportunity under your leadership to reform the failed statute, and make an example for not only this Nation but others around the world. The Business Roundtable looks forward to working with the entire Congress and the administration to achieve this goal. Thank you, very much.

[The attachments of Mr. Popoff follow:]

The Business Roundtable

Modifications on Remedy Selection
to the Administration's Proposed Superfund Bill

National Goals

The Roundtable supports the purposes and objectives set forth in Section 501. Working from this good start, the Roundtable recommends that this section be expanded to include additional factors. First, statutorily establish a national risk reduction goal of 10^{-4} to 10^{-6} based on a realistic risk assessment protocol and mandate risk be reduced to levels within this range. Second, reasonableness in Superfund expenditures must also be a national goal. There is no clear requirement that remedial actions must be cost effective. The Roundtable recommends that Section 501 be amended to include as an objective making remedial actions more cost-effective and emphasizing reasonableness of costs as an objective for the overall program.

Cost Effectiveness When Selecting a Remedy

We agree with many of the cost saving features of the Administration's bill. A further improvement would be a provision requiring the Administrator to select the low cost remedy where there are several equally appropriate remedies available. This additional change would both promote fiscally responsible decision making and ensure that risks are addressed.

Generic Cleanup Levels

In an effort to streamline cleanups, the Administration has directed EPA to promulgate "national generic cleanup levels for specific hazardous substances." These cleanup levels are to reflect future land uses and other site specific variables and represent concentration levels below which a response action is not required. The Roundtable can support this proposal as long as each generic standard maximizes the use and consideration of site specific factors and the generic standards are used at the discretion of the PRPs. Many states provide the PRP an option to utilize either an established standard or perform a site specific risk assessment when developing an appropriate remedy. We recommend that the bill provide PRPs with the option either to utilize the national generic cleanup level, perform a site specific risk assessment or implement an appropriate generic remedy.

Land Use

The Administration bill expressly recognizes and incorporates the concept of evaluating land use when selecting a remedy. This is a necessary and positive addition to the remedy selection process. The Roundtable believes land use must be taken into account in the evaluation of risks and the selection of a remedy at each site. We propose that this definition be firmer and suggest the use of the term actual or currently planned land use when considering an appropriate remedy. The bill currently uses the term "reasonably anticipated". This language is open for subjective interpretation and is therefore less effective.

Ground and Surface Water Use

Although the Administration's bill does provide for considering land use when selecting a remedy, it does not address groundwater or surface water. To clarify this, the bill should include language which would specify that Superfund remedies should be chosen to conform with actual or planned land/water use. The practice is to associate the term land use with residential or industrial type categorizations. In contrast, groundwater and surface water use are usually associated with the designation as either: an actual or primary drinking water source; a secondary or potential drinking water source; or a non drinking water source. Accordingly, the bill should be amended so that proposed remedies take into account actual or currently planned groundwater and surface water uses.

"Hot Spot"

We support the concept of treatment for "hot spots" subject to amending the definition of hot spot to "a discrete area within a facility that contains hazardous substances that are **highly toxic, highly mobile, cannot be reliably contained and where there is a realistic likelihood of exposure which could present a significant risk to human health or the environment**". This modification will ensure that only those sites or portions of sites which are truly hot spots will be subject to the preference for treatment.

Use of Containment/Interim Containment

The Roundtable applauds the Administration for eliminating the statutory provisions creating a preference for treatment. The Administration's statement in the analysis accompanying the bill that containment and treatment technologies should be considered on a level playing field so long as they meet the remedial standards is entirely appropriate and is a real step forward in providing for cost-effective and protective remedies. To ensure that this approach is implemented in practice, however, the bill should explicitly state that containment and treatment remedies should be considered equally. The bill should also clarify that containment options can achieve the cleanup levels by cutting off exposure routes. In other words, the point of compliance for containment is the point of exposure, and that is where the cleanup and any risk level should be measured. Finally, the Roundtable recommends that "interim containment" be utilized as a remedy only where there is no cost-effective treatment or permanent containment remedy available. Where containment is used, it should be considered a final remedy unless the aforementioned conditions exist.

Elimination of ARARs

The introductory materials accompanying the Administration's bill indicate that the bill is intended to require remedial decisions to be made within the four corners of the new statute. Contrary to this statement, however, the bill retains a modified ARARs provision that creates many of the same problems as exist under the current statute. The modified ARARs provision should be deleted from the bill because it allows remedies to be based on standards outside of Superfund that bear little or no relation to the risk posed by the site. Under the bill's approach, the determination of which Federal requirements are "suitable" (and therefore ARARs) is of significant concern, particularly in terms of groundwater remediation decisions. Safe Drinking Water Act standards should not apply universally but should instead be used where groundwater is currently being used or currently planned for use as drinking water (*i.e.*, only in situations where risk analysis warrants that level of risk reduction), and the point of compliance should be the point of exposure. Moreover, while the limitation of state ARARs to those standards specifically addressing remedial action is an improvement over current law, state ARARs should simply not be requirements under § 121 (d).

Community Involvement

We support early, frequent and open communication with the community potentially affected by a Superfund site regarding how that site will be remediated. However, the community involvement title goes too far by creating substantive requirements for remedy selection. The very loose language in the community involvement title relating to multiple sources of risk and background levels as a measure of community acceptance must be clarified to assure that the more general provisions of the community involvement title do not override more specific provisions of the remedy selection title. It also must be made clear that the citizen, environmental and public interest representatives on the Community Working Group must live in the affected community and therefore truly represent local interest.

Voluntary Remediation

The Administration's proposal on voluntary cleanups is a good start. Programs need to be established nationwide to encourage and foster voluntary cleanups. One significant stumbling block to voluntary performance would be removed by offering PRPs some longterm protection. upon performing voluntary action. This would be achieved by adding to the bill that where PRPs or responsible entities perform voluntary remediations, which are in compliance with all cleanup requirement under CERCLA and SARA, then the PRP will not be required to return to the site and perform additional work under this or any other environmental statute.

THE BUSINESS ROUNDTABLE

ELEMENTS FOR SUPERFUND LIABILITY AND FUNDING REFORM

The Business Roundtable supports comprehensive reform of the current Superfund law, regulations and program operation so that the Superfund program can be refocused on its most important goal - to protect human health and the environment by quickly and efficiently addressing the risks associated with past waste disposal.

The Roundtable's position with respect to fundamental reform in liability and funding consists of a number of key elements which reflect the intent of previously approved Roundtable principles and position statements. We will work to incorporate as best possible into final legislative language the elements listed herein:

Roundtable Elements for Liability and Funding Reform:

1) Since the country's resources are finite, Superfund expenditures, both public and private, should be subject to an annual budget with priorities based on health risks.

2) Essential to the success of Superfund reform is a substantial reduction in overall costs through reforming the remedy selection process, minimizing transaction costs and assuring that Natural Resource Damage claims are contained within well-defined and readily established limits. The Roundtable will continue to seek out and support proposals to accomplish this to the maximum extent — consistent with Superfund's goals of protecting human health and the environment.

3) The imposition of retroactive liability is unfair and alien to U.S. judicial tradition. The Roundtable will continue to look for ways to ameliorate effects of retroactive liability, and to explore alternate funding mechanisms.

4) Funding for the Superfund program should be fair and equitable, defined and well understood early in the reauthorization process, and should provide certainty and predictability to as many constituencies as possible. Therefore, the Roundtable supports:

   - an insurance tax that is affordable to the insurance industry and includes contributions from all appropriate segments of the property and casualty insurance industry, including foreign insurers;

   - a modest tax on small businesses, which do not pay the environmental income tax;

   - a modest increase in the contribution from general revenues if there is a cap on municipal solid waste generators and transporters;

- no increase in current crude oil and chemical feedstock taxes;
- if necessary, an increase in the Environmental Income Tax (up to a doubling);
- a mechanism to assure that all taxes and fees collected as part of the Superfund program are dedicated to Superfund purposes and not used to reduce the deficit or for any other unrelated purpose.

5) A fair share allocation process should be binding on both PRPs and the government, and also provide for the full orphan share to be paid from the Superfund. If there is an aggregate cap for municipal generators and transporters, it should be no less than ten percent at each site.

6) A statutory framework should be included which provides for the resolution of the vast majority of insurer/PRP disputes in a fair and equitable manner.

7) Federal PRPs at private sites should participate in the cost allocation process and settlement in the same manner and the same extent as private PRPs. They should be liable for activities subject to federal regulation of the economy during wartime.

8) Environmental justice issues, related to waste site cleanup, must be addressed in the reauthorization, and the Roundtable will work constructively with other constituencies to assure that appropriate provisions, based upon sound risk assessment principles, are included.

Mr. SWIFT. Thank you, Mr. Popoff. I am happy to recognize Mr. J. Donald Annett, president of Environmental Health and Safety Division of Texaco. Mr. Annett.

STATEMENT OF J. DONALD ANNETT

Mr. ANNETT. Thank you, Mr. Chairman. I am appearing today on behalf of the American Petroleum Institute. Before turning to the specific comments on remedy selection provisions in the administration's bill, I want to note three fundamental propositions concerning Superfund.

The Superfund goal of protecting human health and the environment is just as valid today as it was in 1980, and as was reaffirmed in 1986. The fatal flaws came about because of how liability, remedy selection and revenue raising mechanisms were designed and implemented. These mechanisms need to be fixed and overhauled now, not next year.

The second observation is, revenue motivating industrial companies, municipal governments, insurance companies, waste generators and transporters, banks and lending institutions to expeditiously clean up waste sites, the existing statute drives them to hire lawyers and consultants to make someone else pay for the cleanup or challenge remedy selection.

Third, our Nation continues to face massive expenditures to protect the health of people and the environment. It is imperative that our finite resources not be misallocated to ineffective and wasteful programs as occurs in the name of cleanup's today.

Turning to specific comments on remedy selection. API wants to commend the administration for recognizing the need for legislative changes in Superfund, and providing very constructive proposals which API can support with certain modifications and/or clarifications.

The bill's recognition of land use in remedy selection will clearly speed cleanup's, reduce cleanup costs, and conserve resources. This important reform provision would also reduce excessive remediation. API strongly supports this concept, and is pleased that the administration has included it in the bill.

The bill also calls for establishment of a national protocol for conducting risk assessments be based on realistic assumptions. Such protocol can greatly advance risk assessment reform and could correct a serious flaw in the present program. Unfortunately, the bill makes little provision for using the risk assessment protocol it establishes, by over emphasizing the use of national generic cleanup levels, mandatory treatment for hot spots and generic remedies. The bill may largely preclude reliance on site specific risk assessments.

API urges that the statute clearly provide that if the Administrator disagrees with the site specific risk assessment, that PRP would have the right to have such done. In determining cleanup procedures and remedies the Administrator would be required to give substantial weight to the PRP's risk assessment.

API applauds the administration for recognizing containment as a legitimate form of response action. The bill seems to permit selection of protective remedies which employ treatment and/or containment on an equal basis. In section 503 of the bill it appears to

eliminate the preference for treatment and permanence except in the case of hot spots. Protecting health and the environment is the goal, and maximum flexibility in selecting the remedy should be achieved in achieving that goal.

API is willing to support permanence for treatment of hot spots. We are willing to support that, as long as the term is narrowed so that it doesn't broadly include every hazardous substance in every site. We would suggest that the definition be changed, as follows. A hot spot is a discreet area within a facility that contains hazardous substance that are highly toxic, highly mobile, cannot be reliably contained, and present a significant risk to human health and environment.

API is concerned that the bill contains only limited requirement of remedial actions be cost effective. Generic remedies are required to be cost effective, but it is silent with respect to other remedies. Further, cost is the last factor considered in selecting appropriate remedies, and they are considered only if they are unreasonable, and only in relationship to the other four factors considered.

The bill could be interpreted today as maintaining the status with respect to cost under CERCLA. Mr. Laws, earlier today could have helped that interpretation, when he stated that costs would be given equal footing with the other four criteria in deciding remedy selection. That was a helpful bit of testimony.

API wants to emphasize, when we discuss cost effectiveness we are not calling for relaxation in requirements to protect human health and the environment, but rather for the selection of the lowest cost appropriate remedy whenever several alternatives are available. The cost consideration would not reduce protection of human health and the environment.

API is concerned with the clarity in the terms national goals, generic cleanup levels, and generic remedies. API does not support national cleanup standards that would be mandated with respect to every site. We would accept, however, inclusion of these concepts in the bill provided they are clearly defined. For example, generic cleanup levels should be renamed, must be renamed, and used not as a national cookie cutter fix but as a no further action level determination. They truly represent concentration levels below which a response action is not required.

If a site does contain contaminates that exceed this no further action level, the mandate would be that remediation requirements must be further evaluated. That evaluation must conclude a full consideration of generic remedies properly defined, as well as risk assessments. The option must be given to the parties to look at whether you pick a remedy selection, a risk assessment, et cetera.

Our complete statement discusses ARAR's, that has been discussed earlier. I would simply note that the language in the bill still creates ambiguity as to whether the national standards under this bill, the national criteria, would be undercut by continued utilization of other national laws and State laws. We think the best approach would be to clearly make it very clear that ARAR's should not be used.

I want to reiterate API's support for reform of Superfund remedy selection process. There are positive things in the administration's bill, where we wish to have them clarified or expanded. API, like

BRT, is looking forward to working with Congress and the administration to make the needed changes.

I want to commend you, Mr. Chairman, for having these hearings on this very important issue. Again, I urge, Congress should act this year.

Mr. Chairman, the Nation would be truly served if you would cap off your very illustrious Congressional career by leading the charge to pass a Superfund bill that will really protect human health and the environment. Thank you, very much.

[The prepared statement of Mr. Annett follows:]

Testimony of the American Petroleum Institute
for the Subcommittee on Transportation and Hazardous Materials
of the Committee on Energy and Commerce
U.S. House of Representatives
on Remedy Selection Issues
February 24, 1994

The American Petroleum Institute (API) appreciates the opportunity to submit testimony on the remedy selection provisions of H.R. 3800, the Clinton Administration's proposed "Superfund Reform Act of 1994." API represents approximately 300 member companies involved in the exploration & production, refining, transportation, and marketing of petroleum and petroleum products. API members will be greatly affected by the changes that Congress elects to make to the Superfund program as members of the community, as potentially responsible parties (PRPs), and as taxpayers. Thus API offers the following comments to help further Superfund reform.

API agrees with and supports the Administration's renewed emphasis on Superfund's goal of protecting human health and the environment. API also agrees with EPA Administrator Browner that the Superfund program should protect human health and environment more efficiently and more fairly than the current law does. API concurs with her statement that "the heart of Superfund reform has to be speeding the pace and lowering the cost of cleanup."[1]

[1] Statement of Carol M. Browner, Administrator, U.S. Environmental Protection Agency, before the Subcommittee on Transportation and Hazardous Materials of the Committee on Energy and Commerce U.S. House of Representatives, February 3, 1994, Page 9.

API supports several of the bill's provisions, but this support is tempered with concern over other provisions, which would appear to counteract faster and lower cost response actions.

Land Use

The bill's recognition of land use in remedy selection could greatly speed cleanup, reduce cleanup costs, and conserve resources. The bill would establish that "reasonably anticipated future uses of land" must be taken into account in the selection of a remedy. This important reform would reduce the excessive remediation that is caused by trying to clean every site to the same contaminant concentration. Future exposure at sites will vary widely depending on the intended future use of the land. Maximum societal benefits from the Superfund program can only be achieved when cleanup standards and remedy selection are tailored to actual exposures anticipated under realistic future land use. API strongly supports this concept and is pleased that the Administration has included it in the bill.

To work effectively, however, the "reasonably anticipated future uses of land" must be realistic. The bill requires the President to give substantial weight to community working groups on the determination of future land use but includes no criteria specifying how such recommendations should be made. API encourages the committee to consider providing community working groups with a framework for ensuring that their future land use recommendations are realistic. That framework should recognize existing and current land-use laws and define the working relationship between community working groups and local governments.

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Risk Assessment

The bill calls for establishment of a national protocol, to be based on realistic assumptions, for conducting risk assessments at Superfund sites. Such a protocol could greatly advance risk assessment reform and would correct a serious flaw in the program. Current risk assessment methods are overly conservative and often based on hypothetical, worst-case scenarios, and unrealistic assumptions concerning exposure and toxicity. Such assessments are not always founded on the best available science; rather, they often reflect simplistic rules and default exposure assumptions that do not consider the actual factors at specific sites.

API recommends that the bill require that the new risk protocol be based on current, credible, and realistic scientific evidence and methodologies which have received peer review; actual site-specific data where it is available or reasonably obtainable; and a range of values for exposure and toxicity as opposed to just worst-case assumptions. Scientifically objective risk assessments based on all relevant data should be the central element in making cleanup decisions.

Unfortunately, although the bill directs establishment of a risk assessment protocol, it makes little provision for its use. By relying on national generic cleanup levels, mandatory treatment for hot spots, and generic remedies, the bill largely precludes reliance on site-specific risk assessment.

API is concerned that the Administrator will rarely choose to apply the protocol and that site-specific risk assessment will occur only in those cases where "a national generic cleanup level has not been developed." Generic levels and generic remedies may help

streamline remedy selection and can be cost effective at some sites. At many other sites, however, risk management decisions are better made on the basis of actual site-specific factors. The risks posed, actual and potential water and land use, toxicity and exposure pathways, and degree and type of contamination are likely to vary widely from site to site. API believes that remedy selection is a critical and complex decision that should not be made automatically. The particular characteristics of a site should always be considered in determining whether to rely on generic remedies, national generic cleanup standards, or site-specific risk assessments.

API also suggests that if a PRP disagrees with the Administrator's determination of whether a site-specific risk assessment is appropriate, the PRP should have the right to conduct a risk assessment. In determining the cleanup levels appropriate for a site, the Administrator should be required to give substantial weight to the results of the PRP's risk assessment.

National Goals Levels and Remedies

The bill requires the Administrator to promulgate national goals to be applied at all facilities subject to remedial action. API agrees that rule-making is the best process for establishing such goals, but API suggests that a time limit be established for the process.

API is troubled however, by the lack of clarity in the terms "national goals," "generic cleanup levels," and "generic remedies." Although the intent of the bill seems to be to streamline remedial processes through the use of national remedy selection criteria, the bill does not clearly define the terminology or Congressional intent. This could cause confusion

and lead to lengthy and costly litigation over the meaning of the mandate given to the Administrator.

The bill directs EPA to promulgate "national generic cleanup levels for specific hazardous substances". API recommends renaming generic cleanup levels "no further action levels," because they "represent concentration levels below which a response action is not required." Renaming and redefining generic cleanup levels in this way would avoid the creation of wasteful one-size-fits-all site cleanup levels or standards. Instead, no further action levels would quickly identify low priority contaminants and focus remedial actions on truly significant risks.

Containment and the Preference for Treatment

CERCLA currently over-emphasizes treatment in remedy selection. Therefore, API welcomes the Administration's acceptance of containment as a legitimate form of response action.

The current preference for treatment and permanent remedies often precludes alternative remedies such as containment and institutional and engineering controls. In many cases, alternative remedies would fully protect human health and the environment more rapidly and at greatly reduced costs. Furthermore, containment remedies, which leave contaminated soil undisturbed, can pose less risk to human health and the environment than more active types of remediation, which involve excavation and subsequent transportation, treatment, and disposal.

The Administration's bill properly permits selection of protective remedies which employ treatment and/or containment on an equal basis. And, Section 503 of the bill appears to eliminate the preference for treatment and permanence except in the case of hot spots. Protecting human health and the environment is the goal of Superfund, and maximum flexibility should be allowed in achieving this goal.

One of the factors used to select the appropriate remedy is the measure of "its long-term reliability or its capability to achieve long-term protection of human health and the environment." API is pleased that long-term reliability will be used as an appropriate measure of Superfund's goal.

Despite these positive changes, several other provisions retain the preference for treatment, including the misnamed "Innovative Remedies" section of the bill. Even if an appropriate containment remedy is available, interim containment methods could be selected whenever a treatment remedy is found to be disproportionately costly. Thus, a fully protective containment remedy could be rejected while waiting for an appropriate treatment remedy to be developed. This is clearly a continuation of the bias for treatment.

Treatment is specifically maintained for hot spots. API is not opposed to treatment for specific contaminated areas that pose unacceptable risk levels. Unfortunately, the bill defines hot spots so broadly that the term would include most hazardous substances at all Superfund sites. As a result, most remedies would include a substantial amount of treatment regardless of the degree of protection and long-term reliability provided by a containment remedy. In order to properly limit this preference for treatment, API suggests that the term hot spot be clarified and more narrowly defined as "a discrete area within a facility that contains

hazardous substances that are highly toxic, highly mobile, cannot be reliably contained, and present a significant risk to human health or the environment."

Cost of Cleanup

API is concerned that the bill contains only limited consideration of cost. The bill does require that generic remedies be cost-effective. The same should be true of other remedies. Unfortunately, cost is listed as the fifth and last factor to be considered by the President in selecting appropriate remedies. Even then, costs are only to be considered if they are unreasonable and only in relation to the other factors. Thus, the bill continues to give inadequate consideration to cost under CERCLA -- a major weakness in the current law.

The costs of site remedies must be a greater factor if Superfund implementation is to increase its rate of progress and decrease its inefficient use of societal resources. This does not imply that the requirement to protect human health and the environment should be relaxed but rather that selection of the lowest cost, appropriate remedy should be required whenever several adequate alternatives are available. Increased considerations of cost will actually enhance protection of human health and the environment by addressing more sites with the same amount of resources.

Interestingly, the bill does recognize the importance of cost for fund-paid cleanup in the context of complying with Federal and State standards. In the selection of remedies at fund-paid sites, the "level or standard of control" may be relaxed if the cost of achieving the

standard is too high. The importance of cost should be recognized for PRP-paid cleanups as well as fund-paid cleanups.

The "reasonableness of the cost of the remedy" should be maintained as an equally weighted factor to be taken into account by the President in selecting appropriate remedies. In addition, the President also should be required to select the lowest cost, appropriate remedy at sites where more than one appropriate remedy is available.

Applicable or Relevant and Appropriate Requirements (ARARs)

Currently, engineering and environmental standards from federal, state, and local laws, which were established to address other problems, are used to set cleanup standards. Attaining these standards (or ARARs) is mandatory because they are threshold criteria for remedy selection. The use of overlapping and conflicting ARARs has long retarded cleanup progress at Superfund sites.

Unfortunately the bill does not eliminate ARARs, despite the Administration's stated intent to do so. The bill states that a remedial action must comply with any federal requirement determined to be "suitable for application to the remedial action at the facility." It further requires compliance with requirements of "any state environmental law specifically addressing remedial action that is adopted for the purpose of protecting human health or the environment with the best available scientific evidence through a public process where such a law is more stringent." This inconsistency will continue the current problem with ARARs. API recommends that the legislation reflect the Administration's stated intent to eliminate ARARs.

Conclusion

It is API's position that a number of substantive changes to H.R. 3800 are needed. This said, we are pleased that the reform efforts are going forward. Administration officials and members of Congress are to be commended for their efforts to remedy the current law and regulations. API sincerely hopes its testimony will assist those efforts and looks forward to working with members of the Subcommittee to reform Superfund.

Mr. SWIFT. Thank you, Mr. Annett. I am willing to lead, and we will find out how many people want to follow.

Mr. ANNETT. I am here.

Mr. SWIFT. Thank you, very much. I am happy to welcome Roger Hirl, who is president and CEO of OxyChem, appearing here on behalf of the Chemical Manufacturers Association. Welcome, Mr. Hirl. You may proceed.

STATEMENT OF ROGER HIRL

Mr. HIRL. Thank you, Mr. Chairman. Since you have defined what it is that I do, you have taken the first paragraph of my remarks. I am here testifying, as you have stated, on behalf of the CMA. I will use the brief definition, the Chemical Manufacturers Association.

I, too, thank you very much, for your commitment and outstanding leadership on the issue of Superfund. You have been a very consistent and influential voice for Superfund reform. As the administration and Congress looks at the concern that the public has expressed many times over environmental law and environmental control, certainly, a flawed Superfund is something that sets a very poor example if you will of what really we can do about environmental concerns.

For the past several months, Mr. Chairman, CMA has talked to hundreds of people about Superfund. We have talked to officials at every level, from local and State and Federal governments. We have talked to environmental leaders, business leaders and journalists. We asked them about the process for selecting remedies at Superfund sites. Frankly, we were surprised at how much agreement we did find. By large majorities and from every point on the political spectrum, the people we talked to said that cleanup's take too long, cost too much, and accomplish too little.

They said the law was to blame. It sets unrealistic standards and doesn't consider real life factors. It doesn't give the community a voice in cleanup decisions that affect their very life. They told us they wanted a Superfund program that results in faster cleanup's, less expensive remedies at everything that affects them, cleanup's that take future land use into consideration and give the community a say so in how cleanup's are done.

They, especially local officials, said they are frustrated that old industrial sites are lying unused in their cities while business' move to Greenfield sites beyond city limits. We agree with them. Superfund can achieve its objectives without draining communities and business alike. Simply put, nobody can afford Superfund the way it currently operates.

Mr. Chairman, the place to begin repairing the Superfund program is in its remedy selection provisions. We think the administration bill is a very welcome first step in the reform process. It is, in fact, a good starting point. Giving the community a strong voice in the remedy selection process is one of the clear benefits of this bill. Community working groups can provide an avenue for community participation in making cleanup decisions.

Considering future land use when selecting a remedy is another positive feature of the administration plan. It can streamline the cleanup process by matching the cleanup to the site's planned use,

and do so without sacrificing current levels of protection. A future industrial site for instance does not obviously require the same cleanup as a housing development in the future.

The administration undoes itself by imposing national cleanup standards on sites. Even though the standards are use-based it imposes a one size fits all use standard, a standard that I am convinced will result in more waste and more litigation and more process. The bill seems to correct another one of the most time consuming and expensive elements of Superfund, the law's current preference for treatment.

Eliminating part of the treatment preference is a positive step. Treatment containment or other measures should all be considered on equal footing, so long as they achieve the goal of community protection. Then, the bill says that all so-called hot spots must be treated. This provision doesn't consider all remedies equally. Again, it requires treatment.

This provision is worded so broadly, that treatment could apply to the entire site at every site. Again, we have a case of one provision largely cancelling out the other. There in fact could be sites where there are so many hot spots as defined, that the cost and effectiveness of cleanup would be greater than under current law.

Next, the bill calls for reform of EPA's risk assessment methods. Good idea, but the plan falls short of true reform by offering no specifics, no definitions, or no timetables. This portion of the bill could be considerably beefed up, by incorporating the Risk Communication Act of 1993. In any event, a call for risk assessment reform would be negated by the bill's reliance on national cleanup standards. National standards cannot address local situations, all of them. National standards on site specific risk assessments, we believe, provide the most accurate picture of real risks at a site and would lead to the most appropriate response.

The bill also gives some consideration to cost when selecting a remedy. Here, again, I think it falls short of real reform. The bill should require cleanup's to use the most cost effective methods available so long as they fully protect the public health. I would like to make one last point, Mr. Chairman.

The administration bill makes no mention of acceptable risk. Currently, EPA defines 10 to the minus 4 to 10 to the minus 6 as a risk range that protects human health. Just last year the U.S. Court of Appeals for the DC. Circuit confirmed that this range fully protects the public. We do not agree with those who would replace the range with a single 10 to the minus 6 standard. We do not think that it is a scientifically valid argument in all cases.

After all, as William Reilly noted, the risk of a person being struck dead by lightening is 35 times greater than 10 to the minus 6. Dying in an accidental fall is 4,000 times more likely than being killed in a car accident, and is 16,000 times above the 10 to the minus 6 standard. We would like to retain the risk ranges already incorporated in the current program.

In closing, Mr. Chairman, we have a golden opportunity to achieve meaningful and beneficial reform to Superfund's remedy selection process. The administration is certainly off to a good start. If we can straighten some of the twists and turns in this bill, we will be on the path of real and lasting improvements to the

Superfund program. Thank you. I join the prior gentlemen in saying we would like to support this, as you retire from your wonderful service to this Congress.

[The prepared statement of Mr. Hirl follows:]

STATEMENT OF J. ROGER HIRL, PRESIDENT, OCCIDENTAL CHEMICAL CORPORATION

Good morning, Mr. Chairman and members of the subcommittee. My name is Roger Hirl, and I'm the president and chief executive officer of Occidental Chemical Corporation. I'm here today to testify on behalf of CMA, the Chemical Manufacturers Association.

As Congress turns its attention to Superfund reform, nothing could be more important than improving the remedy selection process. The current system is simply too rigid, too slow, and too costly. As a result, it encourages wasteful remedies. We need a program that protects human health, speeds site cleanups, and encourages redevelopment of sites in our cities to create job opportunities where they are needed.

The administration's reform proposal, as reflected in H.R. 3800, is a welcome first step in the right direction. With thoughtful improvement, genuine, beneficial reform is in reach. Today, I will briefly note four positive elements in the administration's proposal and then address six issues where without improvement the success of the program will be limited.

First, we applaud the administration's recognition that future land use should be considered in the remedy selection process. This will allow sites to be cleaned up to levels that are consistent with their intended future uses. A site being prepared for new industrial use does not need to be cleaned up to the same level that must be required for the future site of a housing development or a school.

Second, while we agree that generic remedies can help streamline the Superfund process, our experience is that site-specific factors are often extremely important in selecting a remedy. For that reason, we believe that generic remedies should not be mandatory. Flexibility to choose the most appropriate remedy, generic or site-specific, is essential.

Third, our industry commends the bill's partial elimination of the current preference for treatment remedies. We agree that treatment, containment, or other remedial measures, such as institutional and engineering controls, should be considered on an equal footing. All of these methods can provide safe and effective remedies.

Fourth, there must be greater community involvement in Superfund's remedy selection process. Community Working Groups can provide a focal point for community participation in Superfund decision making.

Despite these positive aspects of the administration's bill, there remain six major areas that without considerable work will unnecessarily burden the remedial process with inappropriate and costly requirements. Of particular concern, are the use of national cleanup levels, and the definition and required treatment of "hot spots." Risk assessment reform, ARAR's, the role of cost and the level of acceptable risk are also areas that must be improved to achieve real Superfund reform.

First, CMA is concerned that the national cleanup levels described in H.R. 3800 are often going to require cleanups that go far beyond what is needed at a site, and will result in wasted resources that can be better spent at other sites. As proposed by the administration bill, there is not enough flexibility for adjusting these levels to reflect site-specific characteristics. We believe that site-specific risk assessments will avoid this problem and will provide the most accurate picture of the risks posed by sites.

However, national generic levels could be useful in the cleanup process if they were used as screening levels below which no action would be required for certain substances or that could eliminate certain exposure pathways.

Second, CMA objects to the new preference for treatment of so-called "hot spots." Any highly contaminated areas or areas of particular concern should be accounted for during the remedy selection process. In addition, the definition of "hot spots" is so broad that entire sites could be designated as "hot spots." The bill's preference for treatment of "hot spots" should be deleted or at the very least, considerably narrowed.

Third, while we endorse the call for reform of EPA's risk assessment methodology, the bill does not go nearly far enough. It offers no specifics, no definitions, and no deadlines for action. We urge that H.R. 3800 incorporate the well thought-out provisions in H.R. 2910, the Risk Communication Act of 1993.

Fourth, a general consensus exists among Superfund stakeholders that ARAR's should be eliminated from the remedy selection process because they are obstacles to reaching sound decisions. At first blush, H.R. 3800 appears to eliminate ARAR's. But what it really does is replace ARAR's with two new sets of standards: (1) Federal standards that are "suitable" for Superfund; and (2) State cleanup standards that are more stringent than Federal standards. This modification fails to solve the problem.

CMA recommends that EPA be able to *consider* ARAR's in selecting remedies, but that they not be required to use them when it doesn't make sense.

Fifth, H.R. 3800 places greater emphasis on cost in the remedy selection process. That is important. However, we believe meaningful reform requires more than this. The bill should be revised so that cost, in the form of cost-effectiveness, is reflected by selecting remedies that protect human health at the lowest cost. Making cost-effectiveness a threshold criterion will ensure that hard questions will be asked, and asked before gold-plated decisions become irrevocable.

Sixth, and last, H.R. 3800 requires a rulemaking to establish the level of acceptable risk. Under the current program, EPA has set the level at a range of 10 to the minus 4, to 10 to the minus 6 for carcinogens, that is, a one in ten thousand to one in a million chance of contracting cancer from site exposure. Some other participants in the Superfund dialogue have suggested that the range should be eliminated, and that the acceptable risk level should be fixed at 10 to the minus 6.

CMA believes that EPA's current risk range should be maintained. Just last year, EPA's risk range was upheld by the U.S. Court of Appeals for the DC. Circuit. The court agreed with EPA's findings that risk levels in the range of 10 to the minus 4 to 10 to the minus 6 are protective of human health as contemplated by Superfund. We know of no scientifically valid justification for narrowing that range and requiring all remedies to achieve a risk level of 10 to the minus 6.

In fact, in pointing out how remote such a risk is, former EPA Administrator William Reilly stated that the hazard from death by lightning is 35 times as great; by accidental falls, 4,000 times as great; and in a car accident, 16,000 times as great.

In closing, Mr. Chairman, H.R. 3800 takes some cautious first steps toward solving the fundamental problems with the current remedy selection process. But more is needed.

Mr. Chairman, this is a golden opportunity for beneficial reform. The administration has begun the process of change; we should support it and complete it. Two weeks ago we testified before you about our concerns with the liability portion of the administration's bill. Today, we highlighted our problems with the remedy selection provisions. We commit to working with you and the other members of the subcommittee to address these and other concerns in the coming weeks. Thank you Mr. Chairman. I will be happy to answer any questions.

Mr. SWIFT. Thank you, very much. Our last witness on this panel is Mr. Richard Barth, chairman, president and CEO of Ciba-Geigy Corporation. I am happy to recognize you and thank you as well, for your enormous cooperation with the committee.

STATEMENT OF RICHARD BARTH

Mr. BARTH. Thank you, Mr. Chairman. I appreciate the opportunity to appear before the subcommittee. I, too, urge the subcommittee to move Superfund reform to prompt conclusion in this Congress.

As a company—and I am the only speaker on our panel who is speaking here on behalf of his individual company—we have carried out our obligations, under the present difficult Superfund law in a constructive and non-contentious manner. We now appear before you to endorse changes which will improve the law's effectiveness both from a health and environmental standpoint, but as well from a cost standpoint.

Last year we spent $60 million on remediation activity. We believe a significant portion of that was not required in order to safeguard human health and the environment. I think it's worth noting that we are remediating conditions which stem from waste management practices some of which date back over 40 years, and

which practices were lawful, permitted and generally state of the art.

Let me now turn to the bill and focus on six specific areas. One, mandate for permanence to be replaced by a standard of long term reliability. H.R. 3800 rightly replaces the mandate for permanence with remedial actions which provide assurance of long term reliability. The present mandate has caused innumerable delays and wasted resources without any increased protection of human health and the environment.

Two, the role of containment technology. H.R. 3800 recognizes that long term reliability can be achieved in a variety of ways and places containment on a equal footing with treatment. Containment may represent the most appropriate remedial option when technology does not exist to address a problem or when achieves equivalent protection in a significantly more cost effective manner.

When containment is reused it obviously raises the question of who guarantees performance down the road, or how will technology be developed to address presently unsolvable conditions. To address these questions, Mr. Chairman, I suggest creation of two funds, to be financed by responsible parties employing containment. One, a containment and contingency fund would guarantee performance of a containment remedy or pay for required future remedial action should the responsible parties become insolvent.

A second technology research fund would intensify present efforts by funding research and providing demonstration grants focused on developing new technologies to cost effectively remediate presently unsolvable problems.

Three, hot spots. An area of special concern highlighted in the bill deals with hot spots. It is important that there is no ambiguity in what constitutes a hot spot. It must be clearly defined and specifically defined. I think we all have a sense of what hot spots are. I know that in my company when somebody comes in and says we have a hot spot, I don't think there's any question. You just say let's get it out and let's treat it. I would be surprised that it is not feasible to precisely define hot spots. As I say, it's pretty automatic in our organization that if you got one and you can treat it and remove it and treat it, just get at it and don't waste your time.

On balance, a preference for treatment is probably the appropriate approach to discreet hot spots, once again, if properly defined.

The fourth item, role of costs. All remedial options including those addressing hot spots should be the subject of a cost benefit analysis. While cost is one of the five remedy criteria in the Bill, we must ensure that it's equally weighted to the four others which are effectiveness of remedy, long term reliability, risk posed by the remedy and acceptability to the community.

Five, elimination of ARAR's. We support the elimination of ARAR's with the retention of the recognition to be given to applicable State standards, specifically promulgated for remediation. Six, national goals, generic cleanup levels and risk protocol. One of the recurring criticisms of the Superfund program has been that it lacks clear direction, consistency and measurable goals.

H.R. 3800 attempts to answer this question, through the establishment of national goals, national generic cleanup levels and a new national risk protocol.

We look forward to having a better understanding of the basis upon which the goals and cleanup levels will be based, and the extent to which site specific considerations, anticipated future land use, realistic exposure scenarios and cost effectiveness will be factored into those goals or cleanup levels. If these factors are properly considered the net result can be a substantial improvement over the current situation.

It has been our experience that site specific risk assessments based on realistic and not hypothetical assumptions, can be the most effective means to determine appropriate cleanup levels for a site. Generic cleanup levels may promote faster remediation at smaller, less complicated sites. However, in the case of larger and more complex sites with greater variety of site specific factors, cleanup levels need to take into account the results of a site specific risk assessment based on realistic assumptions.

We are pleased to see that the bill calls for the establishment of a new national risk protocol, to be based on realistic assumptions. Hopefully, this approach will replace existing techniques, which often generate the selection of remedies which are unnecessarily expensive, without any increased benefits.

We also agree with the bill's statement that all communities, no matter where they are located, should receive consistent and equivalent levels of protection from Superfund remedies. We support and encourage active community participation in the remedial process, from start to finish. Communities have a large stake in a cleanup. We have learned first hand, that an involved community is more productive to the entire process.

In conclusion, Mr. Chairman, H.R. 3800 addresses many of the major weaknesses of the Superfund program and has the potential to dramatically improve the program, while also reducing remediation costs. Mr. Chairman, as you work through the reauthorization process I ask that special attention be given to the problem of how new requirements in this bill will be applied to those sites that have not yet begun actual remediation but are in various stages of the regulatory process.

We hope that transition rules can be developed which will ensure the implementation in those cases, of the principles of the amended law. Ciba is committed to seeing through Superfund reform in 1994. To that end, we are looking forward to working with you and the subcommittee to see that this goal is accomplished. We certainly hope that this opportunity does not pass us by.

Mr. Chairman, this concludes my remarks. I would be happy to join the others in answering any questions. Thank you, very much.

[The prepared statement of Mr. Barth follows:]

TESTIMONY OF:

RICHARD A. BARTH
Chairman, President & CEO
Ciba-Geigy Corporation

Thank you Mr. Chairman and members of the Committee for the opportunity to discuss remedy selection as outlined under H.R. 3800 and the needed reform of the Superfund program.

Since Ciba isn't exactly a household name, I'd like to start by offering a brief sketch of Ciba. Ciba-Geigy Corporation, headquartered in Ardsley, New York, is a wholly-owned subsidiary of Ciba-Geigy Limited located in Basel, Switzerland. In the US, we have over 16,000 employees primarily engaged in the manufacture of health care, agricultural and industrial chemical products.

Our US business represents about one-third of the world-wide Ciba enterprise. In 1993, we had sales of $4.5 billion. We manufacture in the US over 80 percent of what we sell in the US. We have become, as many multi-national companies, increasingly globally integrated in our manufacturing operations, and as part of this global enterprise, we have also become a significant exporter from the US of manufactured goods.

Guiding all of our world-wide operations is an operating philosophy called VISION 2000 which gives equal weight to our economic, social and environmental responsibilities.

Ciba is committed to a rational Superfund process. We think that the present law does not provide a rational process, and we strongly endorse its comprehensive overhaul.

Our own experience with the Superfund program resulted from waste disposal practices between 1950-1980 that were the legal, accepted and often times, state-of-the-art practices of the day.

While we acknowledge responsibility for our cleanup obligations, Ciba believes that changes in the law are necessary to make Superfund more environmentally responsive and economically realistic. We support cost-effective cleanups that are protective of human health and the environment.

Ciba is spending in excess of $60 million annually on site remediation. That figure includes engineering and design work, implementation and some transaction costs. Not included in this figure are our insurance litigation costs. We believe a significant part of our expenditures have been in excess of what is required to select and implement the remedy necessary to protect human health and the environment. Some of these costs have been driven by the present law's mandate for permanence, preference for treatment, and the application of applicable, relevant or appropriate requirements (ARARs), which in many cases are not necessary to meet the health and environmental protection needs of the public.

Throughout the past year, Ciba, as well as numerous groups, organizations and coalitions, involving all stakeholders, have worked diligently to develop constructive reform proposals to make Superfund a more effective, equitable and efficient program.

H.R. 3800 addresses many of the issues raised by these diverse groups and goes a long way in addressing the shortcomings of the present law. Ciba strongly supports comprehensive Superfund reform in 1994, and welcomes the Administration's bill, H.R. 3800, which Ciba believes could speed remedial actions, lower costs and provide greater opportunities for the community to participate in the remedial process.

The following represent Ciba's comments on the Remedy Selection portion of H.R. 3800.

1. Permanence Replaced by Long-Term Reliability

H. R. 3800 rightly replaces the mandate for permanence with remedial actions which provide assurance of long-term reliability. The present mandate for permanence has caused innumerable delays and has wasted resources. It doesn't make sense to pursue a remedy that cannot be reasonably achieved with today's technology or is many times more expensive without providing any additional protection of human health and the environment.

Ciba encountered a multi-year delay and significantly increased cost at one of its sites when a remediation plan was revised based on the mandate for permanence.

The original remedial plan called for application of removal, treatment and containment technologies. The revised plan eliminated all containment and called only for removal and thermal treatment. The revised plan was no more protective of human health and the environment but was considerably more expensive.

It is our belief, that under H.R. 3800, remediation at this site would have been expedited, costs reduced and containment would have been an appropriate and protective element of the overall remedy.

Selection of remedies at sites should be guided by the principles of long-term reliability and protection of human health and the environment. Actual human exposure pathways (drinking water, airborne particulate, soil, etc.) must be managed immediately.

Then, the focus should be placed on those remedial options which can be implemented to provide long-term reliability in a cost-effective fashion. Those options may include treatment, containment or a combination of those technologies.

2. The Role Of Containment Technology

Long-term reliability can be achieved in a variety of different ways. In many cases containment (both interim and permanent), and containment combined with treatment (e.g. hydraulic containment that includes groundwater treatment) can play a major role in providing long-term reliability of the remedy. Whenever containment is used, it should achieve equivalent levels of protectiveness as other remedies or combination of remedies.

Containment may represent the most appropriate remedial option when technology doesn't exist to address a problem, such as dense non-aqueous phase liquids (DNAPLs). Containment is also the better approach when it achieves equivalent protection in a significantly more cost-effective manner than other remedial options.

Whenever containment is used, it obviously raises the question of who guarantees performance of the remedy, what happens if that responsible party becomes insolvent years down the road, or how will technology be developed to address presently unsolvable situations?

To address these questions Mr. Chairman, I'd suggest creation of two funds to be financed by contributions from responsible parties employing containment.

A Containment Contingency Fund would guarantee performance of a containment remedy or pay for required future remedial action should the responsible parties become insolvent.

A Technology Research Fund would intensify present efforts by funding research and providing demonstration grants focused on developing new technologies to cost-effectively remediate presently unsolvable problems.

3. Hot Spots

An area of special concern highlighted in H. R. 3800 deals with the subject of hot spots.

Hot spots are defined in the bill as those discrete areas at a site that contain hazardous substances that are highly toxic or highly mobile, cannot be reliably contained, and present a significant risk to human health or the environment should exposure occur. In these cases we need to carefully examine those remedial options which can achieve the appropriate remedial goals in a cost effective manner.

On balance, a preference for treatment is probably the appropriate approach to discrete hot spots where proven technology exists to render cost-effective treatment. In certain situations, elimination of a hot spot may be more environmentally sound and cost-effective in the long run than attempting to contain it.

There will be those cases, however, that cannot be readily treated due either to lack of proven technology (DNAPLs), inordinate expense or a combination of both.

Interim containment is the only sensible means to protect human health and the environment in these scenarios, and thus should be utilized until a cost-effective and demonstrated treatment remedy is found. Throughout this period, the responsible parties should maintain liability and responsibility for regular monitoring of the site, not the local landscaping company responsible for maintaining the cap over the site.

In either case, any action taken must guarantee and provide equivalent protection of human health and the environment.

4. Role of Cost

All remedial options, including hot spots, should be subject to a cost-benefit analysis. While cost is one of the five remedy selection criteria, it must be equally weighted with the other four criteria: effectiveness of the remedy, long-term reliability, risk posed by the remedy and acceptability to the community.

5. Elimination of ARARs

Ciba supports the elimination of the RARs from ARARs and supports the bill's language stipulating that only more stringent, applicable state standards specifically promulgated for remediation be applicable to Superfund remediation. Any federal standard applied to Superfund beyond those established as generic levels must be legally applicable.

6. National Goals, Generic Cleanup levels and Risk Protocol

Central to the remedy selection discussion is the question of how clean is clean. H.R. 3800 attempts to answer this question through the establishment of national goals, national generic cleanup levels and a new national risk protocol.

One of the recurring criticisms of the Superfund program has been that it lacks clear direction, consistency in applying cleanup standards and remedies, and measurable goals. To the extent that the concepts of national goals, generic cleanup levels and a risk protocol attempt to address those criticisms, then Ciba is encouraged by these initiatives.

We look forward to having a better understanding of the basis upon which the goals and cleanup levels will be based and the extent to which site specific considerations, cost-effectiveness, anticipated future land use and realistic exposure scenarios will be factored into those goals or cleanup levels. If these factors are properly considered the net result can be a substantial improvement over the current situation.

Despite our present preference for realistic site specific risk assessment, we believe that the Administration's intent in proposing national generic levels is to provide consistency and faster completion of remedial activities. Presumably, these generic cleanup levels would be designed to achieve national goals once they are established.

It has been our experience that site specific risk assessments, based on realistic, not hypothetical, risks and exposure pathways can be the most effective means to determine appropriate cleanup levels for a site, especially larger, more complex sites.

Generic cleanup levels could promote faster remediation at smaller, less complicated sites. In the case of larger, more complex sites (with greater variety of site specific criteria), the cleanup levels may need to take into account the results of a site specific risk assessment based on realistic assumptions.

We are pleased to see that the bill calls for the establishment of a new national risk protocol to be based on realistic assumptions. Hopefully this new tool will replace the existing linear risk model which generated hypothetical risk scenarios, based on laboratory extrapolations, that have often driven remediation costs to excessive levels without any commensurate increase in levels of protection to human health or the environment.

We also agree with the bill's statement that all communities, no matter where they are located, should receive consistent and equivalent levels of protection from Superfund remedies. We are open to discussion as to what those goals should be and how they are calculated.

Additionally, Ciba supports and encourages active community participation in the remedial process -- from start to finish. Communities have a large stake in cleanup. We have learned first hand that an involved community is more productive to the entire process.

Conclusion

Mr. Chairman, H. R. 3800 addresses many of the major criticisms of the Superfund program, and has the potential to dramatically improve the program while also reducing remediation costs.

With the limited time remaining in the 103rd Congress, all stakeholders must come together to work cooperatively if Superfund reform is to become a reality.

Ciba is committed to seeing through Superfund reform in 1994. To that end, we look forward to working with you and the Subcommittee to see that this goal is accomplished.
We cannot afford to let this opportunity pass us by.

Mr. Chairman, this concludes my remarks. I'd be happy to answer any questions you or other members of the Subcommittee may have.

Mr. SWIFT. Thank you, Mr. Barth. I thank the entire panel. I am greatly pleased that all of you recognize the significant improvements in this proposal over the status quo. I think you point to some things that need to be done, and I think it's a fairly imposing list of things that have to be done.

One of them, a number of you pointed to some ambiguities in the bill as it currently exists. I think in some cases that was intentionally fuzzed over to resolve some things they couldn't resolve down in that interminable and endless, and not particularly useful interagency process they had at the White House. They have been additionally helpful by things that they couldn't resolve, they sent them up here for us to resolve, as though it was going to be easier at this level rather than harder.

I absolutely agree, I don't want to write fuzzy law. You can write a fuzzy bill but you shouldn't be around here writing fuzzy law. We need to work on some of those definitions. We want very much to work with all of you, in trying to do that.

I would note, however, that we, for very specific reasons, did not choose to organize our panel so that we had a broad range of points of view. I just want you to know that you do not constitute the universe that we have to work with here. You might want to stay around and listen to the next panel, which will show you some of the problems we are going to have in trying to work out those definitions.

I think it is terribly important that the definitions be refined, so that you reduce to an absolute minimum any ambiguity in the law. We want to work with you in that regard.

One of the things that I think is the intention here is a perfectly understandable desire on the part of industry and business and PRP's potential and otherwise, for certainly, for lower costs, for flexibility and on the other hand, having some standards. The very first prolonged serious discussion I had with a major corporation in this country and it was a very useful one, they led me through very carefully the need for enormous flexibility, site specific as can be and on and on.

When we got all through about 2 or 3 hours later, they had made a credibly persuasive case for all of that. They said, but there aren't any standards by which to measure when you finally got there. I have no problem with the flexibility but at some point you have to have something by which you measure whether what you have done is successful.

Whether it's national standards and whether it's how we define hot spots or what have you, I am with you on the flexibility. I have to have some help on setting some method by which we determine when the job is done. I don't think that the two are inconsistent. I don't think they have to be inconsistent. On the one hand I am going to be dealing with people who want standards and don't really give a damn whether there is any flexibility, and other people who want flexibility and their primary concerns aren't the standards.

We have to have both, and I hope you will be able to help us in trying to figure out how we do that. I want you to have the flexibility and the low cost, but I have to be able to point to somebody and say here's the way by which we measure that the right point has

been achieved by the cleanup. You can be very helpful to us as we work with and your organizations later.

You have pretty much all listed the significant improvements that this bill has over the status quo. I mentioned some of those in my opening statement and won't repeat them. I think we also need to be careful that we are not measuring everything by the ideal that we do measure some of these things by the status quo, and recognize significant improvements that have been made. If we can get those definitions tied down in a number of ways we will have made a lot of progress over the awful situation which we find ourselves.

After those remarks let me ask a couple of questions. Is there any type of contaminated material at Superfund sites which you think a preference for treatment is appropriately applied to? I know, again, we are getting back to this issue of you wanting as much flexibility as you can get, but isn't there some point at which a preference for treatment is appropriate and, if so, could you indicate where that line might be drawn? Mr. Barth?

Mr. BARTH. Well, any material which is a significant concentration and is highly toxic and as the legislation is drafted indicates is likely to be mobile, it's in the interest of the owner of that site to get it out or to treat it in situ as promptly as possible. Your costs will be greater by delaying on that action.

There's a common objective it seems to me, when you have a condition which represents a real risk either to those in the immediate proximity if you are a plant site or if it's a significant risk to migrating into groundwater. Once that gets away from you it's a downhill road, crosswise and otherwise.

As I said earlier, I would be surprised if we have a hard time defining hot spots. Maybe I am naive in this respect. I think if you have one you know one.

Mr. SWIFT. Mr. Annett, you had a definition in your testimony.

Mr. ANNETT. We very specifically looked at the administration's bill, and tried to weigh the containment philosophy and treatment philosophy. They had said yes, hot spots should be treated. Our problem wasn't with the concept that certain areas must be treated, it's how they define it.

We have given you a very specific definition, which as I said was, where there is a discreet area within a facility that contains hazardous substances and they are highly toxic, highly mobile, cannot be contained and present a significant risk to human health and the environment. Maybe the lawyers can play with that. We are willing to concede, treatment should take preference at that point in time. Containment may not be appropriate.

Mr. SWIFT. Yes. I was wondering about the definition of highly in that particular instance, something lawyers could probably play game with forever if it wasn't tied down.

Mr. ANNETT. Well, tied down somehow.

Mr. SWIFT. That's helpful. Both of those observations are helpful. Would you all agree that the provisions with regard to a preference in this bill is infinitely superior over the status quo, where we just run around applying treatment to everything in sight.

Mr. Barth, as an individual company, how do you see the provisions of the bill that affect cleanup costs as they are compared with current law?

Mr. BARTH. I think a comment was given either from the subcommittee that significant savings—I think it was Congressman Oxley that may have listed significant savings—that are expected to flow from it. I would expect that as an individual company we will see similar type of savings and range of savings. I would not be surprised that we would find that of the $60 million we spent last year, that in the range of 20 percent, give or take, could be avoided without compromising the health and environment objectives of cleanup's.

I think there are real opportunities in that regard.

Mr. SWIFT. Anybody else, Mr. Hirl?

Mr. HIRL. Mr. Chairman, the Chemical Manufacturers Association has proposed a remedy selection alternative by our judgment, and this printed in February of 1994, very recently. We see about $9 million per site saving in this proposal, about a 35 percent reduction from current.

If you would agree, I would like to put into the permanent record our statement on that situation, as far as cost savings are concerned.

Mr. SWIFT. Without objection, so ordered. Are you saying that that's in addition to savings that would be made with the administration bill?

Mr. HIRL. I believe Mr. Chairman, the administration indicated about a 25 percent saving over current levels of cost. Our proposal we believe by our analysis, would be about a 35 percent reduction as compared to the 25 percent administration proposal.

Mr. ANNETT. Mr. Chairman, I might just note that because of some of the ambiguity we have identified, it's very difficult to identify the 25 percent. The target ought to be at least 25 percent reduction in the remedy selection processes. We like the target but we are having a hard time adding the numbers up. We want to work that process.

Mr. SWIFT. As I suggested, we want to work with you to try to eliminate ambiguity or perceived ambiguity. One of things that you said, Mr. Annett, by relying on national generic cleanup levels, mandatory treatment for hot spots and generic remedies, the administration bill largely precludes reliance on site specific risk assessment. In your written statement you said that.

I guess you and I disagree there, and that means we probably have to talk and try to understand where we disagree. It seems to me that in several places in the bill it makes it very clear that you can have site specific risk assessment. If that is unclear to you, if two unreasonable people disagree about what it says, we need to talk and make sure we get that language clarified.

I don't see where you can conclude that the bill would preclude reliance on site specific risk assessment. If you would care to amplify that, I would be happy to have you do so.

Mr. ANNETT. Let me explain the concern we have. I think the debate really evolves around how you interpret and define generic cleanup levels. We suggest that term be redefined as one that says there's no further action required. You set a 20 parts per million

level as a level below—if you are below that you are OK, don't worry about it.

If you are above it then you go to the site. At that site you look to see whether there's a generic remedy that could play. That remedy looks OK, and let's accept that. But then the PRP and the parties that say let's look at maybe a risk assessment at that site. That's an option. It may be that no further action level, that 20 parts per million, is a reasonable target. You may say let's get down to the 20 parts, that's the best way to do it.

What we are concerned with is somebody saying there is a standard that has been set that would be automatically applied at the cleanup level for every site where that chemical or substance may be. It was the concern of this use of the term of generic cleanup level that might preclude the site by site risk assessment.

Again, I think that it's an area that we can work with the administration and with you all to help define that.

Mr. SWIFT. I think we need to do that. I think the intent of the bill is to not arrive at the conclusion that worries you, so if it's a matter of making it clear.

Mr. POPOFF. Mr. Chairman.

Mr. SWIFT. Yes, Mr. Popoff.

Mr. POPOFF. I would like to address the question that you posed previously that related to cost, and differentiate myself to some degree from my colleagues here. Unlike business associations, the Business Roundtable is a diverse group including insured and insurers, including service sector, financial, light industry and heavy manufacturing organizations.

The issue of remedy selection was salient to our being able to bring 200 companies to the table and reach consensus. It's been a 2-year labor of love, but there have been moments that have been better than others in coming together. The inducement has been the cost saving issue. The inducement has been the 35 percent hopefully, economy that is available to us. That brought rationality to the attendant issue of liability in funding.

We feel further, that the advent of an annual budget is something that should be addressed in an environment where financial resources are finite and, indeed, programmatic spending is in everyone's considered best interest.

I make that point to emphasize that industry has come together. They are highly supportive of the initiative. The remedy selection and the attendant cost savings has been literally the door opener that has brought very disparate groups together, and given us a chance to affect the cost savings. Then, go on, having fixed the size of the bill, to address the issue of who pays what in what proportion.

Mr. HIRL. If I may, Mr. Chairman. As Mr. Popoff well knows, the Chemical Manufacturers Association supports diversity in every form, including industries. The testimony of Mr. Laws would have to be examined more carefully as we listen to it, as it relates to generic remedies and the implementation of it, as perhaps a preamble to site specific risk assessment.

While what we read concerns us, what we heard may be a little bit different along the lines of let's discuss what it really means.

Mr. SWIFT. Again, getting some clarification and so forth. I do hope that if, in fact at the 25 percent level, you say $1 billion. It would seem to me to be kind of irrational to say we don't want to save $1 billion unless we can save $1.3 billion. That is roughly the difference between 25 percent and 35 percent. If you can get the $1.3 billion, I am with you. If, for a variety of reasons that is not possible, it seems to me to be self-defeating to say we don't want to save the billion.

Mr. POPOFF. Clearly.

Mr. SWIFT. You would agree with that?

Mr. POPOFF. I would certainly agree with that.

Mr. SWIFT. I am going to conclude. I want to thank you all. When I said we want to work with you, one, that's absolutely true. We need your support. We are going to have to be working with other people, people on the next panel and other groups that have been included in the process both at NACEP and Keystone and other places, who have legitimate concerns as well.

Come on in, the water is fine. We will see if we can't work this out and save you a billion or a billion and three, whatever the case may be. Thank you all very much. I want to recognize my colleague from Ohio.

Mr. OXLEY. Thank you, Mr. Chairman. Mr. Popoff, you advocate that PRP should have a say in whether site specific information should be considered. Do you read H.R. 3800 as leaving the question of site specific risk assessment entirely in the hands of EPA, with no legal recourse? Were you here when I had the discussion with Mr. Laws?

Mr. POPOFF. Yes, I was.

Mr. OXLEY. What was your reaction?

Mr. POPOFF. I felt that Mr. Laws' comments opened an avenue that is far more compatible with our desires than the original phraseology that was inherent in the administration's proposal. I think he demonstrated in his testimony a greater degree of openness, an address to the realization that one size does not fit all, and that remediation should be looked at and the program overall should be looked at in terms of a broad overview and then administration on a specific basis, in keeping with the needs of the community and of the site.

Mr. OXLEY. Mr. Annett, did you have a comment on that?

Mr. ANNETT. I basically agree with what Frank just said.

Mr. OXLEY. Any other members of the panel—are we in agreement?

Mr. HIRL. Yes.

Mr. OXLEY. Mr. Annett, the business community has traditionally opposed the national cleanup standards. Am I hearing something different today?

Mr. ANNETT. You are not hearing something different with respect to the term national cleanup standards. I think as all of us have pointed out, there isn't a fixed formula that you can take to every site and say apply it. What we are willing to look at is concepts such as generic remedies, something we call no further action levels.

Those kind of concepts can be built into a proposal that is not a national standard. That's the distinction we are trying to make.

Mr. OXLEY. As far as the remedial part of it is concerned, you don't want the ceiling to become the floor; is that a fair statement?

Mr. ANNETT. Yes. On our so-called no further action level we want that to be the level at which the Administrator would say OK, it's clean and no problem, move on. If it's above it, then you kick in the options of looking at generic remedies, look at the option of a site by site risk assessment, et cetera.

Mr. OXLEY. Are you proposing that a site specific risk assessment be conducted at every site?

Mr. ANNETT. The answer is no. I just suggested there has to be options. In some cases this generic remedy, whatever they may define it to be and there has to be careful analysis of that, that may be used. It may be that, if you have these no further action levels, you get down to that and that solves it. You have to have the option of site by site.

I think it's been unfairly stated that because site by site risk assessments are to be used, that it will be a major impediment to any further movement and fast movement in this area. With these options we are offering that problem should be solved.

Mr. OXLEY. Let me ask each one of you to respond. The Keystone Superfund Commission advocates the cleanup standard of one in one million lifetime cancer risk standard, presumably for the same hypothetical individuals in EPA risk assessments. Do you believe this approach is wise, and what impact do you believe such a standard could have on the Superfund cost. Please feel free to refer to the cancer risk chart using EPA methodology that I referred to earlier and was referred to in some of your remarks.

Let's start with Mr. Popoff.

Mr. POPOFF. I advocate the range, just as you mentioned in your commentary and as I tried to include into my testimony. I think science should be the ultimate arbiter or risk. I think basically a generality pinpointing one bright line is not in our best interest. It also addresses the cost issue, and adds inordinate costs when indeed benefit is not forthcoming.

Mr. OXLEY. Mr. Barth.

Mr. BARTH. I join Mr. Popoff in his observation. I would add, the assumptions that go into the risk assessment are the key variable. If you get realistic assumptions that drives in our opinion, the best results. It's an integrated process. The ranges are important, rather than the one bright line. The assumptions being realistic, the site specific conditions, the land use factors, all of those elements go into risk assessment.

The present approach, as I said in my remarks, the present techniques do not give full weight to all of those factors. It bears on this issue of site specific, because those are factors. I think we are dealing also with complex sites more than not, when we are addressing these kinds of issues.

Mr. OXLEY. Mr. Hirl.

Mr. HIRL. I do agree with both Mr. Barth and Mr. Popoff. A ten to the minus six standard, a single standard is very proscriptive. It leads to what are considered extremely expensive cleanup's for areas that don't require it. It invites litigation, it invites transaction costs, and creates the same kind of environment in which we

are dealing today. I see it as an impediment to really effectively changing Superfund to an effective law.

Mr. OXLEY. Mr. Annett.

Mr. ANNETT. I did not include this in the testimony, but we support the position of CMA and BRT. There should be a national risk reduction goal of ten to the minus four, ten to the minus six. Recently, the National Research Council has required on a Clean Air Act, get a study of EPA's proposal.

They concluded a single point was not doable. If you study the scientific information, the methodology required to do risk assessment, there is no precision to it such that you can say it's ten to the minus four, ten to the minus six, et cetera. Dr. John Graham at the Harvard Center of Risk Assessment has spent years looking at this, and he has concluded that ten to the minus four and ten to the minus six is acceptable, and that's what EPA is using today.

Mr. OXLEY. Thank you.

Ms. LAMBERT. The Chair recognizes the gentleman from Michigan.

Mr. UPTON. Thank you. Mr. Popoff, as a fellow Michigander, I certainly appreciated your testimony and willingness to come before our panel this morning and this afternoon. I would certainly underscore all of your testimony. Clearly, the program has not worked the way that it was intended, and we need to work on a bipartisan basis to make this program work much better and make the changes that we need to make.

As you well know, our Great Lakes Region has been really pock marked by a series of dead zones, almost mausoleums someone would call them, where no prudent individual or company would possibly invest for fear of becoming entranced and entrenched in Superfund's liability web.

I represent many communities in southwestern Michigan, and even communities without a four way stop sign have been impacted economically because of what someone did once before. Clearly, it's undermined the economic vitality of communities the size of small communities as well as large ones, like Kalamazoo or Benton Harbor in the Twin Cities.

I know that Dow North America has written me a letter, in response to a bill that I introduced last session, which really does two things. It protects and provides for existing statutory shelter for innocent land owners as well as lenders, and it provides for a tax credit for voluntary cleanup's for non-responsible parties. I know that Dow has indicated its support of my legislation.

I would simply ask, in your role in the Business Roundtable and particularly on the Environmental Committee, if you might take some of the legislation that I have introduced and try to get some response from Business Roundtable, to see if they might support such a concept as well as this legislation is beginning to move.

Mr. POPOFF. We applaud—we not only support what you have promulgated, we applaud the voluntary feature. We have found in our address in the recent past to clear air as the case in point, that the voluntary 3350 initiative of the EPA put together under Administrator Reilly's leadership not only brought everyone to the table in advance of the legislation coming into play but it brought

people to the table with proactive, preemptive solutions that really embodied the best of environmental reform.

If we can get voluntarism into our environmental initiative, our task will be, as environmental stewards, considerably lightened and the address to environment will get the unanimity of support that it lacks today. The voluntary provision is a powerful one. I think we need to unleash the creativity of both government, the environmental community and industry to address on a proactive basis, reform, rather than wait for legislation to bite and have a compliance kind of mentality underpin our industry.

We not only address this as we look at Michigan and the rest of the United States, we address this as we look at the world. In Michigan, as you know, we are trying to be more than just the automotive State. We are indeed addressing small industry need to export aggressively. That's in our best interest and certainly in everyone else's.

We need to ensure that our environmental laws are not impediments to trade, that are not impediments to competitiveness. We need to use our laws as models to take around the world, so that we can take the potential for trade related, non-competitive environmental issues off the table and continue on. I applaud what you have been able to do, and the voluntary provision is a powerhouse. We have good experience with that.

Mr. UPTON. Thank you. I yield back the balance of my time. Thank you, Madam Chairwoman.

Ms. LAMBERT. Thank you. The Chair will recognize herself at this point. Mr. Hirl, do you have research or studies that would prove to you that site specific remedy selection risk assessment would actually cost less and be more efficient than the proposed EPA national generic standards?

Mr. HIRL. Madam Chairwoman, I would first of all say more effective, to qualify that to as effective, and in some cases more effective. The answer to the question is yes, we do. We have been asked and will provide for the chairman, information related to times when achieving a 10 to the minus 6 standard, the incremental cost of that which did not benefit protection of human health and the environment beyond required standards was excessive. We will provide that for the Chair.

Ms. LAMBERT. It just seems to me that it takes longer time as we have seen in the past, and it seemed to cost more when we are looking at site specific remedy selection.

Mr. BARTH. If I might comment on that. In our spending we find we spend about 50 percent on remediation, about 30-some odd percent on engineering design work, and the rest of the 15 percent on transaction costs. The high proportion of evaluation risk assessment, engineering that goes into that design engineering phase, is probably distorted on the high side. In the beginning period we were doing parallel tests with EPA, and there was a redundancy in some of that work.

As we go forward the payback on doing solid risk assessment is that you get a much better remedy selection at the end of the path. No doubt, you are going to spend more money in that risk assessment process than you would if you just had a generic plain vanilla standard. There would be up front savings, but the costs at the

back end of not doing that preliminary solid evaluative work in complex sites is that you get a much targeted, much more economically efficient and as equally protective results.

On a pure cost basis you are spending more up front but you are doing a solid, up front investment job to get a payback on the far end for all concerned.

It's possible, it seems to me, that if you have plain vanilla similarly situated sites there may be some wisdom that one shouldn't keep doing the same risk type assessment. I think those are probably very simple sites. Maybe there are many of those common, homogenized sites and maybe you can avoid some of that. Our experience in the chemical industry and in our plant sites, they are complex, they are site specific conditions of the soil, conditions of where you are located, exposure pathways, et cetera. If you don't do your homework up front you are just in a morass and you won't get a good solution necessarily, and you are going to have a very expensive solution.

Mr. HIRL. If I may additionally comment, site specific risk based cleanup proposals under the administration's proposal for modification as well as the others that we have talked about here, some of the modifications will result in much more effective cleanup and much more cost effective cleanup, in my opinion. What you have seen in the past are those types of things done under the existing law. We are proposing the changes in the law to better implement these kinds of things.

Ms. LAMBERT. Mr. Hirl and Mr. Annett, I just want to make sure that I have something clear, so I will clarify it. If we were to distill the Superfund Reauthorization positions of your organizations down to their basics, would we fairly describe them as all cleanup's should be based solely on site specific risk assessments designed to meet a risk range of 10 to the minus 4 to 10 to the minus 6?

Mr. ANNETT. Madam Chairwoman, I think as I tried to stress, there should be several options put on the table. Yes, the risk range should be the 10 to the minus 4, 10 to the minus 6. At a site we are trying to determine, is there a risk to the community and is there impact on the environment. You look at the risk.

We are suggesting that at certain sites maybe there could be some generic remedies that will be applicable to multiple sites, and that will fit that site. We are saying that these no further actions levels, my example of 20 parts per million, could be a target for that site. You could say if it's below it there's no problem, if it's above it we will try to get down to that. Or you could say, what is the most effective way to do a risk assessment.

The parties, particularly the PRP, looking at what is the best approach, that doesn't mean that you have to use site by site every single time. We should never forget, we are looking at the question of health and risk. Until you get that decision made you can't look at what the remedy should be.

Up front do the right amount of work, and at the back end you will save cost and time in the long run.

Ms. LAMBERT. Mr. Hirl.

Mr. HIRL. I would be simple to say I agree, and I do. I think again, look back at the Assistant Administrator's testimony and the concept of generic solutions being something that is a preamble

to looking at site specific risk assessment. If the generic standard is correct and applies, then it certainly can be used. It is not to be ruled out of hand.

But let's think of it more as a preamble and potential solution than the answer, flexibility being the issue.

Ms. LAMBERT. In both of your cases you would like to qualify that statement as opposed to agree with it.

Mr. ANNETT. Yes.

Mr. HIRL. Right.

Ms. LAMBERT. I go back to the chairman's original statements, we have to have something to go by in the end result of what we are trying to achieve. I thank the panel very much for your patience and attendance.

Mr. ANNETT. Madam Chairwoman, we thought that this discussion was very constructive, particularly comments made by Mr. Laws. I hope we would have the opportunity to submit additional comments for the record.

Ms. LAMBERT. Yes. Without objection, so ordered. Thank you, again, to the panel. I appreciate your patience. We will call the third panel.

Mr. Dan Eden, president of the Association of State and Territorial Solid Waste Management Officials, Mr. John Quarles, Hazardous Waste Cleanup Project, Ms. Linda Greer, senior scientist, National Resources Defense Council, Ms. Velma Smith, director, Groundwater Protection Project.

Mr. SWIFT. Welcome, to you all. We appreciate your being here. We appreciate you, who have had to wait the longest time of all. We will begin with Mr. Dan Eden. As you all know, your statements are in the record. You can proceed to summarize as you wish. Mr. Eden.

STATEMENTS OF DAN EDEN, PRESIDENT, ASSOCIATION OF STATE AND TERRITORIAL SOLID WASTE MANAGEMENT OFFICIALS; LINDA E. GREER, SENIOR SCIENTIST, NATURAL RESOURCES DEFENSE COUNCIL; JOHN QUARLES, ON BEHALF OF THE HAZARDOUS WASTE CLEANUP PROJECT; AND VELMA M. SMITH, DIRECTOR, GROUNDWATER PROTECTION PROJECT, FRIENDS OF THE EARTH

Mr. EDEN. Good afternoon, Mr. Chairman and members of the committee. I am Dan Eden, director of waste policy for the Texas Natural Resource Conservation Commission. I am also the president of ASTSWMO. I am here today, representing State Waste Program Managers and Cleanup Program Directors. With me today, is Mr. Martin Giesfeldt, chief of the Wisconsin Cleanup Program and chairman of our CERCLA subcommittee.

We also appreciate the opportunity to be here today, to present our views on the remedy selection provisions in H.R. 3800. From our perspective, H.R. 3800 offers a significant improvement to the current remedy selection process because it lays out a more specific process for achieving cleanup. However, we believe that it can be improved in a number of ways.

First, we think that the statute should clearly specify a single national risk exposure level for all sites. This would be a cleanup goal to assure consistency in the cleanup of all sites, and it would

provide predictability for PRP's. Such a goal would shorten the cleanup process we believe, and ensure greater equity to communities than the current risk range that EPA uses. Particularly for voluntary cleanup's, we think that parties need to know in advance what that goal will be.

Second, ASTSWMO recommends that Congress direct EPA to work with States to develop national cleanup levels or models based on the national risk exposure level. A number of States have already moved forward to do this, in the absence of national goals. For example, Texas last year adopted cleanup standards for soil and groundwater based upon a risk level of 10 to the minus 6. Wisconsin is also in the process of developing those standards. We think that EPA should capitalize on the efforts of States, and move forward to do this as well.

Third, we recommend that a specific timeframe for the development of national cleanup standards be included in the statute. We have completed our rules in a 2-year process that included a great deal of public input. We know that EPA has already been developing their numbers for specific chemicals and we think that this work should be completed quickly, to assure that cleanup moves forward and in reality, that we will not receive the benefits of this bill until such standards are in place.

We have a number of concerns about the language in the bill. Specifically, section 502 which indicates that a remedial action shall be required to comply with State environmental laws which are specific to remedial action, as long as the law has been based upon the best scientific evidence. That's paraphrasing the language. We are very concerned, that this is an area which is open to subjective interpretation, and may cause future disputes between the States and Federal agencies.

For example, we are concerned that would a PRP be required to comply with a State law which protects wetlands as part of a State program. Because such a law does not apply specifically to remedial actions, the answer would probably be no.

Another concern deals with section 503, which outlines the criteria for selecting an appropriate remedy. We agree with the four components in that section. Although we assume that State concurrence is implied in the fourth provision which specifies community acceptance, we would like to see explicit language to that effect. In addition, we believe that a disproportionate cost test to assure the reasonableness of the cost, is going to be a critical tool as has been discussed, but also one that will be very difficult to devise.

The next issue we would like to highlight pertains to the treatment or containment provisions. It is our understanding when reading section 503(c) that a preference would be placed on containment rather than a preference for permanent remedies. We believe that unless a preference is explicitly stated for treatment, as modified by a cost test, it seems that the majority of sites will be capped and fenced, and that States will be dealing with the long term responsibility for these sites.

We do not believe that this will result necessarily in long term and permanent remedies, and in equities that is in the cleanup sought by all parties.

Finally, we have a great concern about section 127(2) of title II. This provision would relieve PRP's of any additional cost imposed by more stringent State requirements. We feel that the provision preempts State cleanup laws, and strongly recommend its deletion.

I want to keep my remarks brief. At this point I hope that you will consider our suggestions and our full testimony, to make this bill more workable for the States and EPA to implement. We will glad, after the panel is finished, to answer any questions. Thank you.

[Testimony resumes on p. 800.]

[The prepared statement and attachments of Mr. Eden follow:]

Testimony

of the Association of State and Territorial
Solid Waste Management Officials
(ASTSWMO)

Good morning. I am Dan Eden, Director of the Waste Policy Division of the Texas Natural Resource Conservation Commission. I am also the President of the Association of State and Territorial Solid Waste Management Officials (ASTSWMO) and am here today representing ASTSWMO. I am accompanied by Mark Giesfeldt, Chief of the Emergency and Remedial Response Section of the Wisconsin Department of Natural Resources. Mark Giesfeldt is also Chair of ASTSWMO's CERCLA Subcommittee. ASTSWMO is a non-profit association which represents the collective interests of waste program directors of the nation's States and Territories. Besides the State cleanup and remedial program managers, ASTSWMO's membership also includes the State regulatory program managers for solid waste, hazardous waste, underground storage tanks, and waste minimization and recycling programs. Our membership is drawn exclusively from State employees who deal daily with the many management and resource implications of the State waste management programs they direct. Working closely with the U.S. Environmental Protection Agency (U.S. EPA), we share the objectives of the Congress and the public in providing for safe, effective and timely investigation and cleanup of the many contaminated sites throughout the nation. We, therefore, have a fundamental interest in the dialogue surrounding the proposed legislation [identified hereafter as "H.R. 3800"] designed to reform and restructure the Superfund program. As the day to day implementors of the State and Federal cleanup programs, we believe we can offer a unique perspective to this debate.

BACKGROUND:

It is our understanding that, when Congress enacted the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) in 1980, commonly known as Superfund, it was envisioned that there were approximately 400 serious abandoned hazardous waste sites requiring remediation and that Superfund would have a life-span of perhaps five years. Today, it is estimated that there are over twenty thousand sites in this country in need of some sort of remediation. Of the 1300 identified NPL sites, approximately 225 have been cleaned up. In order for the primary implementors of the Superfund program (State and Federal regulators) to more effectively address the remediation of these contaminated sites in a more time efficient manner, two critical changes to CERCLA are necessary. First, CERCLA should clearly specify a national cleanup goal, i.e., a single national target risk level and second, States who assume the lead responsibility for a site should have the ability and the authority to select the remedy.

I wish to briefly cover these two points as they relate to the current system before specifically addressing the Remedy Selection section of H.R. 3800.

Currently, the National Contingency Plan (NCP) provides for a risk range of 1 x 10-4 to 1 x 10-6 for whole site risk carcinogens. The risk level determines the acceptable level of exposure of risk that can occur at a site. The first step in the cleanup process is to determine the actual risk presented by each site. To make this determination, the Agency currently must conduct exhaustive data

gathering efforts and risk assessment modeling. Then, assuming the result is a risk greater than the risk range (e.g., 10-3), a determination is made to remediate the site. The U.S. EPA then determines what remedy should be implemented at the site. The selected remedy will, in large part, determine the site's future land use. Currently these critical decisions will vary from site to site, resulting in a continuum of "protectiveness" and "permanence" at sites throughout the nation due to the inherent flexibility provided by the risk range. As a result, a site in one State could be remediated to the 10-6 standard, but another site within the State could be determined to need no federal action as the risk posed from the site is 10-4, thus falling within the risk range. Not surprisingly, this "flexible" process fosters lengthy debates and heated disagreements over whether remediation is even necessary, and the form any remedation should take. It also places administrators and implementors of the program into the inappropriate role of determining risk policy. Eliminating these debates and providing definitive risk guidance for the implementors of the program would greatly increase the pace of cleanups and ensure equal protection for all citizens throughout this country.

Also, allowing States the opportunity to select the remedy at a site will also speed the process. Generally, the U.S. EPA has interpreted CERCLA to mean that only the U.S. EPA has the authority to select a remedy, regardless of whether a State was assigned lead agency status. The current State role at NPL sites ranges from simply providing the requisite State match funds at the time of the

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construction of the cleanup remedy to performing response actions to the signing of Records of Decision (RODs). In those few cases where a State has signed a ROD, the remedy was being implemented by a private party and Fund dollars were not being expended. These sites may save time in the beginning of the process due to a State's streamlined assessment process, but will result in even more arduous disputes if U.S. EPA disagrees with the selected remedy at the ROD stage. In New Jersey for example, the U.S. EPA and the State regulatory agency disagreed on which remedy to implement at a State lead Superfund site. This disagreement caused a one-year delay in the selection of the remedy. The disagreement was over which remedy complied with the preference for permanence and treatment, not over protectiveness.

We believe that because States remediate the vast majority of the confirmed contaminated sites in this country and will continue to do so in the future, they should be granted the authority to determine the remedy at all NPL sites.

We offer as a measure of proof, preliminary data results from a survey which ASTSWMO has recently completed with the support of the U.S. EPA. In 1992 ASTSWMO and the U.S. EPA agreed that while there was an abundance of data on Federal cleanup levels, there was a considerable gap in data on State cleanups. Therefore, a study was initiated and implemented for the purpose of providing a more comprehensive picture of Superfund-influenced cleanups, both complete and underway, and to lend credibility to the current debate surrounding the issue of the appropriate State role in

Superfund.

Specifically, the aforementioned survey was designed to measure the extent of State hazardous waste cleanup activity at non-NPL sites exclusive of those sites being cleaned up under RCRA authorities. All hazardous waste cleanup efforts performed by States/territories directly, under State/territory enforcement authority, and under State/territory voluntary and property transfer programs were eligible for inclusion in this data gathering effort. Thirty-eight States and two territories responded to the survey. Preliminary data results indicate that at least 12,000 sites have been remediated in these 38 States and two territories since the inception of Superfund in 1980. In addition, these States and territories indicated that they are currently working on another 13,700 active sites. Let me stress that these figures are still in the final stage of being quality checked and verified and that the figures should be used as a point of reference when measuring State cleanup capabilities and when discussing what may be the actual universe of contaminated sites in this country. ASTSWMO and U.S. EPA will present the final report to the Subcommittee upon its completion.

ASTSWMO REMEDY SELECTION PROPOSAL:

As I alluded to earlier, ASTSWMO believes the fundamental issue surrounding the remedy selection process in this country centers on one key issue: do we wish to maintain a system in this country where a range of what constitutes "clean" is often times determined by where one lives, which U.S. EPA Region is selecting

the remedy, and whether a site is publicly funded?

The ASTSWMO Board of Directors made the determination on January 24, 1994 that the current system for selecting cleanups in this country should be modified. ASTSWMO strongly advocates the establishment of a single national clean up goal and from that single goal, the development of reasonable and consistent national models for clean up standards to be applied equally at all sites throughout the country.

Briefly, the ASTSWMO proposal as outlined in the attached position paper, "An Overarching Clean Up Goal - Clean Up Standards - Remedy Selection" consists of the following components which we feel may be useful when assessing the effectiveness of H.R. 3800:

First, we believe clear cleanup goals should be developed. We respectfully suggest that Congress specify in the statute a single national target risk level or clearly and explicitly direct the U.S. EPA to develop a single national target risk level. ASTSWMO does not advocate a particular target risk level as we believe this is a policy decision. We would like to note, however, that a number of States currently operate with no less than a 10-6 excess target risk goal for individual carcinogens. The National Commission on Superfund also recommended this same risk goal based on their deliberations.

Second, in conjunction with the establishment of a specific national target risk goal applicable to all sites, the primary outcome of Superfund site cleanups should be the protection of human health and the environment, which ASTSWMO believes is best

achieved through a preference for permanent remedies. However, we do acknowledge that there are occasions when disproportionate cost, technical impracticability, engineering feasibility and other factors may render a permanent remedy impossible at a site. ASTSWMO proposes the following definition for permanent remedy:

> "An implemented remedy is considered permanent when it allows for the unrestricted use of all land and natural resources; results in protection of human and ecological health; except for the purpose of treatment, minimizes the removal of the contaminants to another site; and minimizes media exchanges of the contaminant."

Third, we believe that models for calculating the actual allowable contaminant concentrations for the various environmental media (i.e, soil, groundwater, surface water, sediment, air, etc...) at Superfund sites can be easily developed using the minimum national target risk goal. We believe Congress should explicitly direct the U.S. EPA to work with the States in developing these models as many States already have extensive experience in this area. For example, Texas promulgated standards for soil and groundwater in 1993. It would behoove the U.S. EPA to capitalize on this experience rather than "reinvent the wheel". National target risk goals combined with the development of models for calculating cleanup standards would ensure consistency in cleanups throughout the country, minimize lengthy debates, and greatly simplify the remedy selection process for State and Federal implementors of the program -- hence a faster, more streamlined

Superfund program.

Fourth, national cleanup standards should serve as national site screening criteria, i.e., criteria to determine the first decision of the cleanup process, namely - does the site need cleanup? Site screening criteria would allow for this decision to be made early in the process. For those sites which do require cleanup, national health based concentrations could be derived for individual chemicals or from national models as referenced in point three of the proposal. These uniform, national health-based chemical concentration standards would replace site-specific risk assessments, which currently result in varying degrees of cleanup.

Fifth, ASTSWMO recommends that the land use determination be an integral and distinct part of the site specific clean up decision making process and that it occur <u>prior</u> to the establishment of the site-specific clean up standards. Current and known future land uses, zoning considerations, the activities and activity patterns of the exposed population, the municipal master plan and the community working group's recommendation would all be factored into the decision to determine the land use designation (i.e, unrestricted - residential land use, or restricted - commercial, industrial and recreational land uses).

This approach is in contrast to the current NCP process, where future land use is a product of the remedy selection process. We believe our approach would significantly streamline the process and ultimately result in the redevelopment of existing industrial areas (where typically most of the Superfund sites are located), rather

than having industrial development in currently non-industrial areas.

Sixth, the implementation of a streamlined remedy screening process. Following the course of our logic, if a land use is determined to be unrestricted, only permanent remedies will be considered subject to a cost test. However, if a land use is determined to be restricted, both permanent and non-permanent remedies will be identified. All remedial alternatives, whether unrestricted or restricted, must reduce exposure to the contaminants as specified by the national target risk level.

The remedial alternatives that are protective of public health and the environment will be evaluated based on three criteria: technical implementability, administrative feasibility, and community acceptance.

Once these alternatives are arrayed and evaluated, a disproportionate cost test would be conducted between permanent and non-permanent remedies. Cost is a factor which currently must be considered in the remedy selection process, but as is the case with determining a site's cleanup goal, there is no clear and precise guidance. Therefore, ASTSWMO strongly recommends that Congress direct the U.S. EPA to work with the States in preparing a definition for disproportionate cost.

Lastly, ASTSWMO recommends that if a permanent remedy is not achievable that the following conditions apply: liability for the cleanup of a site to unrestricted land use should continue and responsible parties should be responsible for long-term monitoring

and operation and maintenance.

ASTSWMO COMMENTS ON H.R. 3800 SECTIONS 501 - 507:

From our perspective as State Waste Officials, H.R. 3800 is a dramatic step in the right direction, primarily because it lays out a more specific process for achieving cleanups.

A theme which can be discerned from the ASTSWMO proposal is that, we as State regulators do not want to be placed in the role of selecting risk policy decisions when implementing cleanups at sites. For example, the current statute directs Federal and State regulators to cleanup sites to the "maximum extent practicable" while providing no definition of what the maximum extent should be, i.e, no national cleanup goal. When we combine a risk range with the absence of promulgated national cleanup models or standards and the words, "maximum extent practicable", the resulting decision becomes, quite frankly, any one's guess. Some say only permanent remedies meet this definition, while others say only permanent remedies which can be achieved at minimum cost meet this definition. The result is often times lengthy disputes between the Responsible Parties and the lead governmental agency *and* between the Federal and State Agencies. With the enormous number of sites requiring cleanup in this country, we can no longer operate under this current system and claim to be protecting human health and the environment. ASTSWMO therefore, supports many of the components outlined in Title V of H.R. 3800.

We would like to take this opportunity to provide a few specific comments on areas which we believe require further

specificity and clarification in the statute in order to truly ensure a streamlined productive Superfund program in the future.

First, section 502 requires that the "Administrator shall promulgate national goals to be applied at all facilities subject to remedial action under this Act". We applaud the concept, but are afraid that unless definitive goals are specified, the U.S. EPA will continue with its use of the current 10-4 to 10-6 risk range, or adopt some similarly ambiguous approach. Added clarification as to Congress' actual intent will avoid a repeat of the past.

Second, ASTSWMO also recommends that Congress clearly direct the U.S. EPA to work with the States in developing these national generic cleanup levels or models. Unless otherwise indicated, and regardless of whether States are authorized to implement the program, the U.S. EPA may interpret the statute as allowing for no State input in this process. And as I mentioned earlier, at least 15 States have already developed or proposed cleanup standards which are working and have been tested. Many States have chosen to develop State specific standards, primarily due to the slow progress made by the U.S. EPA in this area.

This leads to my third point regarding the development of these goals and standards. We recommend that a timeframe for their completion be specified in the statute. The U.S. EPA has currently been working on developing numbers for specific chemicals for the last 2 - 3 years. This process must be brought to conclusion in a timely and productive manner in order to truly reap the benefits of a reauthorized CERCLA "in the field" .

Fourth, Section 502(5)(ii) indicates that a remedial action shall be required to comply with State environmental law which specifically pertains to remedial action and protection of human health and the environment as long as the law has been adopted based on the "best available scientific evidence". We are concerned that this may be another area open to subjective interpretation and may be the cause of serious and lengthy disputes in the future between State and Federal agencies. We recommend the above phrase be deleted from the statute.

Fifth, Section 503(3)(A) outlines the criteria for selecting an appropriate remedy. We agree with all the listed components, however, we have two primary concerns. Although, we assume that State concurrence is implied in the fourth provision which specifies community acceptability, we recommend adding the words "and to the State" to the end of 503(3)(A)(iv). Additionally, as outlined in H.R. 3800 the four criteria are to be evaluated based on the "reasonableness of the cost of the remedy". Again, State and Federal regulators will be placed in the ambiguous role of determining what cost is reasonable to assure the unrestricted use of a site. We question whether State and Federal regulators should be expected to determine which communities get cleanups to industrial levels and which ones are cleaned up to background levels, i.e. pristine conditions? State Waste Officials do not believe it is their job to make such subjective decisions, but rather to ensure the proper implementation of the statute. Therefore, we believe Congress should direct the U.S. EPA to work

with the States to develop a test for disproportionate cost in order to fairly and consistently determine the "reasonable cost".

Sixth , we seek a clarification as to Congress' intent on two issues. The first issue pertains to section 502(5)(A)(i)and 502(5)(A)(ii). These two sections seem to indicate that all Federal applicable relevant and appropriate requirements (ARARs) will apply for all sites, whereas after this Act is amended, only State applicable standards will apply. We are very concerned with the double standard presented by these two sections and do not agree that State ARARs should be dismissed so preemptively.

The second issue pertains to the treatment or containment provisions. It is our understanding when reading Section 503(C), that a preference would be placed on containment of pollution rather than a preference for permanence. Specifically, "hot spots" of a site are to receive a preference for treatment only if they meet a very specific and difficult test. Unless a preference is explicitly stated for treatment as modified by a cost test, it seems to us that the majority of sites will result in engineering/institutional controls, e.g., fences or caps with deed restrictions. We do not believe this is the Congressional intent, nor will it result in the equity of cleanups sought by all parties.

I do have one additional comment concerning remedy selection that must be addressed in H.R. 3800. Under section 127(2)(g) of Title II -- State Roles, the issue of more stringent State standards is discussed. While Congress might wish a State to pay the cost difference if a State's standard is more stringent and the

remedy is being implemented at a fund-financed site, we are very concerned with the phrase, "Neither the Fund **nor any party liable for response costs** shall incur costs in excess of those necessary to achieve a level of cleanup required under section 121(d) of this Act." We want to bring to your attention the fact that we believe Congress should not relieve RPs from such payments, and that to do so is a preemption of State law and may even be a constitutional issue. We strongly recommend Congress delete the words "nor any party liable for response costs" as we do not believe preemption of State law was Congress' actual intent.

THE STATE ROLE PROPOSAL:

We are pleased that there has been a recognition on the part of Congress and the Administration that, to more effectively combat the cleanup problem in this country, the State role in Superfund must be enhanced. ASTSWMO fully supports authorization of the program to willing and qualified States.

We have reviewed the proposal and have several comments on the authorization/referral process. As the State role is not the primary subject for this hearing we will submit additional comments for the record at a later date. We feel it is appropriate, however, to briefly outline several elements of our position which we believe can be incorporated into the current proposal.

We are strongly committed to an expanded State role, by which capable States may voluntarily seek the authority to fully implement significant elements of the Superfund program within their own State. State programs are prepared to be fully

accountable for the use of public resources, and for the effectiveness of their cleanups, but should be given wide flexibility in the ways in which they carry out their responsibilities. Consistency is important and will come with the use of a single cleanup goal, but this is not a preventative regulatory program, and site cleanups require a broad range of management decisions to reach necessary results. Therefore we propose the following mechanism for implementing and operating an authorized/delegated Superfund program:

A. QUALIFYING CRITERIA: Congress would direct U.S. EPA to work jointly with the States to develop qualifying criteria for delegation of the program to requesting States.

B. DETERMINATION OF STATE QUALIFICATION: Determination of State-Qualification would be made on a performance basis (i.e., self-certification) as is done with the Underground Storage Tanks program rather than on a process basis. This will enhance the likelihood and availability of State innovation and improvement, thereby helping to ensure the desired end result - namely the greatest possible number of timely and protective site cleanups given the available resources.

C. PARTIAL DELEGATION: Delegation should be strictly voluntary and all States should have the opportunity to qualify for either full or partial delegation.

Based on the assumption that site specific cleanup funds will continue to be provided by responsible parties, the Federal Trust Fund and State cleanup funds, there will also need to be an

investment in the building and maintenance of State cleanup programs. We believe the most cost-effective and cost efficient means of providing funding to States with delegated programs would involve the use of two-year program grants. The program-grant funding method that the U.S. EPA is using for the Underground Storage Tanks program has worked very well from both the State and Federal perspectives. A program grant should be equally as effective in the Superfund program as in the LUST program, as the large number of sites on a national Superfund registry would still be less than the current number of LUST sites. The program grant could cover items such as part of the State costs for administering the program, performing site assessment work (i.e, site identification and decision on the need to cleanup), enforcement activities, and/or emergency type activities. We believe State programs could perform the work for less cost than the for-profit Federal contractors and so reduce total costs.

ASTSWMO also believes that there must be a careful reevaluation of how Federal funds are utilized for publicly financed site-specific cleanups and how cost sharing requirements, and/or cutoffs for the federal funds, impact State cleanup funds. These government funding bases must be harmonized to ensure fair and appropriate division of responsibilities. I must add that, as program managers, our experience and expertise is in using these funds, and not in the manner in which they are best collected. This is an area where our Governors and State legislators can provide better input.

Lastly, the original ASTSWMO proposal for an authorized/delegated Superfund program contained the concept of a National Registry. We believe that CERCLA should be modified to reflect the full range of the national cleanup needs, to include all sites which require cleanup. This recognition of the full range of the problem cannot ignore the present NPL completion obligations, nor the finite limitations of the current trust fund, but would reflect the need to delegate some of the authorities and enforcement tools of the national Superfund program to willing and able States. In short, CERCLA goes beyond the NPL in requiring government action to remediate hazardous releases, and the States should be provided similar authorities to those now provided to the Federal government for remediation of sites whether listed on the NPL or not.

In order to achieve this result, we propose the development of a National Registry of sites exclusive of RCRA authorities requiring cleanup under CERCLA authority. Superfund has the ability to potentially affect all of the contaminated sites in the country but does not provide the mechanism to allow all sites (i.e., those which do not score above 28.5 in the Superfund site scoring system) to reach cleanup under the Federal program. Under such a program, U.S. EPA could be required to solicit from each State a list of sites that fall under Superfund authority. This list would represent all the sites that are contaminated above a certain nationally established target risk level. Sites below this established risk level would not be placed on the National Registry

nor be subject to CERCLA liability. This national registry would replace CERCLIS.

An efficient mechanism for removing sites from the National Register once they are cleaned up would be required. Such a removal mechanism would provide finality for responsible and voluntary parties and serve as an incentive to accomplish clean up activities.

Through this National Register process a "true priority list" of sites that require public financing for cleanup would be developed. Congress would continue to authorize an overall program funding level and U.S. EPA would be responsible for distributing site-specific monies available each year. Each State implementing the program would receive monies from the Federal Trust Fund (on a prioritization basis or under a grant formula) to address these fund-financed sites.

After exhausting enforcement efforts based on the current Strict, Joint and Several Liability scheme or the invitation to enter a voluntary cleanup program, a subset of sites on the National Register would remain. These sites would comprise a National Funding List and replace the NPL. Sites would go through a prioritization process for public funding once the State (or U.S. EPA in those States choosing not to participate in the program) determined that no responsible parties or other party were willing or able to pay for or conduct the cleanup. This qualification process would consider the severity of the contamination in relation to the other sites requiring public funding.

The Administration appears to have supported the concept of a national registry as the proposal did contain one aspect of the concept - the State registry. We do not understand the rationale or the intent for adopting only part of our recommendation. We believe this will not result in the elimination of two cleanup systems in this country or alleviate interagency conflicts. The only purpose it appears to serve is the continued promotion of the unequal partnership between the U.S. EPA and the States and the fostering of continued "turf" battles. Although we do not agree, we can understand the reluctance of many parties to eliminate the current NPL structure, but **we strongly recommend that if our integrated proposal for a single list is not adopted in its entirety, the provision of a State registry described in Section 207 be removed entirely from the bill.**

CONCLUSION:

The Administration and Congress should be complimented for developing such a comprehensive reauthorization proposal for Superfund. ASTSWMO hopes that its suggestions will be adopted as constructive improvements to the bill and make it more workable for the States and the U.S. EPA to implement. We are available to assist the Subcommittee Staff as you continue your deliberations on this important legislation. I will be happy to answer any questions. Thank you.

HOW CLEAN IS CLEAN?

NATIONAL CLEANUP GOALS

* NATIONAL TARGET RISK LEVELS
  * Carcinogens=10-5 or 10-6(constant for individual and multiple contaminants)
  * Non-carcinogens=HI<1.0(total contaminants)

* PERMANENT REMEDY
  * Unrestricted land-use for human health and natural resources
  * No future adverse ecological effect
  * Preference for on-site detoxification
  * Minimize cross media transfer of contaminants

NATIONAL CLEANUP STANDARDS OR MODELS

* SITE SCREENING CRITERIA
  * National target risk level & national cleanup standards
  * Screening for ecological effects

* SOIL
  * Human health levels for residential & commercial/industrial uses
  * Model soil to ground water pathway

* GROUND WATER
  * Human health levels
  * Nondegradation
  * Technical Impracticability

* SURFACE WATER
  * Human health levels
  * Overland flow
  * Ground water recharge

* SEDIMENT
  * Aquatic life levels

* DNAPLs
  * Locate all DNAPLs
  * Address as "source" material
  * Technical Impracticability limitations

LAND USE DETERMINATION (UNRESTRICTED VERSUS RESTRICTED) AND REMEDY SCREENING PROCESS

COMPARE PERMANENT & NON-PERMANENT REMEDIAL ALTERNATIVES FOR:

* Technical Implementability
* Administrative Feasibility
* Community Acceptance

PREFERENCE FOR PERMANENT REMEDY

(APPLY DISPROPORTIONATE COST TEST)

PERMANENT REMEDY ACHIEVABLE	PERMANENT REMEDY NOT ACHIEVABLE
Unrestricted Land Use *No further Review *No further liability *Natural Resource Damages may or may not be considered	Next best Remedy Selection Process *Long-term effectiveness *Short-term risk *Total Cost *Community acceptance Restricted Land Use *Institutional controls *Periodic review *Continued liability *Escrow cleanup account *Nat. Res. Damage Assessment *Proposed change in land use - return to Land Use Determination

2/8/94

SUPERFUND REAUTHORIZATION

An Overarching Clean Up Goal - Clean Up Standards - Remedy Selection

Resulting in a Streamlined Superfund Program

I. Background

In 1980, the Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) in response to the release or threatened release of hazardous substances into the environment at inactive waste sites. The major components of the statute provided clean up response authorities, compensation and cost-recovery, and established the liability scheme. (1)

In 1986, CERCLA was amended by the Superfund Amendments and Reauthorization Act (SARA). The following excerpt from an EPA document presents the rationale for SARA's amendments governing clean up and remedy selection:

During the 1986 Superfund Amendments and Reauthorization Act (SARA) debates, EPA was criticized for selecting remedies that relied chiefly on containment oriented solutions. Containment remedies were not viewed as providing adequate long term solutions for remediating Superfund sites. It was argued that the Superfund program should be at the forefront of developing and implementing treatment oriented remedies that achieve permanent reductions in toxicity, mobility or volume of hazardous substances.

The resulting language of section 121(b) of CERCLA provides that remedial actions utilizing treatment as a principal element to achieve permanent reductions in toxicity, mobility, or volume of hazardous substances are to be preferred over remedial actions not

utilizing such treatment. Section 121 also requires that selected remedial actions shall be protective of human health and the environment, cost effective and utilize permanent solutions and alternative treatment technologies to the maximum extent practicable. (2)

In addition, CERCLA authorized EPA to develop and implement a response plan, "which shall establish procedures and standards for responding to releases of hazardous substances, pollutants or contaminants." (3) In response, EPA promulgated the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), most recently revised in response to SARA in 1990. (4) The NCP provides direction in determining "how clean is clean" at individual sites. However, both the NCP and the statute lack sufficient specificity in reaching the "how clean is clean" determination.

Currently, this lack of specificity in determining "how clean is clean" injects a great degree of uncertainty into and prolongs the overall clean up process. With the total universe of contaminated sites nationwide needing clean up estimated to be between 10,000 and 20,000, additional specificity in reaching the "how clean is clean" determination is critical to the reauthorization of CERCLA. The two areas where additional direction is needed are in the establishment of national clean up goals and standards. The national clean up goals should be established by the Congress and incorporated into the statute, while clean up standards should be developed by EPA and the States.

The Association of State and Territorial Solid Waste Management Officials (ASTSWMO) advocates the establishment of a national clean up goal and from that the development of reasonable and consistent national models for clean up standards. This paper presents a model for the overall Superfund clean up process that would result from the

establishment of a national clean up goal and national clean up standards. A flowchart is also presented depicting the proposed clean up process.

II. Status Quo

Because CERCLA does not specify "how clean is clean," EPA currently makes the following critical decisions regarding "how clean is clean" for each individual site based on the NCP and agency guidance for the development of cleanup standards protective of human health and the environment. For example, the NCP currently provides for a risk range of 1 x 10-4 to 1 x 10-6 for whole site risk for carcinogens. Therefore, the first decision is what risk is presented by the site as a whole based on exhaustive data gathering and risk assessment modeling. Assuming this results in a decision that the site requires remediation under Superfund, the next question is how much waste needs to be remediated and what are the available methods for treating or containing the waste. Finally, the selection of a remediation approach for the site in large part determines the productive uses available for that site.

These decisions are based upon the nature and extent of contamination, the availability and limitations of treatment technologies, the potential pathways of exposure to the contamination (i.e., site-specific risk assessments), the current and future land uses, the costs, the applicable State and Federal laws (ARARs), and a variety of factors associated with the practicability of achieving particular clean up levels. Because these decisions vary from site to site (and from State to State), each site has an individual decision-making process to determine "how clean is clean." Such "flexibility" has resulted in a continuum of "permanence" and "cleanliness" at sites throughout the nation.

At some sites, treatment of all wastes to cleanup standards protective of any site use (e.g. residential), is determined to be appropriate and cost-effective. Following clean up, these sites are available for unrestricted use--the most protective (cleanest) and permanent decision possible. At other sites, wastes may be cleaned up to standards appropriate to certain restricted land uses and thereby limit the options for productive use or suitable use only with restrictions. This remedy, while fully protective for restricted use activities, results in a site that is not as clean as one allowing for unrestricted future land use. Such a remedy is also not permanent because it incorporates site restrictions and because some waste must be managed into the future.

The crux of the "how clean is clean" issue is whether to continue with a system that identifies a spectrum of points along a protectiveness continuum as possible clean up goals on an individual site-by-site basis (guided by the NCP's remedy selection expectations), or to move to a system with a nationally defined clean up goal, upon which clear and predictable cleanup standards can be developed.

III. National Clean Up Goal

Currently missing from the Superfund Program is a clearly defined overarching clean up goal applicable to all sites and specified in the statute itself. Such a national goal is needed to drive the entire clean up process. A national clean up goal should consist of two parts--1) national clean up target risk goals and 2) a definition of a permanent remedy.

i. National Target Risk Goals

A target risk level represents the allowable risk from the residual contamination remaining after a particular remedial action has been completed. Due to the inherent

difference between carcinogens and noncarcinogens, one type of target risk goal needs to be set for carcinogens and another for noncarcinogens. [Subsequent reference throughout the remainder of this paper to the "target risk goal" includes the target risk goals for both carcinogen and noncarcinogens.] For example, for carcinogens, Congress could set the national target risk goal at a 10-6 excess risk of cancer to an exposed individual for individual carcinogens, and a 10-5 cumulative (i.e., additive for carcinogenic chemicals and exposure pathways) excess risk of cancer to an exposed individual per site. NOTE: A number of States already operate with no less than a 10-6 excess target risk goal for individual carcinogens. For noncarcinogens, Congress could set the national target risk goal to not exceed a hazard index of 1.0, for total contaminants with similar target endpoints, per site.

Based upon the selected national target risk goals, models can be developed to calculate the actual allowable contaminant concentrations for the various environmental media (i.e., soil, groundwater, surface water, sediment, air, etc.) at Superfund sites. The national target risk goals could then be uniformly applied to each impacted medium at a site.

ASTSWMO acknowledges that limited information is available about the relationship between Superfund site contamination and its impacts on the site ecology. Currently, this limited knowledge does not allow for the implementation of national standards based upon ecological impacts. Until ecological risks are able to be better and more uniformly quantified, clean ups responsive to ecological concerns should continue to be determined on a site-by-site basis. EPA, in conjunction with the States, needs to develop guidance for those situations under which ecological risks would take precedence over a standard human health

based target risk level.

ii. Definition of Permanent Remedy

In conjunction with the establishment of a specific national target risk goal applicable to all sites, the primary outcome of Superfund site clean ups must be the protection of human health and the environment, and ASTSWMO believes that this is best achieved via a preference for permanent remedies. ASTSWMO acknowledges that there are occasions when disproportionate cost, technical impracticability, engineering infeasibility and other factors may render a permanent remedy impossible at a site. Any definition of a permanent remedy, at a minimum, needs to address 1) land use; 2) protection of human health and ecological health; 3) the preference for detoxification (treatment); and, 4) minimizing transfer of contaminants from one medium to another. ASTSWMO proposes the following definition:

An implemented remedy is considered permanent when it allows for the unrestricted use of all land and natural resources; results in protection of human and ecological health; except for the purpose of treatment, minimizes the removal of the contaminants to another site; and minimizes media exchanges of the contaminant. (5)

Key terms in this definition are:

Unrestricted land use means the residual contamination will not pose an unacceptable risk to health, public welfare, or the environment, and no institutional controls (i.e., engineering controls or restrictions of record) are required to restrict land use in the future.

Residential use is the default scenario for unrestricted land use. The unrestricted land use scenario pertains primarily to the clean up of contaminated soils to the national target risk goals. Where ground water is involved, restoration may not be technically practicable and institutional controls restricting future ground water use may be necessary. In such instances, however, unrestricted land use can still be achieved (i.e., the site may be developed for residential use but institutional controls would be placed on ground water use). Implicit within this definition are the concepts that the future use must be beneficial and that treatment is preferred over containment.

Protection of human and ecological health means that a permanent remedy is one that eliminates or minimizes adverse direct and indirect effects of the site on both the aquatic and terrestrial species, communities or ecosystems and regional environmental quality.

Under this definition, minimizes the removal of the contaminants to another site means that the preference is for the on-site detoxification or destruction of the contaminants through treatment. [Examples of on-site treatment include soil washing for lead removal or bioremediation such that no residual contamination remains on-site.] The least preferred remedial alternatives are those that involve the removal of some or all of the contaminant (or contaminated media, such as soil) to another location (e.g., land disposal facility).

Minimizes exchanges of the contaminants to other environmental media, under the above definition, means that migration of contaminants, either naturally or as part of the clean up,

from one medium to another. Remedial alternatives that minimize impact on other media during or following implementation of the remedy are preferred. The impacts of different treatment alternatives must be considered (e.g., the environmental consequences of discharges to the air from the operation of a groundwater pump and treat system for "X" years compared to natural attenuation of the groundwater). Remedies must employ the appropriate control measures to minimize impacts across media and to ensure a net reduction in the overall risk to the public health and environment posed by the site.

Rationale

Because CERCLA does not incorporate national clean up goals, any particular clean up level is almost always subject to debate and disagreement. The current NCP fosters these debates and disagreements because it allows residual contaminant levels to fall anywhere in the 10-4 and 10-6 excess risk range.

Should Congress select a national target risk goal and define a process for remedy selection, with preference for the choice of permanent remedies, the national contaminated site clean up process would be greatly simplified and, hence, streamlined. First, a National clean up goal would provide for the development of a clear benchmark for an early and cost effective decision for whether a site needs to be cleaned up or not. In addition, minimum national target risk goals would provide a clear starting point from which to develop uniform methodologies for setting clean up standards. National clean up goals for Superfund sites, incorporating minimum target risk levels, would allow for better comparisons and thereby a basis for developing consistency between the allowed risk acceptable under all environmental programs (e.g., Resource, Conservation and Recovery Act (RCRA); etc.). National target

risk goals and a clear process for remedy selection, with preference for permanent remedies, would ensure consistent clean up efforts nationwide.

IV. National Site Screening Criteria and Clean Up Standards

With clearly articulated national clean up goals, national clean up models and standards can be developed. The national clean up standards and models would consist of two principal elements--1) national site screening criteria and 2) media-specific clean up standards based on uniform models to establish clean up standards on a site specific basis. The establishment of site screening criteria would allow for the decision of whether or not a site needs action under the federal program to be made early in the process. This decision would be a "no action/further action necessary" determination for each site. To address those sites determined to require clean up, national health-based concentrations could be derived for individual chemicals or models developed for calculating health-based concentrations for a particular chemical. These uniform, national health-based chemical concentration standards would replace site-specific risk assessments, which currently result in varying degrees of clean up. Much discussion is expected on the advantages and disadvantages of national standards versus State specific standards based on the national models.

ASTSWMO recommends that CERCLA be amended to direct EPA, in conjunction with the States, to develop national site screening criteria and models for the development of health-based concentration standards for soil, groundwater, surface water, and sediment.

Rationale

The benefits of establishing a national site screening mechanism are many. The current decision process would be greatly simplified and a consistently applied yes/no decision for entering the Superfund clean up process would be specified. The national site screening criteria would replace the Hazard Ranking Score(HRS)-II system. All sites exceeding the site screening criteria, based upon the Congressionally-mandated national target risk goals and the national health based cleanup standards, would be entered on the National Register of contaminated sites needing clean up. [See ASTSWMO position paper entitled Comprehensive Superfund Program.] This approach would provide for consistent decisions nationwide on which sites are to be cleaned up, unlike the present situation, where anecdotes abound as to the sometimes questionable placement of a site on the National Priorities List (NPL).

The establishment of a uniform, national site screening criteria and national health-based clean up standards (whether chemical-specific concentrations or models to derive chemical-specific clean up levels) would result in a tremendous streamlining of the Superfund cleanup process. In addition to replacing the oftentimes cumbersome HRS-II process, the use of national site screening criteria and national clean up standards would allow site clean up activities to rapidly move to the remedy selection phase. The resulting increase in the number of sites actually cleaned up would fulfill the original intent of program. With clearly articulated clean up goals and the application of uniform national clean up standards, the existing contention surrounding many aspects of the current Superfund process would be eliminated, resulting in more rapid, hence responsive, clean ups.

V. Land Use Determination

ASTSWMO recommends that a land use determination be an integral and distinct part of the site specific clean up decision-making process. Land use is divided into two types--unrestricted (e.g., residential land use) or restricted (e.g., commercial, industrial and recreational land uses).

Current and known future land uses and zoning should be considered in arriving at a land use designation. Both the site itself, the surrounding area, the activities and activity patterns of the potentially exposed population and the municipal master plan must be considered in developing the land use designation. Typically, land use at most Superfund sites falls into residential, commercial, industrial or recreational land use categories. (6) These categories reflect local governmental zoning classifications.

A permanent remedy is achieved upon meeting the residential component of the national clean up goals. Further, a permanent remedy will allow for any land use consistent with zoning and community interest.

If a permanent remedy cannot be achieved (by definition) - the land use is determined to be restricted. Restricted land use would have the option to employ clean up standards based upon nonresidential exposure pathways. In the future, should the site's land use be proposed to be changed, a "return loop" to the land use determination step in the overall site specific clean up process would be required.

Rationale

ASTSWMO advocates making the land use determination prior to the establishment of the site-specific clean up standards, thus predicating clean up levels on land use assuming, of

course, reasonable remedies exist for all land use options. This approach is in contrast to the existing NCP process in which future land use is a product of the remedy selection process. ASTSWMO believes its recommended approach would further streamline the Superfund process by clearly establishing the basis for the remedy selection and selected clean up standards. In addition, this approach recognizes the large number of Superfund sites located in traditional industrial areas. ASTSWMO believes that this approach will ultimately result in the redevelopment of existing industrial areas rather than industrial development in currently non-industrial areas.

VI. Remedy Screening Process

If the land use is determined to be unrestricted, only permanent remedy alternatives will be identified. If no permanent remedy is available, the unrestricted land use must be reconsidered. Alternately, if the land use is determined to be restricted, both permanent and non-permanent remedy alternatives will be identified. Central to both the restricted and unrestricted use scenarios is that the remedial alternatives must reduce exposure to contaminants such that the risk goal is achieved.

Once permanent and non-permanent alternatives have been arrayed, the next step in the remedy evaluation process is remedy screening. The alternatives are screened against the criteria of technical implementability, administrative feasibility, and community acceptance.

Upon completion of the evaluation of permanent and nonpermanent remedial alternatives, a disproportionate cost test would occur comparing permanent and nonpermanent remedies. ASTSWMO recommends that Congress direct EPA, in conjunction with the States, to develop a definition for "disproportionate cost" for use in comparing permanent or

nonpermanent remedies.

VII. Unrestricted Land Use

Unrestricted land use means that the land, after clean up activities are complete, can be returned to residential use without the need for engineering controls or other restrictions. There would be no further site review (e.g., the current 5-year review requirement), nor would there be any further liability attached to the responsible parties. In addition, natural resource damages may be considered in those cases where site conditions indicate a need.

There may be instances where soil clean up standards based upon unrestricted use are achieved, but the groundwater clean up standards have not yet been achieved. In such cases, continuing monitoring and institutional controls (i.e. prohibition on ground water use) would be required.

VIII. Non-Permanent Remedy Selection Process

If a permanent remedy is not achievable, ASTSWMO proposes for the remedy selection process to select the "next best" remedial alternative using the following method. The individual non-permanent remedial alternatives will be assessed according to four evaluation criteria, rather than the present nine provided for in the NCP. The four criteria are:

Long-Term Effectiveness. Long-term effectiveness is defined as the ability of an alternative to maintain the desired level of protection of human health and the environment over time. By definition, permanent remedies provide absolute long-term effectiveness. Absent the availability of a permanent remedy, non-permanent remedial alternatives that achieve

significant reductions in toxicity, mobility, or volume through treatment are to be preferred over other alternatives. In addition, the ability of the alternative to contain and/or manage treatment residuals, to minimize transfer of contaminants from one medium to another, and to maintain established response action objectives and clean up levels over time is of major consideration.

Short-Term Risk. Any short-term risks possible as a result of implementing an alternative are identified and weighed against the ultimate long-term benefits of implementing the remedial alternative.

Total Costs. The cost of implementing the alternative, including long-term monitoring and operation and maintenance, are to be considered.

Community Acceptance. The range of non-permanent alternatives and the benefits and drawbacks of each alternative would be presented to the community for comment. Community comments would be considered and addressed.

Each non-permanent remedial alternative developed for a restricted land use would be evaluated according to the four criteria. The selected remedy is either a permanent remedy (which allows for unrestricted land use) or the next best remedy for a restricted land use.

IX. Use Restrictions

When a permanent remedy is not achievable, the final step in the remedy selection process is the determination of appropriate restrictions on the land use. This will occur after a remedial alternative has been selected. There are two possible scenarios employing land use restrictions.

Under the first scenario, the commercial, industrial or recreational health-based standards are achieved. For example, soils are detoxified to the commercial, industrial or recreational clean up standards. Institutional controls, such as a zoning restriction and notification on the property records of the remaining contamination, would be required. Such land use restrictions would remain in perpetuity or until the site is remediated to residential (i.e. permanent remedy) levels. A mechanism for the public to obtain records of such institutional controls should be established. One State, for example, maintains a computer record of all Records of Decision, including all mandated institutional controls.

Under the second scenario, the commercial, industrial or recreational health-based standards are not achieved. The selected remedy would then require the elimination of the routes of exposure. Institutional controls, such as a zoning restriction and notification on the property record of the remaining contamination, would be required. Examples of institutional controls, above and beyond zoning and property record notifications, are water well advisories or restrictions. Examples of engineering controls are contaminant encapsulation or "caps, signs, fences, or solidification".

Additional components associated with non-permanent remedies:

Liability for the clean up of a site to restricted land use would continue and the site

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remedy would be subject to periodic review . Responsible parties would be responsible for long-term monitoring and operation and maintenance. The conditions associated with any restricted land use would appear to provide numerous incentives to implement a permanent remedy.

Only upon the achievement of a permanent remedy would the institutional control and other components of a non-permanent remedy be removed. In addition, any proposed change in land use would require a return to the land use determination step in the Superfund clean up process. Responsible parties would be required to notify the appropriate authority and conduct additional cleanup when a change in land use is proposed.

X. Ecological Concerns

Limited information about the relationship between Superfund site contamination and its impact on a site's ecology is currently available. Both a screening mechanism and clean up standards designed to protect ecological concerns are needed. ASTSWMO recommends further research in this area.

XII. ASTSWMO Position

The Association of State and Territorial Solid Waste Management Officials (ASTSWMO) advocates the establishment of a national clean up goal with a preference for permanence and from that the development of reasonable and consistent national models for clean up standards. This paper presents a model for the overall Superfund clean up process that would result from the establishment of a national clean up goal and national clean up standards.

XI. Bibliography

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Adopted by the ASTSWMO Board of Directors, January 24, 1994 in Santa Fe, New Mexico

Mr. SWIFT. Mr. Eden, thank you, very much. I recognize now, Ms. Linda Greer. Welcome back. You seem to spend a lot of time here helping us. Linda is a senior scientist, with the Natural Resources Defense Council.

Ms. GREER. I might add, at this time of day it's usually better to be brief than to be brilliant. I plan to try my best.

Mr. SWIFT. You will probably be both.

STATEMENT OF LINDA GREER

Ms. GREER. Today, as you know, NRDC was part of the Superfund Commission, along with the Environmental Defense Fund and from the Environmental Community. My comments today and recommendations for change in the administration's bill are from the Commission. My written statement also provides a rationale for the environmental community's perspective as to why these changes are recommended. I just wanted to make it clear, that I am actually speaking from the Commission today, as an environmental participant in the Commission.

NRDC really did welcome the administration introducing the bill to get the ball rolling. But we were very disappointed with key aspects of the bill, in terms of remedy selection. I am going to go through those aspects of the bill today, giving you the Commission's recommendations for change there.

Mr. SWIFT. You said NRDC was, but you are speaking for the Commission.

Ms. GREER. For the Commission, that's right. In terms of the statutory goals, the existing statutory goal in Superfund is to protect human health, welfare and the environment. We have had some conversation about this today. The administration bill perpetuates the status quo of the risk range. It tolerates a 100 fold range of protection.

What bothers us about this debate is that at the same time people talk about wanting to provide equivalent level of protection to all affected citizens across the country. It seems to be a disconnect to me, how you can say you are providing equivalent level of protection across the country if you are in fact tolerating a 100 fold difference in the protection that you are calling acceptable.

Although EPA states that it wants this equivalent protection, its tolerance of the risk range to me and to the Commission, suggested that there was not going to be equivalent levels. What the Superfund Commission did about this is perhaps our least understood recommendation. What we did was, we fixed the risk at ten to the minus six, and recognized that there would be many situations where a ten to the minus sixth risk could not be accomplished. For example, where there was grossly disproportionate costs and those sorts of things.

I think the best way to understand the rationale of how we got to where we did is, we looked at the reasons why EPA sometimes feels it needs the range, and it came down to things like cost and lack of available treatment and land use and other things. What the Commission approach does is, it allows all of those factors to be taken into account in an explicit and transparent way. At the end of the day the risk that the community is facing is no greater than a single point, ten to the minus sixth.

Under different land uses the concentrations that would result would be different, different ten to the minus sixth levels so to speak, in terms of parts per mission. We think that we are allowing for an appropriate level of site specific flexibility, but we are at the same time able to tell communities across the country that they will all be treated the same in terms of risk that is posed by the site.

On cleanup levels, there is a very significant difference in our minds, between the administration bill and the Commission. The administration bill basically sets standards, and at the same time allows the Administrator discretion for site specific risk assessment. Our concern is that these standards will be sort of like nuclear weapons, developed with the hope that they will never be used. They will be on the books, but that there will be nonetheless a very drawn out and contentious period of time at each site where people debate as to whether or not those numbers would apply to the site, or whether the numbers should be completely thrown out and replaced by a variable number.

The other problem with that approach is that it is not at all transparent. Once you get into a site specific risk assessment, how you get to the numbers that you get to and the risk assessment process per se, is very unpopular in communities and with the environmental community, because it is very difficult to track how people are getting to the numbers that they get to.

It is for this reason that the Commission developed a formulaic approach instead of a set of numbers, which we think basically allows for a limited amount of site specific flexibility where that can be justified. Where that flexibility can be justified is where variables can be easily measured, objectively measured, scientifically well understood, and not for other variables which cannot be measured or not scientifically understood.

I guess the upshot of what we did is, we think we provided for the appropriate amount of flexibility rather than giving you an either/or, that you either use this number which doesn't change or you use a number that can change in any way to any extent, regardless of how easily measured the variables should be.

I will talk to you about two other significant differences in terms of treatment and interim containment, two concerns that the Commission has with the administration bill, and leave to the written statement three additional concerns about groundwater and the lack of administration bill addressing groundwater, land use and ARAR's.

Under treatment, this has been long discussed this morning, EPA narrows the preference to hot spots. The Superfund Commission also did some narrowing of the statutory preference for treatment, narrowing it to hot spots and to something we called warm spots which I agree, is not the most elegant terminology.

The biggest problem we have with the EPA definition of hot spots is that the definition is in fact quite narrow. It is narrower than their existing guidance, as to what is a hot spot. Although this is a distinction that is sort of more appreciated in Washington than it is outside of the beltway, the fact that they say highly toxic or highly mobile, cannot be reliably contained, or presents a threat to human health and the environment, the fact that they say and

instead of or in our mind suggests that what you would have to do in order to find a hot spot is basically find something that had four or even five characteristics associated with it before it could be a hot spot.

Under our definition, basically, you would only have to have one of those things in order to be a hot spot. The upshot of the whole thing is that we think that definition is so narrow, that the preference for treatment for such a narrow area of hot spots would not be a genuine preference for treatment.

Last but not least, my oral statement on interim containment. The administration bill, besides using the words interim containment, bears very little resemblance to what the national commission did with interim containment. These differences are very important to us, because our construct of interim containment was really what we thought we were doing to best, first of all, save the business community unnecessary expense and at the same time foster the development of treatment technology.

The one thing that we could agree on early on in the Commission was that if technology was available that was effective and that was cheap, we would not be in this bind that we are in. The fact of the matter was the fundamental problem was that many of these technologies were costly, and that there were many types of situations for which technology did not exist. It was really a keystone, so to speak of what we did, to come up with something that we thought looked really good, to foster the development of improved technology.

That is what we think the interim containment of the provisions of the Superfund Commission report does. The critical difference is, under the Superfund Commission approach if you have a situation where technology does not exist but treatment would be preferred, i.e., you have a hot spot or a warm spot, if the technology doesn't exit at all or it's grossly disproportionately costly, you are in interim containment.

You monitor every 5 years, EPA makes a finding every 5 years, you are on the hook until technology is developed. As a practical matter, if technology doesn't develop in 20 or 30 years you have sort of *de facto* become the permanent containment situation. But, you have an obligation to continually go back and look as to whether treatment is available.

Under the administration's bill as we read it, it appears that interim containment is only selected if the Administrator foresees treatment becoming available or foresees the drop in cost of the treatment becoming available. Our concern is that because of that, there will be many sites that are delegated to permanent containment, and the market for future treatment will essentially be sitting under these caps across the country rather than sitting there as an incentive for technology developers to look at and say we have this material that we know ultimately people will be required to address, so it is worth it to me to develop this technology because there is a real market there.

In addition, we provided in the Superfund Commission for an interim containment fund, for fees to be paid by the responsible parties when they are in interim containment. Those fees would be on a sliding scale, as is discussed in our approach. Basically, it would provide money for the development of new technologies, in order again, to foster the development of technologies. Such a fund is not created in the administration bill.

I think that's it for my oral statement. Thank you very much, for this opportunity to testify.

[The prepared statement of Ms. Greer follows:]

Testimony of the

Natural Resources Defense Council

Good morning. I am Linda E. Greer, Ph.D., Senior Scientist with the Public Health program of the Natural Resources Defense Council (NRDC). NRDC is a private, not-for-profit, public interest environmental organization with over 170,000 members nationwide. NRDC participated in the original authorization of the Superfund program in 1980 as well as the Act's reauthorization in 1986.

NRDC has overseen the implementation of the Superfund program since its inception. We have participated in rulemakings, published reports about progress in the program, provided technical and legal advise to communities affected by Superfund sites, and undertaken systematic analyses of key issues affecting the success of the program over the last 12 years. Issues of concern to us over the years have most notably included remedy selection and identification of cleanup standards in the Superfund program. We sit on EPA's NACEPT Committee, which was set up by Carol Browner for advise during the development of Administration positions on Superfund legislative reform, and I am a member of the National Academy of Sciences National Research Council (NRC) Committee on Groundwater Cleanup Alternatives, a Committee that is currently reviewing the technical limitations of groundwater cleanup of dense non-aqueous phase liquids (DNAPL), a key issue in remedy selection.

As you are aware, NRDC is a part of the National Commission on Superfund (NCS), along with the National Audubon Society and the Environmental Defense Fund from the environmental community. All three of these organizations strongly support the complete set of recommendations in the Commission's report, but today I will focus my remarks on remedy selection. All the recommendations for change in Superfund that I will discuss today are those we developed with the Commission. I very much appreciate this opportunity to testify.

One of the major concerns NRDC has had with the current application of cleanup standards and remedy selection in the Superfund program is the widely variant cleanup decisions made from site to site throughout the country. Some communities receive excellent cleanups for their sites, while other communities receive wholly inadequate cleanups. These variations are a product of statutory criteria that afford EPA substantial discretion and flexibility in making cleanup decisions through the nation. They also stem from the application of an acceptable "risk range" policy that allows EPA the unfettered discretion to protect one community from cancer risks at a level vastly different from the protection afforded another community, oftentimes without explanation or justification.

Many community groups and environmentalists have advocated that the law be changed to bring greater standardization and transparency in cleanup decisions. Providing greater certainty and clarity to the remedy selection and cleanup process will not only help communities, but will help businesses who have expressed concerns that some cleanup decisions require expenditures that don't appreciably increase human health or environmental protection.

This common concern about uncertainty and variability by environmentalists and industry formed the basis for the recommendations in the Commission report about remedy selection. The goals of the Commission recommendations on remedy are to ensure that the clean-up standard and remedy selection process 1) have a clearly articulated goal, 2) be guided by a decisionmaking process which is understood by all of the affected parties, 3) be streamlined to work effectively and efficiently to protect human health and the environment, 4) contain incentives for the development and implementation of new and improved remedial technology, 5) provide a clearly defined role for meaningful involvement by affected communities, and 6) provide a consistent rationale for decisionmaking. We believe strongly that every community deserves the identical guarantee of meaningful health protection for each remedy selected.

Although NRDC certainly welcomed the Administration's getting the ball rolling several weeks ago with the introduction of its Superfund reform package, I regretfully must report that the bill's cleanup standards and remedy selection portions are a big disappointment to the environmental community and are, in our opinion, quite insufficient to meet the goals of the Superfund Commission in remedy reform. Absent substantial modification in remedy selection, NRDC would oppose passage of the Administration bill.

Our detailed concerns about the Administration's bill in this area are as follows:

Statutory Goal

According the section 104(a)(1), the general goal of Superfund's cleanup program is to "protect the public health, or welfare, or environment" whenever any hazardous substance is released or there is a substantial threat of such release into the environment, or where there is a "release or substantial threat of release into the environment of any pollutant or contaminant which my present an imminent and substantial danger to the public health or welfare". In implementing this goal, EPA typically identifies a level of risk at each site which it feels meets Superfund's goal. This risk level usually falls within a range of between 10-4 to 10-6, a one hundred fold difference in protection afforded to communities.

Several major issues have arisen with respect to EPA's use of risk assessments and a risk range to meet Superfund's goal. First, some in the environmental and grass roots community argue that risk assessment are inherently flawed because of statistical and scientific failings in the risk assessment process, which results in an underestimation of the real risks. These individuals argue that EPA should clean up a site to the "background" levels that existed at the site prior to the pollution to ensure protection. Many in the business community feel the risk assessment over-estimates the true risks at a site. Last but certainly not least, the use of the risk range results in varying levels of cleanups at facilities and an unequal level of protection among citizens living near Superfund sites, an outcome which cannot be justified.

The Administration's proposal does little to address this problem; to the contrary, the proposal appears to statutorily sanction the use of the risk range to implement Superfund cleanup goals and calls for EPA to establish a national risk assessment protocol to be used at all sites.

The NCS calls for the elimination of the risk range. All cleanups would be required to meet a 10-6 level for carcinogens and a hazard index of 1 for non-carcinogens. Instead of using a risk range to take into account varying site factors in a way that is difficult to understand, our proposal advocates explicit, up-front consideration of legitimate site differences, technological limitations, and future land use of the site. We believe that although the level of protection afforded to every community is not allowed to vary under our approach, our consideration of these other factors will in fact provide adequate flexibility to the program to design and implement appropriate remedies across the country.

Cleanup Levels

The current Superfund program does not produce clear and consistent cleanup levels. Excessive time is being spent in determining cleanup levels for every site, and the environmental and grass roots communities question whether the results provide for consistent and adequate health and environmental protection across the country. The process for deriving cleanup levels is not at all transparent, and there are insufficient and often ineffective roles for communities in setting appropriate cleanup levels.

Rhetoric to the contrary, the Administration bill does little to change the existing process of selecting cleanup goals at Superfund sites. The Administration's bill provides for neither a streamlined approach to minimize time or inconsistencies nor for a transparent process that is scientifically based and easily understood by communities and PRPs. It is true that the Administration bill sets the Agency on course to develop national cleanup standards. However, the standards that EPA develops will likely be contested at most sites, since the bill also allows for alternative standards to be set for any given site using site-specific risk assessment. We are gravely concerned that as a result of this approach, the standards that the Agency develops will be hotly debated at most sites, only to be replaced with numbers derived from site-specific risk assessments after contentious argument and delay -- the very problem that has plagued the program to date.

The NCS recommends that EPA be directed to develop cleanup levels using a formula approach for the 100 most frequently occurring contaminants. The formula should allow for limited site-specific flexibility where inputs: 1) can be objectively measured; 2) have effects that are scientifically well-understood; and 3) have significant impact on the contaminants cleanup levels identified by the formula. Inputs not allowed to vary would be constants and would be required to reflect reasonable worst-case estimates. The presumption should be to use the formula approach in most cases, although EPA should also be directed to explore limited circumstances where background and site-specific risk assessments might be appropriate, such as where the

formula will not be developed for a particular chemical or where background achieves similar outcomes and is more acceptable t the community. The statute should provide a deadline for EPA to do this work, and a "hammer" of some sort should the work not be completed. Under this approach, the numbers that will be developed will actually be used, scientifically justifiable site-specific flexibility will be provided, there will be minimal opportunities for abuse of risk assessment methodologies, the process will be transparent, and participation by communities will be facilitated.

Treatment

In the debate surrounding the reauthorization of Superfund in 1986, the environmental community put great emphasis on the need to greatly enhance the use of permanent remedies at Superfund sites. Although there are some types of Superfund sites, such as municipal landfills, where permanent remedies are not practical (given generally the size and dilute nature of the toxic waste disposed) there are many sites where treatment should be used as one component of a complete remedy, targeted at chemical "hot spots" of high concentration or waste-like material. The 1986 statutory preference for treatment was based on experience that suggested that contained facilities (capped with clay on the surface and sometimes also contained with subsurface walls underground) were likely to be unsuccessful remedies in the long run.

In 1985/1986, the environmental community strongly believed that containment provided no more than short-term band-aid solutions to long-term festering contamination problems; that society was technically incapable of designing containment that would not ultimately leak; and that we were institutionally incapable of either ensuring that contained facilities would be properly maintained or that the land containing wastes would not ultimately be put to use for a purpose inconsistent with residual contamination levels, such as occurred at the infamous Love Canal site in New York, etc.

Where do things stand on these issues seven years later, as we embark on another Superfund reauthorization? Not much has changed with regard to the technical limitations of containment. Although industry lobbyists inside the beltway like to characterize containment as a straightforward method to achieve permanent isolation of the waste from humans or the environment, even a quick look outside of the Beltway to assess the performance of contained facilities indicates that containment can be considered only a short-term solution to the long-term problem of toxic chemical dumpsites.

For these reasons, in selecting a site remedy designed to provide protection of human health and the environment over the long-term, areas of highly toxic or highly mobile waste ("hot spots") clearly warrant treatment.

The Administration proposal falls short of ensuring that treatment remain a preferred option for remedying such areas. Under its bill, hot spots are defined as discreet areas within a facility that contain hazardous substances "that are highly toxic or

highly mobile, cannot be reliably contained, and present a significant risk to human health or the environment should exposure occur". These areas may be contained instead of treated for an interim period if the cost of treatment is deemed "disproportionate".

Although EPA for years has had practical guidance defining hot spots ("Guide to Principal Threat and Low-Level Threat Waste", November 1991, PB92-963345), its legislative proposal appears to significantly narrow the guidance's scope by requiring that designated hot spot areas by highly toxic or mobile, not be reliably contained and present a significant risk. Such areas are investigated only where a facility is being evaluated for permanent containment. In addition, EPA indicates that hot spots may be contained for an interim period if the cost of treatment is "disproportionate" -- arguably a very broad test. Finally, the Administration proposal fails to reasonably define the way in which hot spots shall be determined.

Under the NCS approach, the narrow restriction of the Administration bill would be modified to reflect the more flexible language of EPA's Principal Threat guidance: hot spots are defined as "materials considered to be highly toxic or highly mobile that generally cannot be reliably contained or would present a significant risk to human health or the environment should exposure occur." For these areas, the preference for treatment is retained. Moreover, under the NCS approach, treatment is required to be considered at areas which, although not hot spots, nevertheless are moderately toxic or moderately mobile or for which long-term containment does not appear to be reliable. In these cases of medium contamination, availability of effective treatment should be considered but with a heightened requirement that the cost of treatment be reasonable. Finally, it must be clear that the investigation to identify these areas be prompt and practical.

Interim Containment

At many Superfund sites, there is currently not a feasible technology available to permanently treat the contaminants at the site to protective levels. Today, Superfund requires either that experimental technologies be implemented at such sites (an option which incurs both costs to the PRPs and risks to the communities) or that clay be put on top of those sites to contain the contamination. Changes are needed in Superfund to properly address these types of sites in the short run, to foster the development of effective technologies to address these situations in the long run, and to ensure that the sites are properly remediated once the technology is developed.

The Administration's bill falls far, far short of what is necessary either to adequately address sites where technology is not currently available or to foster the development of technology for the future. Under the Administrations bill, if a treatment remedy is available only at disproportionate cost -- the President is provided the discretion to select interim containment, as long as he determines that an appropriate treatment remedy is likely to become available within a reasonable period of time. If an

appropriate treatment remedy becomes available within that period of time, that remedy is required.

The Administration's requirement that interim containment be selected only where a determination is made that technology is likely to be available will result in unnecessary and undesirable limitations in using this provision. Its implied one-time review of technology availability will also unduly limit the potential benefits of the approach. Nothing is provided in the bill to actually foster the development of the technologies needed in these situations. Lastly, the bill's failure to specify public reporting at interim contained facilities will not deliver public confidence in its approach.

Under the NCS approach, interim containment remedies are appropriate for any site where treatment is required (such as for "hot spots" of highly contaminated material), but is not currently available. Interim containment remedies are required to minimize to the maximum extent practicable, the migration of contaminants into air, water, soil, and groundwater at any concentration. Monitoring of the effectiveness of interim containment is required to include all routes of exposure at a frequency that is adequate to detect the possible movement of contaminants, and the monitoring data must be made readily available to the public. Citizen suit authority is provided under the NCS approach to assure that monitoring and reporting responsibilities are carried out as required. EPA is required to make a determination whether treatment technology is available and feasible to implement at the site every five years. If technology is determined to be feasible, the remedy is required to be implemented within two years.

An interim containment site fund is established, with the primary purpose to fund technology development initiatives. When interim containment is implemented at a site, the responsible parties would be required to pay into this fund. This fund can be used for purposes related to technology development and activities associated with interim containment remedies, such as providing resources to the CWGs and TAGs to assess technology options and effectiveness, and providing partial funding of public/private partnerships for development of new treatment technologies. The fund could also be used for subsidizing PRPs who try innovative technologies which fail and who are required to implement a second remedy.

Groundwater

The Superfund program currently suffers from inconsistencies in its approach in deciding whether or not to clean up groundwater at a site, especially in those cases where groundwater is not currently used but is of potential use. The Administration bill is silent on how groundwater is to be remediated and therefore does little to streamline groundwater remedy decisionmaking and make it more consistent program-wide.

The NCS believes that the statute should explicitly state that groundwater should be remediated unless it is considered unusable and therefore not an exposure pathway. This is the case where groundwater is naturally unusable and does not pose an ecological hazard, or where the groundwater has historic, widespread non-Superfund created

contamination to the extent that it will not be cleaned up in the foreseeable future. Where water is unusable, any migration of contamination should be contained at the edge of the plume if technologically feasible, and alternative water supplies should be provided to substitute for the water the community will not be able to use.

In some cases, remediation simply may not be technologically feasible despite the desirability of clean-up. Often in the case of DNAPLs, for example, there is no existing technology capable of remediating impacted groundwater to required clean-up levels. Interim containment that assures no migration beyond the edge of the plume should be implemented, and the site should be subject to a five-year review. If effective technology develops within the review period, it should be implement expeditiously.

Land Use

The Administration Superfund reform bill proposes to incorporate land use considerations in the national standard setting process. We assume this to mean that national remediation standards will be established for various land uses. Apparently, the appropriate national standard for a site will be chosen when the "reasonably anticipated future uses of land at a facility" are known. We are concerned about this approach because it provides a very important role for land-use based decisionmaking in the Superfund program. As I have previously testified in detail, the reliance on land use to provide long-term protection to communities has long been difficult for the environmental community to accept, given the difficulties associated with both accurately predicting future needs for the land and limitations in our institutional capabilities to control for inappropriate future uses. For these reasons, we are concerned with the very central role the Administration appears to provide for land-use based decision-making.

Although the NCS does allow land use to be taken into account, the proposal is quite different from EPA's. First, under our approach, land use is not considered in the development of a standard national formula from which cleanup levels at a particular site will be derived; rather, the formula allows for site-specific flexibility mostly in the area of fate and transport assumptions for particular chemicals. Land use is considered in the stage of remedy selection, where technology availability and feasibility and community acceptance of the remedy, and other factors are evaluated as well. Second, we provide for a statutory presumption that sites on or adjacent to residential development be cleaned up to residential levels (unless the presumption is overridden or residential levels cannot be achieved due to technological limitations, grossly disproportionate cost, etc.) Third, we provide a central role for the affected community in making land use recommendations.

Even with these limitations, the NCS fully expects that decisions on future land use will in many cases dictate the remedy ultimately selected for a site. This is based on the fact that key opportunities are created where they currently do not exist to base decisions on the future use of the land. For example, under our approach, sites located in industrial parks need not be remedied to residential cleanup levels regardless of the

availability of technology at reasonable cost. We strongly urge that the administration bill be modified to adopt the National Commission proposal in this area.

Applicable, Relevant, and Appropriate Requirements (ARARs)

Without question, ARARs have not delivered the consistency and confidence in remedy selection that the environmental community originally expected. They have also been frustrating to industry, which feels aggrieved in those cases where ARARs arguably should not be applied to their sites. For these reasons, there has been little disagreement that the reliance on ARARs should be modified in the statute.

The Administration bill does not adopt the approach developed by the NCS in this area. While the bill does eliminate relevant and appropriate requirements as we recommend, it is more stingy with state applicable requirements than can be justified. Particularly disturbing are the Administration bill limits that applicable state standards be only those which are promulgated using the "best available scientific evidence through a public process".

The NCS proposes that this restriction in the administration bill be eliminated. It is not appropriate for the federal government to make determinations about whether the scientific data used by a state to promulgate its own remedial standards is based on the "best available" scientific evidence and whether the public process prescribed in that state is adequate. We believe that the states are uniquely and individually qualified to make these determinations, and federal law should not intrude on these state decisions.

To facilitate prompt remediation, state designation of applicable remediation standards should take place within an established time frame after enactment, should be subject to public notice and comment, and should be reproposed on a yearly basis to incorporate any newly promulgated remediation standards. States should be explicitly allowed to repromulgate any of its existing standards not originally developed for application in remedial situations for the purposes of making them applicable.

Conclusion

My testimony today has focused on several limitations of the Administraton's Superfund reauthoriztion bill. NRDC is deeply concerned to see changes in the areas I have outlined, and we look forward to working through the Superfund Commission with this Subcommittee to achieve changes in the bill that are necessary to ensure proper protection of human health and the environment to affected communities surrounding the Superfund sites across this nation.

Thank you very much for this opportunity to testify.

Mr. SWIFT. Ms. Greer, thank you. I am happy to recognize Mr. John Quarles, with the Hazardous Waste Cleanup Project.

STATEMENT OF JOHN QUARLES

Mr. QUARLES. Thank you, Mr. Chairman. I will also endeavor just to hit a few high points. I will not go through my testimony, but I would like to discuss a few of the major themes and issues that are covered by it.

I will begin by simply emphasizing as the prior panel unanimously stated, that industry in general recognizes the administration bill as a good start towards solving the problem. We do urge you to continue toward trying to complete Superfund Reauthorization this year.

In my testimony I emphasize the concerns over cost effectiveness. In 25 years of fulltime involvement in environmental and regulatory issues, I think I have learned as well as anyone that it is unfashionable and politically ineffective to talk about costs with regard to environmental controls. I think it is encouraging to recognize that even the administration has acknowledged that costs are a concern, and that much of the criticism of this program is that it is too costly. There's also criticism because of the delay.

In its statement of goals for this legislation, the administration does not explicitly recognize that cost effectiveness is one of the goals. I would emphasize that right up front in section 501 where it states the objectives of the legislation, there be added a subparagraph D that states that one of the objectives is to assure the reasonableness of the cost of the remedies, and that the program will be cost effective.

We all know in our gut and we have heard, that remedies are often not cost effective. The question is, why not. I think there are two fundamental problems that are causing the results that people want to change. One problem is that we do not have a valid system for assessment of the risks that are presented by these sites. The risk assessment methodology exaggerates the risks, and the whole process does not communicate them effectively.

Second, we have a very complicated statutory and regulatory framework for establishing criteria to make decisions on remedy, and it's very difficult to work through that process. As you do, the system is tilted against cost effective solutions. What causes that tilt, it's the ARAR's and the preferences. Those come into play, only in the sense of driving a result toward a degree of control that is not justified on the basis of the basic criteria. That's true under the present statute and it's true under the bill.

There are unfortunate results that come from these aspects. One of them is that the costs of remedies is excessive. Another is that this is a major reason for a lot of the delay in the process. You have a framework that bureaucrats and people in the field are trying to work with that doesn't lead naturally and easily and directly to a common sense result. A tremendous amount of controversy and delay is created, in trying to work through that and come out with a result that does make sense.

I think in addition to this there is an underlying problem, and we might as well state it honestly. What is sticking in everybody's craw, whether they are environmental advocates or business inter-

ests, the government or anywhere else, what is sticking in our craw is that these contaminants are out there in the environment, and we don't like to admit that there is a practical limitation on our ability to get them back.

It's very hard to say we are just going to contain this problem and have to watch over it indefinitely. At a political level that's very hard to say. And yet, the reality of the program and the reality of the accumulated experience is, that's what is necessary because alternatively the costs are just prohibitive.

Let me get a little bit more specific on some of the items. On risk assessment, we do applaud the provision in this statute that there be a national protocol for better risk assessments. We think that needs to be redefined and broadened. It focuses now only on requiring realistic assumptions, and what we really want are realistic risk assessments. The assumptions are the ingredients that go into the risk assessment, but you have to go all the way through to the process. It's a minor wording change, but we think that the national protocol should call for realistic risk assessments and not risk assessments with realistic assumptions.

We also think that there needs to be an emphasis on effective and meaningful risk communication, something along the line that Mr. Oxley presented, that the consideration of risks that are encountered by people in their ordinary lives and community situation need to be put into a balanced perspective with these risks from Superfund sites.

Moving on to the cleanup levels. There are many problems and limitations with respect to this proposal, and they need to be well understood. To begin with and bouncing out of the risk assessment point, the cleanup levels are going to have great difficulty in reflecting a good risk assessment. When you move to a national level, yes, you get more consistent, but you are going to have to make greater use of default assumptions which are going to drive the generic numbers or framework of formula towards more conservative results. There will creep back in, a distortion of the risk.

I will also point out—and you can look at EPA's experience in trying to national ambient air quality standards or trying to promulgate water quality standards, the problems they have had trying to establish under the HWAR process numbers for soil contamination, this is very difficult to come up with numbers or formula or anything else, and don't count on this in our lifetime that we are really going to have a system that can be used.

If and when they do come out with these cleanup standards, we are troubled by the prospect that they will displace site specific risk assessments. Like Mr. Annett and others, I was pleased by what Elliot Laws had to say this morning, that there would be a continuing ability on the part of the administration to use a site specific risk assessment despite there having been promulgated a generic cleanup level. The bill doesn't say that, at least as we read it. A very minor wording change would make that clear. There is clarification required. I can come back and be specific on that.

Finally, and this is the most central concern that we have with regard to the generic cleanup levels is, how do they relate to the situations where you have a containment remedy adopted. What Linda Greer just said, if I understood it correctly, may shed some

helpful light on this. The question is, within an area of containment, are these generic cleanup levels going to be satisfied or not. To be more specific, if the generic cleanup level specifies—if you work through the site related factors they could crank in—if it specifies a certain numerical concentration, is it expected that numerical concentration will exist within the boundaries of an area governed by a containment regime.

Let me say just a couple of words about preferences, hot spots, and containments. It is true that under the bill, that the preference is narrowed. In a political sense that sends a message which may be helpful to people in the region to appreciate that preference is not supposed to be applied as broadly. But, after stating the removal of the preference in the big print and when you move to the discussion of the hot spots in the fine print, the preference reappears.

If you look at the way that the process works today, generally speaking, it's the hot spots that get treated. Outside of a hot spot you don't have treatment. The preference is being retained in this bill in the only areas that realistically treatment is being required today. I am not sure that the fine print really gives you a change in the way the statute might end up.

We have a concern, that the intention and the statement be fulfilled in the actual language of the statute, and we want to be sure that the water gets to the end of the line.

The definition of hot spot is ambiguous, and we are concerned that it's too broad. I know that Linda's concern is too narrow. A lot of it depends on what is the consequence to an area that is defined as a hot spot. There is a sense out there in the regions as to what a hot spot is, and although there is a lot of willingness on the part of industry—and you have heard that a few minutes ago—to undertake treatment in certain areas, there is also a concern that broad areas will be defined as hot spots and the preference will be treated.

What is at stake in the preference is this cost standard. If you are applying the general rules, then you balance the reasonableness of the cost against other factors. Those factors include the effectiveness of the remedy and the long term reliability of the remedy, but it also includes the reasonableness of the cost.

A hot spot, as defined under this bill, the rule that would apply is that there is a preference for treatment unless there is no technology available or if there is a disproportionate cost. It substitutes a disproportionate cost standard. I have concern that it's going too far.

Again, I would emphasize, throughout industry there is a clear recognition that there are pockets of contaminants that feasibly can be gotten and they should be dealt with, and they should be treated. So, there is not a conceptual disagreement with the notion of treatment. What the concern is, is the standard by which the decision is made. We are concerned, that there not be a tilt in the decision framework, that it be done on an even playing field. If it is an even playing field we think that will result in the situations where treatment truly is appropriate.

Thank you, Mr. Chairman. I appreciate your patience.

[Testimony resumes on p. 827.]

[The prepared statement of Mr. Quarles follows:]

HAZARDOUS WASTE
CLEANUP PROJECT

Testimony Of John Quarles
On Behalf Of
The Hazardous Waste Cleanup Project
Before The Subcommittee On Transportation
And Hazardous Materials
Of The Committee On Energy And Commerce
U.S. House Of Representatives

February 24, 1994

Mr. Chairman, Members of the Committee:

Thank you for the opportunity to testify today on H.R. 3800, legislation proposed by the Administration to reform the Superfund program. This legislation has tremendous importance. Superfund exerts profound impacts and imposes huge costs throughout our society. The current program is fundamentally defective and cries out for reform. We applaud your leadership in addressing this urgent national concern.

I am pleased to testify today on behalf of the Hazardous Waste Cleanup Project. This Project was organized specifically to seek reform of the remedy selection provisions of Superfund and related hazardous waste cleanup programs. Its members are major national trade associations representing the aluminum, automotive, chemical, forest and paper, insurance, iron and steel, and petroleum industries of this country.

We commend the Administration for its efforts to address the problems and shortcomings of Superfund. The Administration has adopted and put into effect a number of administrative improvements. In evaluating needs for statutory change, it has examined the current law through an open process that has engaged all points of view and developed a productive discussion of the principal issues. The Administration bill addresses a number of serious problems, and in many respects it would make significant improvement. On the other hand, the solutions proposed by this bill are inadequate or unclear on many important points. Our primary concerns will be discussed below. **We believe, however, that the Administration bill does provide a usable framework and a good starting point from which to develop a set of amendments that will reform this federal program.**

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We also emphasize that Superfund reauthorization should be completed this year. The program is badly flawed and needs reform now. Every month of delay perpetuates an approach to site remediation that is inefficient and producing bad decisions. We urge that the legislative process move forward swiftly.

PROBLEMS OF SUPERFUND; OBJECTIVES FOR REFORM

In recent years Superfund has been a lightning rod for complaint. It has been criticized intensively, repeatedly, and from all sides. In statements released by the Administration to accompany its bill and in the testimony presented by EPA Administrator Carol Browner before this Subcommittee on February 3, the Administration has acknowledged many of these problems and set forth its objectives for reform.

Cleanup Costs Are Often Excessive

We agree with those analyses and those goals, but on a point of paramount importance the Administration has missed the target. It has not confronted directly the fact that the cleanup standards under current law drive decisions toward selecting remedies with costs not justified by their benefits.

The Administration proposal does recognize this problem implicitly. A number of its specific changes are designed to avoid excessive cleanup costs. In explaining the proposal, at one point the testimony by Administrator Browner promises that it will "make cleanups less expensive." The testimony also states that "**The heart of Superfund reform has to be speeding the pace and lowering the cost of cleanup.**" (Emphasis added). We draw encouragement from such statements, but emphasize that the need for cost-effectiveness must be specifically set forth in the legislation.

The Removal Program is one part of Superfund that works well. Under this program EPA has conducted immediate efforts to address direct risks to health and the environment. The success of this program has virtually eliminated all situations where any present threat to public health or the environment might exist. In the Remedial Program, however, problems flourish. This program is directed primarily at future risks that are often theoretical and purely speculative. This program is

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costly, ponderous, and inefficient. This is the program where real reform is required.

Cost Effectiveness Should Be An Explicit Goal

In order to successfully refocus the Remedial Program of Superfund, it must first be clearly acknowledged that the benefits of cleanups mandated under current requirements often do not justify the huge costs they impose. The objective must be clearly stated to make this program more cost-effective. This is not an academic point. Currently engaged in implementing this program are thousands of engineers, technicians, and program managers who are operating under guidelines and assumptions that reflect earlier directives from Washington. If their understanding is to be changed and their operations modified, a clear message must be sent.

One specific recommendation we would make on this point concerns Section 501 of the Administration bill, which states the purposes and objectives of the provisions on remedy selection and cleanup standards. **Section 501 should be amended to incorporate a statement that among the purposes and objectives are "to ensure that the costs of remedial actions are reasonable and that the program is cost-effective."** Certain other changes in the bill also are needed to clarify and fulfill this objective.

RISK ASSESSMENT AND RISK COMMUNICATION

It is clearly stated in the Administration bill, as under current law, that the purpose of remedial action is protection of human health and the environment. We agree. It must also be clearly understood that what this means is **protection against risks** to human health and the environment. This does not include an objective of cleaning up contaminants to achieve background levels or to achieve other abstract standards if not needed to protect human health and the environment. That objective has a certain appeal, but it is clear now that the costs of pursuing any such objective are prohibitive. **The fundamental building blocks for this program must be to achieve an accurate and realistic assessment of the risks and to establish a new methodology for balanced risk communication.** It is essential to present the risks from

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Superfund sites to ordinary citizens in an honest and meaningful perspective.

National Risk Protocol

We therefore applaud the provisions in Section 502 of the Administration bill that would add a new Section 121(d)(4) to CERCLA directing EPA to promulgate "a national risk protocol for conducting risk assessments **based on realistic assumptions**." (Emphasis added). That provision is a big step in the right direction, but it does not go far enough.

Unrealistic assumptions are indeed the most severe deficiency in current methods for developing risk assessments, but they are not the only deficiency. Other distortions that exaggerate risks result from the methods for multiplying risks together, including the selection of the most conservative end of a range of plausible assumptions. The standard for the new EPA national risk protocol should be that it produces realistic risk assessments, not simply that it requires risk assessments based on realistic assumptions.

The provision should also require that EPA develop methodology to assure accurate, objective, and meaningful characterization of risks in its communication to the public of risk assessment results. The risks from Superfund sites need to be explained in reference to other risks commonly experienced by members of the community in their daily lives.

Future Land Use

Related to this subject, we also applaud provisions in the bill directing that remedy selection analyses and decisions should reflect **reasonably anticipated future land uses**. The propensity of the current program to base remedy decisions on assumptions of future land use that are highly implausible is one of the major contributors to unsound decisions that lead to excessive expenditures and waste. Again, however, we believe that these provisions should be broadened so that Superfund decisions will reflect **reasonable anticipations as to the future use of groundwater, as well as other resources** that may be affected by Superfund decisions.

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GENERIC CLEANUP LEVELS

Our concern that remedy decisions reflect realistic risk assessment leads to one of our major concerns regarding the proposal in the Administration bill that EPA promulgate "national generic cleanup levels for specific hazardous substances." We understand that these generic cleanup levels are intended to reflect an assessment of the risks associated with varying concentrations of specific substances, and that they would also reflect certain site-specific variables "which can be easily measured . . . and whose effects are scientifically well understood." Nonetheless, to a substantial degree, these generic cleanup levels will necessarily reflect hypothetical assumptions developed on a national basis in disregard of local realities. **In order to achieve assessments of risk that are more realistic, the greatest need is to get closer to the facts of each site. The recommendation for generic cleanup levels is moving in the opposite direction.** It will produce standards that are even more unrealistic rather than more realistic.

Importance of Site-Specific Risk Assessments

We are extremely concerned by the indication in proposed new Section 121(d)(3), as confirmed by Administrator Browner's testimony (page 10), that site-specific risk assessments will be used in the future only "where either national cleanup levels have not been promulgated or where they do not apply to a particular site." This approach, as just explained, will aggravate rather than improve the problems of inappropriate risk definition.

We believe this recommendation rests on a false assumption as to the difficulty of performing a site-specific risk assessment and the amount of work that it entails. The facts are that in the total process of performing a remedial investigation and feasibility study, the development of a risk assessment is a relatively small step, which pulls together the data generated during the remedial investigation. Although the risk assessment is vital to sound decisionmaking, it does not take nearly as much time or cost nearly as much money as other steps in the RI/FS process. **Even if generic cleanup levels have been developed, the parties performing the RI/FS should be given the option in their discretion to either use the generic cleanup levels or perform a site-specific risk assessment, depending on which would be more appro-**

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priate in the circumstances of each site. This approach has been successfully adopted by several states such as Texas and Michigan.

What Is The Exact Purpose of "Cleanup Levels"?

The provision for generic cleanup levels also raises fundamental questions as to what purpose these cleanup levels are intended to serve. It is possible that they could be intended to establish no action trigger limits or to set standards for voluntary cleanup actions. However, it must be clearly recognized that if they are intended as "cleanup levels" they will not be met within the boundaries of any portion of a site where the selected remedial action includes containment. The essence of containment methodology is to leave the substances in place and to assure that they cannot migrate out of the contained area, while also imposing safeguards to prevent any possible human exposure to the substances within the containment enclosure. For those areas, the generic cleanup levels could not apply.

Cleanup Levels and Containment

It is important to understand that containment is central to the Superfund program. From an examination of the Records of Decision issued by EPA setting forth the Agency's selection of remedy at actual Superfund sites, it is clear that containment is commonly and repeatedly adopted as the only, or as a principal, remedial action. The reason is that containment often is the most practical method to assure protection of human health and the environment. Containment means implementing a comprehensive, and often costly, set of remedial actions to prevent exposure and ensure that contamination does not migrate from the site. Because of the importance of containment under Superfund, it is essential that there be no confusion on the intended relationship between generic cleanup levels and containment remedial action.

It would seem obvious that generic cleanup levels would not be intended to apply within containment areas, but that conclusion should be explicitly stated. In the proposed new Section 121(b)(1) the bill explicitly states that treatment and containment remedial actions should both be considered. Without clarification, the provisions on generic cleanup levels could conflict with that general directive.

As a further safeguard to prevent misunderstanding, the term or label for these requirements should be changed. The suggested label,

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"generic cleanup levels," is misleading and bound to create confusion, since it must be understood that portions of Superfund sites controlled through containment will include vast quantities of material that do not satisfy these cleanup levels. This potential for confusion is compounded by the fact that in all public discussions Superfund remedial actions are commonly referred to as "cleanups." To conduct a program that performs "cleanups" that fail to satisfy "cleanup levels" is certain to confuse the public and undermine public confidence in the program.

PREFERENCES AND ARARs

The most important and fundamental need to reform the Superfund statute on remedy selection is to eliminate the existing preferences for treatment and permanence and the ARARs ("applicable or relevant and appropriate requirements"). Both the preferences and the ARARs were added to Superfund in 1986 as part of an effort to reinforce the assurance that remedial actions under Superfund would achieve protection of human health and the environment. **The flaw of both preferences and ARARs is that they create a tilt in the remedy selection process that, in many cases, drives the decision toward excessive control measures not warranted by a proper balancing of relevant factors and not justified by their benefits.**

General Rules for Remedy Selection — A Balancing Judgment

Under existing law, and also under the Administration bill, there are in effect two mechanisms to govern remedy selection. The law sets forth a fundamental requirement that remedial action must protect human health and the environment. It then sets forth a number of relevant factors that should be considered in selecting the appropriate remedy.

Under the bill, the five governing factors include the effectiveness of the remedy, long-term reliability, any risk that might result from the remedial action itself, acceptability to the affected community, and the reasonableness of the cost. These criteria require an appropriate balancing judgment. In addition, however, both the statute and the bill also inject additional requirements that can override this balancing judgment and force additional control requirements that may entail excessive cost.

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ARARs

The Administration bill would substantially narrow the effect of ARARs. This is a big step in the right direction. There is, however, some uncertainty as to exactly how the proposed new provisions would apply.

As explained in Administrator Browner's testimony, "The requirement for cleanups to meet all relevant and appropriate requirements would be eliminated. Applicable state and federal requirements would be retained." That statement draws a clear bright line. The language of the bill, however, states that remedial actions must comply with any federal requirements determined to be "suitable for application" to the site. This could be a back door to reintroduce any of the "relevant and appropriate" requirements that EPA might wish to apply. This potential problem should be eliminated by clarifying the statutory language to conform to the Browner testimony.

With respect to preferences, the Administration bill again takes a big step in the right direction by eliminating the general application of the preferences for permanence and treatment. In the next breath, however, the bill reinstates the preference for treatment in all areas defined as "hot spots". This creates problems that are discussed below.

HOT SPOTS

As indicated above, the essential reform of Superfund to eliminate preferences that distort the decisional process is compromised in the Administration bill by creating a new preference for treatment in areas defined as hot spots. This feature of the Administration bill will distort priorities and should be changed.

We agree that in many cases heavily contaminated areas should be subjected to treatment, but that result will occur when appropriate under the general rules. The hot spot preference is not necessary and will only interfere with the rational balancing of all appropriate factors provided for by the general rules.

Definition of "Hot Spot"

As an initial comment, the definition of "hot spot" is overly broad. The bill defines hot spot as "a discrete area within a facility that contains hazardous substances that are highly toxic or highly mobile, cannot be

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reliably contained, and present a significant risk to human health or the environment should exposure occur." This language is slightly modified from an existing EPA guideline to determine hot spots that has been given a wide breadth of application. There are several uncertainties as to what coverage would result from the suggested statutory definition.

The first of the three tests included in the definition is that the substances must be **"highly toxic or highly mobile."** Nearly all hazardous substances might be regarded as either highly toxic or highly mobile, or else they probably would not be regarded as hazardous substances. Thus this test could be applied as covering virtually all parts of any Superfund site.

The requirement that the hazardous substances **"cannot be reliably contained"** creates a circuit breaker in the logic of the framework. The basic point of this entire provision on hot spots is to create a preference that such material be treated rather than contained. If this definition means what it says, however, any situation where containment is feasible would not be classified as a "hot spot" and the preference would be nullified. On the other hand, if this literal interpretation is rejected, this part of the definition would have no effect. The question is raised what does this phrase in the definition really mean.

The third test is that the hazardous substances in a hot spot must **"present a significant risk to human health or the environment should exposure occur."** The question here is whether this test should be interpreted as assuming that exposure will occur irrespective of how unlikely that might be or whether the test is intended to suggest that no hot spot exists in situations where exposure is extremely unlikely. Again, depending on the interpretation, this test might be deemed satisfied in virtually every circumstance where hazardous substances are found, making it a meaningless element in the definition.

It is clear that if the concept of hot spots is retained in the bill, careful attention must be devoted to this definition. Meaningful terms must be included so that it will apply only to limited areas where special considerations might be appropriate.

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"Hot Spot" an Inappropriate Label

It should also be emphasized that the label, "hot spot," is inappropriate. This term is inherently inflammatory. It is highly misleading in suggesting an immediacy and severity of risk that is seldom present in reality. The critical need for accurate and balanced risk communication is utterly defeated by use of such an emotional term as "hot spot." The term must be changed.

The Preference Creates a Tilt

Apart from these questions concerning the definition and label, the most fundamental problem with the hot spot provision is that it disturbs the general rules for remedy selection and introduces a preference for treatment that will undermine the cost effectiveness of the remedial program. We do not suggest that treatment is inappropriate as a remedial action. Certainly where pockets of highly concentrated hazardous substances are found, common sense would suggest that the option of treatment and destruction should be carefully considered. The general rules proposed for Section 121(b)(3)(A) state that two of the five factors to be considered in remedy selection are the "effectiveness of the remedy" and its "long-term reliability." These are to be considered together with the "reasonableness of the cost." This balancing judgment is appropriate and in many cases will produce a decision in favor of treatment.

What is inappropriate is to tilt the decision by creating a preference or a presumption that treatment should be selected in all areas defined as hot spots, particularly in view of the broad sweep suggested by its definition. Under the Administration bill, an option other than treatment for hot spot material would be permitted only if no treatment technology exists or such technology would result in "disproportionate cost." In effect, this provision displaces an even-handed balancing of relevant factors that include the "reasonableness of the cost" and substitutes a presumption in favor of treatment unless it is determined that this would cause "disproportionate cost." In simple language, this throws out the fair deal and brings in a stacked deck. This feature will continue to make it impossible for Superfund to serve the public interest through a cost-effective application of societal resources in the remedial program.

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CONCLUSION

As a final statement, I wish to repeat the opening comment that the members of the Hazardous Waste Cleanup Project commend both this Committee and the Administration for laudable efforts to address severe problems in the current Superfund program. In these remarks we have emphasized the main points that in our judgment require further thought to develop a fully effective bill for Superfund reauthorization. There are a number of other details which also warrant additional work and refinement. Nonetheless, the Administration bill does represent an important step toward a better Superfund program. We will be pleased to work with this Committee and its staff to improve this bill with the goal of achieving rapid progress toward the completion of Superfund reauthorization this year.

Thank you, Mr. Chairman. I will be pleased to answer any questions you or other members of the Committee may have.

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Mr. SWIFT. Thank you, Mr. Quarles. Finally, Velma Smith, director of the Groundwater Protection Project for Friends of the Earth.

STATEMENT OF VELMA SMITH

Ms. SMITH. Thank you, Mr. Chairman. Good afternoon. I would like to thank you for this opportunity to offer comments again, on this enormously difficult piece of the Superfund puzzle. I want to start, by giving credit to the administration for bringing this important debate to the forefront, and for helping to crystallize the critical issues that we need to review carefully and to re-evaluate.

Unfortunately, after reading the bill we conclude that, the administration's proposal on remedy selection is significantly flawed. We do not believe it will speed cleanup. In fact, we believe it will delay cleanup. We do not believe that it clarifies cleanup goals. We believe it simply muddies already murky waters, for it replaces both bad and good of existing law with new vagaries. We don't believe that the ARAR's section is basically modified but that it's thrown out.

As Dr. Greer indicated before, we think that in certain respects it will invite more unproductive wrangling and not less, at each site. Overall, we believe that the proposal will foster an increasing reliance on band aid solutions, and with its proposed language regarding covenants not to sue, changing those from discretionary, it will likely burden this generation of taxpayers and those to follow, with the cost of today's mistakes and miscalculations.

With regard to the preference for permanent treatment, despite the rhetoric on this point—and I think actually Mr. Quarles just made my point—Superfund does not require treatment in all instances. It does not reject containment of waste. It does not forbid the Agency from employing institutional controls on the use of resources to achieve its protections.

I must say that I am somewhat baffled at the furor over this, because the language of the law is a preference, not a mandate. The application of the law, as Mr. Quarles has pointed out to particular sites, underscores that point. Containment is actually common. Institutional controls have become par for the course. I would hope that committee members would delve into the specifics of the particular sites where critics are implying that EPA has required treatment for treatment sake. I think that if we look at some of the particulars that might be helpful.

We think that this proposal does not change what the Agency will require, but changes how the Agency will think. We believe it puts cover and run options back on part with options that treat or destroy waste. We believe it does so, without even a meager record of field data to support the long term reliability of containment methods. To the extent that it rejects a preferred hierarchy of treatment over containment, it keeps the Nation on a treadmill of revisiting and re-cleaning sites over and over again. At the same time, we believe it stifles innovation and new cleanup technologies, and helps to lock us into our current state of ineptitude for environmental restoration.

On the point of land use, we are not greatly surprised to see that the bill includes language to allow consideration of land use. The Agency does that now. We are greatly disappointed to find that the

bill does not provide mechanisms to assure that contemplated restricted land uses are acceptable to the local community, that they are consistent with adjoining a nearby land use, and consistent with local planning and zoning, and that continued industrial activities do not take place on sites which are uniquely vulnerable to continued contamination.

The bill is also silent on the issue of how such restrictions will be implemented and enforced over time, and that's a significant gap.

As others have pointed out, the administration bill directs the Agency to engage in several important and no doubt, resource intensive, rulemakings. EPA is to promulgate national cleanup goals, but the bill is silent on what the Agency must consider in developing these. It requires EPA to promulgate cleanup levels for specific contaminants. Somehow those national generic cleanup levels must reflect anticipated land use in particular communities.

Interestingly, must of this regulatory work in our view, could be for not. The bill, as we read it—and obviously there are different interpretations—does not require EPA to use the national cleanup goals or the generic cleanup levels at NPL sites. Site specific risk assessment in our view, can trump the dictates of national cleanup goals at virtually any site. We would predict that it will, wherever site specific risk assessment yields a less stringent cleanup answer. Thus, the bill adds to rather that subtracts, from current difficulties and opportunities for delay.

In offering a Superfund rewrite that makes national cleanup goals subservient to site specific risk assessment, the administration appears to have endorsed the industrial sector's fondness for what has become a very malleable, arcane process for predicting harm from environmental toxics. With the bill's terse language calling for realistic assumptions in a national risk assessment protocol, the administration appears to have bought the rhetoric that says EPA risk assessments are overly conservative.

We understand that a number of members of this committee agree with this point of view, but we respectfully request the committee to re-think that position, and perhaps re-think that position using a bit of imagination, in presuming that you and your family actually lived at one of these sites.

The bill's language regarding realistic assumptions sounds, on its face, sensible. It is a loaded term, as you well know, Mr. Chairman. In the case of Superfund risk assessments, if the Agency is directed to protect all of us, then its arithmetic must account for real people who sit at the high end of the exposure and vulnerability spectrum. As distasteful as the language can be made to sound, that means using reasonable worst case assumptions for data that cannot or will not be carefully and objectively measured.

We know that these sorts of policy decisions are difficult in evaluating. They can't be sanitized and reduced solely to numerical puzzles. You, as policy makers, cannot be shielded from them by looking for scientifically objective answers in a vacuum. We also take issue with the proposition that EPA risk assessments now, are overly conservative.

PRP's have cried loud and long about a few of the variables for which EPA may be making conservative judgments, in the absence

of solid site specific data. In the words of Adam Finkel from Resources for the Future, they choose to ignore a body of evidence, strongly suggesting that as a whole neither exposure assessments nor dose response assessments, have seriously exaggerated their final outputs.

We believe that if Congress and the administration wish to expedite they should seek to minimize, not necessarily eliminate but minimize and not maximize, the role of risk assessments and site cleanup's. Mr. Chairman, I thank you for the opportunity. I look forward to answering your questions.

[The prepared statement of Ms. Smith follows:]

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Testimony
of
Velma M. Smith
Friends of the Earth

before the

House Energy and Commerce Committee
Subcommittee on Transportation and Hazardous Materials

Superfund Reauthorization
Remedy Selection

February 24, 1993

Good morning, Mr. Chairman, Members of the Committee. I am Velma Smith, Director of Friends of the Earth's Groundwater Protection Project. Friends of the Earth is a national, nonprofit organization that works -- in concert with affiliates in over 50 countries across the globe -- on environmental and energy issues.

On behalf of Friends of the Earth, I thank you for this opportunity to testify.

Let me start this morning by identifying a point of agreement with my counterparts in the industrial sector. Former EPA Administrator John Quarles, who now represents the Hazardous Waste Cleanup Project, has called remedy selection this most critical Superfund issue. We agree.

For those who live, work or play in close proximity to the hazards of a Superfund site, other issues become mere footnotes to the issues of how quickly and how thoroughly a site will be remedied.

Clearly, it is enormously difficult to set out workable groundrules that will lead to timely, effective remedies, remedies that will protect people and the environment today and into the future. Afterall, many of the thousand plus Superfund sites stretch more than pocketbooks when it comes to cleanup. Some, like Idaho's Bunker Hill, Virginia's Avtex Chemicals or California's infamous Stringfellow Acid Pits, began their saga of pollution many years ago and were many

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Jane Perkins, President

years in the making. Their problems will not be easily or quickly cured by the current Superfund program or by a revamped program. Others, like the Summitville gold mine site in Colorado, are of much more recent vintage but in only a few short years wreaked environmental destruction that will be a long time in cleaning up.

As this Committee works to improve the process by which critical cleanup decisions are made for these pollution disasters, Friends of the Earth recommends that it might be worthwhile to linger a bit on some of the Superfund site descriptions, to read the histories of a few NPL sites, to look at contaminant plume maps, to study the results of remedial investigation reports. Sobered by that information, you might conclude, as we have, that problems with long, drawn-out studies and glacial paced cleanup actions -- though they can be exacerbated by the Superfund program -- are not, by any means, solely attributable to the program's liability scheme or its preference for permanent treatment over containment. It is the extent of the pollution messes that have been created, not the stringency of liability or the loftiness of goals, that assures that the solutions will be slow to evolve.

Today, you have before you the Clinton Administration's take on these difficult issues, and Friends of the Earth gives credit to the Administration for bringing this important debate to the fore, for helping to crystallize the critical issues of remedy selection.

Unfortunately, however, the Administration's proposal will not cure Superfund's current ills; on the contrary, it will take us backwards not forward in the struggle to create an effective and thorough pollution cleanup program.

Friends of the Earth believes that the Administration's proposal on remedy selection is significantly flawed. It will not speed cleanup; in fact, it will likely delay cleanups. It does not clarify cleanup goals; it simply muddies murky waters, for it throws out rather than reforms the current framework for making cleanup decisions. It replaces both bad and good of existing law with new vagaries, inviting more unproductive wrangling and new rounds of litigation.

The Administration proposal offers promises of equity, but provides no mechanisms for achieving fairness in cleanup. It speaks of promoting public participation and elevating the role of the affected community, but it makes remedy selection more arcane and unpredictable than it is today. It creates an insiders' game between regulators and polluters that will require more resources, more time and more Superfund sophistication for citizens to penetrate.

And contrary to the Administration's own laudatory goals of promoting high-tech, "green" technologies, the Administration proposal would go a long way in discouraging advances in groundwater science and environmental cleanup technology. Overall, we believe that the proposal will foster an increasing reliance on slip-shod, bandaid solutions, and -- with its proposed language regarding covenants not to sue -- it will likely burden this generation of taxpayers and those to follow with the costs of today's mistakes and miscalculations.

We believe that the Administration and the Congress can and should do better.

To conclude that the Administration's proposal misses the mark of productive and protective reform so widely, one must consider the language that has been deleted as well as that which has been added. And, one must consider the historic context in which these changes are proposed. First, the history.

The original Superfund did not have a great deal to say on the issue of "How Clean is Clean." Without detailed guidance from Congress and with an apparent distaste for a major new environmental initiative, the early appointees of the Reagan Administration -- Anne Burford and Rita Lavelle -- implemented the law in the manner they saw fit. Their approach succeeded in creating a firestorm of controversy and fueling a raging public distrust of EPA which, some would argue, lingers to this day.

When Congress reauthorized the law, it did not forget the stinging accusations of "sweetheart deals" and the lessons of those turbulent days. It chose to delve head on into the morass of defining "clean." The result was less than perfect, and -- as with most any legislation that emerges from a democratic process of consensus-building -- it finessed remaining disagreements.

Thus, the current Superfund law does not offer an absolutely straight-forward roadmap for determining the cleanup course for individual sites, but it is clear in its overarching goals. We believe that the fundamental notions behind the Superfund law are sound ones: Remove contaminants from the environment to the greatest extent possible and employ the best technologies available to assure that clean stays clean and that the arduous task of cleaning up can actually be declared complete at some point in time.

Deleting the Preference for Permanent Treatment of Wastes

Superfund now requires the Agency, in selecting remedial actions, to give preference to permanent solutions to the "maximum extent practicable." It requires the Agency to conduct an assessment of cleanup alternatives and, in instances in which it selects a non-preferred alternative, to publish a written explanation. The law also directs the Agency to consider, among other things, the long-term uncertainties associated with land disposal, the long-term maintenance costs, the persistence, toxicity, mobility, and bioaccumulation characteristics of hazardous substances, and the short- and long-term potential for adverse health effects from human exposure.

Despite the rhetoric on this point, Superfund does not require treatment in all instances; it does not reject containment of wastes; it does not forbid the Agency from employing institutional controls on the use of resources, including land and water, to achieve its protections. The language of the law is a preference not a mandate, and the application of the law to particular sites underscores that point. Containment is common; institutional controls have become par for the course.

Thus, the Administration's proposal cannot be characterized as one which simply removes

an unachievable and unrealistic mandate. It changes not what the Agency will require but how the Agency will think, and, in repudiating the preference, we believe it puts "cover and run" options back on par with options that treat or destroy waste. We believe it does so without even a meager record of field data to support the long-term reliability of containment methods. So, to the extent that the Administration rejects a preferred hierarchy which chooses treatment or destruction of wastes over containment of pollution, it keeps the nation on a treadmill of revisiting and re-cleaning sites over and over again. At the same time, it stifles innovation in new cleanup technologies and helps to lock us into our current state of ineptitude for environmental restoration.

Muddying the Waters on Application of Other Federal and State Laws

The current statutory language on the degree of cleanup attempts to give more detailed guidance on the levels of cleanup to be attained for various media. It calls for adherence to ARARs or Applicable or Relevant and Appropriate Requirements from other laws, both federal and state. As you know, it specifically lists federal laws which must come into play in the selection of remedies, and it offers some detailed language regarding the application of particular requirements in several laws. One of the most stringent requirements in this section is the requirement for remedial actions to attain the Maximum Contaminant Level Goals established under the Safe Drinking Water Act. In some cases those Goals, or MCLGs as they are called, can be zero. On that point, the language of the law and its actual implementation are at great odds. In the vast majority of cases in which decisions have been reached, EPA has rejected the use of the MCLGs and fallen back on the more lenient MCLs or Maximum Contaminant Levels or some other contaminant concentration number.

The Administration proposal deletes references to ARARs entirely. It does not attempt to distinguish between that which has been unworkable and that which has been useful in making cleanup decisions. Although the Agency's own initiatives to develop soil action levels would seem to confirm the view that a lack of national soil cleanup standards in any of the referenced laws is a troubling gap in the ARAR scheme, its proposal does not focus specifically on issues of soil cleanup. Rather, when it comes to ARARs, it discards good with bad, and replaces the detailed discussion of federal requirements with very broad discretion to EPA. Under the proposal, the President may choose to apply (or not apply) any federal requirements he deems suitable. Apparently, though the bill elsewhere calls for more uniform application of cleanup requirements, the question of what requirements of what federal laws will apply to cleanups will become a case-by-case judgement.

In addition, under the Administration proposal, established state standards face a new and unclear hurdle. Under the bill, more stringent state standards may be applied to cleanups only where such standards were adopted "with the best available scientific evidence." The proposal offers no clue as to who will be the arbiter of such judgements or how the Agency and its thinly stretched staff will research legislative and regulatory histories in various states.

Restricting Land Use Rather than Abating Pollution

To the problems created by these deletions and the enormous opportunities for disagreement and debate at a site level provided by the Administration's ARAR alternative, the bill adds new uncertainties. It directs the President to take into account the "reasonably anticipated future uses of land at a facility" and to consider the views of any Community Working Group which has been established at the site on this point.

As you know, the issue of tailoring the degree of cleanup to land use has been a hotly debated topic for some time. I testified on behalf of Friends of the Earth before this Committee on this point last year, and I won't belabor the specific points I made there. I would, however, like to reiterate our bottom line.

Friends of the Earth believes, first, our goal should be to restore all sites to a full-range of uses; Superfund should be about restoring options not cutting them off.

Where technology uniquely constrains available options, however, it may be that some form of land use restrictions will have to be contemplated. For these cases, Congress should mandate a process which assures, first that the needs of affected neighbors are addressed, that contemplated restricted land uses are acceptable to the local community, consistent with adjoining and nearby land uses and consistent with local planning and zoning, and that continued industrial activities do not take place on a site which is uniquely vulnerable to continued contamination. In no instance, could we endorse a less-than full cleanup alternative on a site directly adjoining or in close proximity to homes, schools, hospitals, playgrounds or other sensitive land uses.

The Administration proposal requires the President to consider the views of the affected community within a Community Working Group that may be formed for each site, but it offers little other than good intentions when it comes to assuring that the affected neighbors become active participants in site decision-making to the extent that they desire. In addition, the Administration proposal would appear to look far too narrowly at the land use question, for it calls for remedies to consider land use "at" the facility; neighboring land uses are not mentioned.

The Administration proposal also fails to provide any insight as to how "reasonably anticipated land use" will be defined, and it offers no mechanisms or procedures for assuring that land use restrictions remain in effect for the appropriate time frames, or for that matter, are even formalized. We believe that any Superfund amendments which provide for land use considerations in remedy selection must stipulate the appropriate forms of deed restrictions and a unambiguous intention to assure that such restrictions will be viewed by the courts as transferring with property. Any such amendment should provide for long-term oversight of these restrictions; someone must be entrusted with enforcing these controls.

Elevating the Consideration of Costs

Current law, as you know, calls for the selection of cost effective remedies. Costs are to be considered, but they do not drive decisions. The Agency must apply appropriate standards and evaluate options to assure protection of human health and the environment and, to the extent

practicable, achieve permanent solutions to the pollution problem. The Agency is to select among the alternatives the remedies which achieve these goals in a cost effective fashion.

Under the Administration proposal, the role of cost consideration changes and, though the language is fuzzy, costs -- not protection against current and future harm -- could become the overarching decision factor in remedy selection under this plan. In enumerating the factors which must be considered in remedy selection, the Administration deletes references to the long term uncertainties of land disposal, long-term maintenance costs, and the toxicity, persistence, mobility and bioaccumulation potential of contaminants. It adds to a reworked list, the "reasonableness of the cost of the remedy." Elsewhere it provides for EPA to opt out of "otherwise appropriate" treatment remedies or even the treatment of discrete "hot spots" at a site, if such options are available only at "disproportionate cost." It does not suggest how the Agency should define either "reasonableness of cost" or "disproportionate cost." Those items, then, must be added to the long list of controversies that will need to be settled on a site-specific basis.

Enlarging Loopholes

As noted earlier, Superfund now dictates a way of thinking about cleanup alternatives but it does not specifically mandate the use of particular remedies. It leaves discretion to the Agency to opt out of permanent treatment, as long as that choice is justified in writing. It allows other flexibility as well, including waivers for technical impracticability.

The Administration greatly enlarges upon this flexibility, and in our view, adds loophole after loophole to allow for the selection of less than adequate remedies.

The Administration bill directs the Agency to engage in several important -- and no doubt resource-intensive -- rulemakings. EPA is to promulgate national cleanup goals; the bill is silent on what the Agency must consider in developing these. It requires EPA to promulgate national generic cleanup levels for specific contaminants, presumably for a variety of media, including water and soil. Somehow those national generic cleanup levels must reflect the anticipated land use in particular communities. It also calls for the establishment of "cost-effective generic remedies for categories of facilities"
and for the promulgation of a national risk protocol for conducting risk assessments.

Interestingly, much of this regulatory work could be for naught, because the bill does not require EPA to use the national cleanup goals or the generic cleanup levels at NPL sites. Site-specific risk assessment can trump the dictates of national cleanup goals at virtually any site, and we would predict that it will -- wherever site-specific risk assessment yields a less stringent cleanup answer. Thus, the bill adds to rather than subtracts from current difficulties and controversies.

Increasing Reliance on Uncertain Risk Predictions

In offering a Superfund rewrite that makes national cleanup goals subservient to site-

specific risk assessment, the Administration appears to have endorsed the industrial sector's fondness for what has become the malleable and arcane process of predicting harm from environmental toxins. And with the bill's terse language calling for "realistic assumptions" in a national risk assessment protocol, the Administration appears to have bought the rhetoric that says EPA's risk assessments are overly conservative.

We urge this Committee and the Administration to rethink such a position.

Clearly, no one can sit here today and quantify the risk associated with the nation's Superfund sites. In fact, uncertainty of dose-response curves aside, it may well be that none of us could accurately predict even the number of National Priority List sites that we might have a decade from now. As we engage in debate about risks and risk assessment, we would do well to keep in mind these limitations on our predictive abilities.

The PRP or Potentially Responsible Party community appears firmly convinced of the ability of quantitative risk assessments not just to yield perspective but to dictate straightforward cleanup answers. The stumbling blocks to rational decisions and expeditious cleanups, they argue, can be found, not in real-life uncertainty and complexity, but in the approaches that EPA has used for risk assessments at individual Superfund sites.

According to many critics, EPA -- either through sheer incompetence or misguided environmental zeal -- has adopted approaches which are "ultra-conservative" and invalid. As the arguments go, conservative and scientifically invalid become synonymous.

First, let me respond by noting that these critics are guilty of precisely the same deception they accuse the Agency of: muddling the value decisions of risk management with the calculus of risk assessment.

The use of conservative or even so-called "ultra conservative" values is not invalid or unscientific on its face.

A decision to use worst-case assumptions, average risk assumptions or some other value is correct or incorrect only in the context of the risk management policy that has been adopted. "[L]ower bounds, averages, upper bounds, and other ways to express uncertain information all have legitimate roles to play depending on the costs of making errors," explains Adam Finkel of Resources for the Future. "[N]one is technically or morally superior to any other unless the context is specified."

In the case of Superfund risk assessments, if the Agency is directed to protect all of us, then its arithmetic must account for real people who sit at the high end of the exposure and vulnerability spectrum. As distasteful as the language can be made to sound, that means using reasonable worst-case assumptions for data which cannot or will not be carefully and objectively measured. If the Congress decides, instead, to offer protection from environmental hazards only to some, then average or lower bound statistics may become appropriate.

These sorts of policy decisions are difficult and value-laden; they touch on fundamental notions of the role of government and sensitive questions of ethics. They can't be sanitized and reduced solely to numerical puzzles. And you as policy-makers cannot be shielded from them by looking for scientifically objective answers in a vacuum.

Second, we take issue with the proposition that EPA risk assessments are, overall, highly conservative. There are many reasons why that is not the case. Let me discuss just a few of those.

Risk assessments are based on a subset of chemicals, not the full complex of chemicals present at Superfund sites. This simplification is necessary, in part, because of limitations in analytical capabilities. Some chemicals can be detected down to relatively low levels. Others are not analyzed or adequately characterized; these include unintended byproducts of manufacturing or other chemical mixing.

A 1987 study of hazardous waste site leachates, for example, found that only a few percent of the total organic carbon content of the mixtures of the 13 sites studied could be identified. The greater percentages of chemicals were simply unknown and uncharacterized. In addition, at the Stringfellow Acid Pits in California, regulators originally focused their efforts on a group of volatile organics (VOCs), including TCE. After working with the site for some time, however, California health officials recognized that the sum of the concentrations of detected contaminants was much less than the total organic halogen concentration. Significant analytical work was required to determine that the contaminated groundwater included high concentrations of apparent acid byproducts of DDT manufacture.

According to William Alley of the U.S. Geological Survey, "...VOCs detected in ground water may often be the 'tip of the iceberg' when complex contaminant sources are nearby...."

But risk assessments cannot assess the risks of unknowns, so risk assessors work from lists of chemicals not real-world mixtures.

And even the lists of known chemicals that drive a risk assessment may be pared down to a manageable number of indicator chemicals. Chemicals for which no data exist are eliminated, and risk assessors select those individual chemicals which would appear to be the most problematic for further analysis. This simplification may be necessary from the standpoint of workability, but it must be recognized as a fundamental decision point which introduces a non-conservative element into the very foundation of risk assessment work.

Non-conservative simplifications are made at the other end of the risk assessment spectrum as well. EPA frequently treats all humans or at best all children and all adults as equally susceptible to harm. According to Edward Calabrese and others, such individual differences as age, sex, genetics, nutritional status and preexisting conditions may affect an individual's susceptibility to harm from toxic substances.

The Society for the Advancement of Women's Health Research, for example, has argued that "...risk assessments have been seriously flawed by gender bias in many areas, including the evaluation of the dose received by an individual, the underlying toxicity of a chemical, and the potential for interactive effects with substances taken specifically by women...."

In the few cases where gender-related differences have been studied in animals, notes the Society, "...it appears that females absorb higher doses of the chemical toxicant than males." If those studies are correct and applicable to humans, then, EPA risk assessments may be non-conservative for women.

Unfortunately, Edward Calabrese is correct. "The extent or magnitude to which predisposing factors enhance susceptibility to toxic substances is known only to a limited extent." Risk assessors may be off the mark when it comes to protecting particular populations, but -- at least for now -- there is scant data to suggest the size of any error.

PRPs have cried loud and long about a few of these variables for which EPA may be making conservative judgments in the absence of solid site-specific data, but in the words of Adam Finkel, they choose to "...ignore a body of evidence strongly suggesting that as a whole, neither exposure assessments nor dose-response assessments have seriously exaggerated their final outputs."

Risk assessment, then, is the process that polluters love to hate. Risk assessment can be criticized at the very same time that it is manipulated. Thus, it should come as no surprise to hear EPA staff state matter-of-factly that "...negotiations with responsible parties often turn into lengthy arguments over risk assessment methods and assumptions."

We believe that if Congress and the Administration wish to expedite cleanup, then they must seek to minimize not maximize the role of risk assessments in site cleanups.

Mr. Chairman, I thank you for the opportunity to testify. I look forward to answering your questions and working with your staff during your deliberations.

Mr. SWIFT. Thank you, very much. Now, I think we have a better idea of the universe is that we are dealing with, and the difficulty we are going to have in trying to resolve some of these. Let me just begin down here at this end of the table, between Mr. Quarles and Ms. Greer, who disagree diametrically about hot spots.

Can you talk among yourselves a little bit to help me understand how two reasonable people can look at the same thing and come to such diverse points of view. One, feeling that hot spots is entirely too broadly defined, and the other one entirely too narrowly defined.

Ms. GREER. I think that the quibble over is it too broad or too narrow really boils down to the fact that there are people in the environmental community and grass roots community who feel fundamentally that containment doesn't cut it; that over the long term they are going wind up being exposed; that the engineering systems are not going to work; that the monitoring is not going to be done; and that, 2, 5, 10, or 15 years from now those contaminants are going to be in their communities. They and I, believe in that strongly.

At the other end, there are some in the business community who believe that containment is fine, and that it can be engineered corrected, and that you can provide the same protection to people if the materials are under the cap or if they are gone, and that's the same thing.

The only light that I can shed on you for this is that we debated this very strongly in the Superfund Commission. The two religions were well represented on the panel. We had very, very acrimonious debate about this within the Commission for about 6 months, at which point I think we decided to get practical. I was never going to be convinced that containment was the same as treatment and that they were never going to be convinced that a preference was necessary, and that we ought to split the difference.

We think that what we did split the difference, that we reserved treatment which can be more expensive and usually is more expensive for the areas where there was a bang for the buck so to speak, and that was the hot spots in the way that we defined it. For the least contaminated areas we allowed treatment and containment to be on an equal footing.

I think that what we did—the religious war, nobody prevailed. What we did instead is, we split the difference in a way that was satisfactory to the business community because they thought it would responsibly minimize costs to the environmental and grass roots community, because they thought that if they were going to be socked with containment at least the worst of the stuff wouldn't be under that cap. If the cap failed, therefore, the contaminants wouldn't go in high concentrations into their neighborhood.

That was what happened over our 12 months of debate, and that is sort of how we came out where we came out.

Mr. SWIFT. Mr. Quarles.

Mr. QUARLES. Since Dr. Greer began focusing on containment, let me also focus mainly on that. I think one of the things that is good about a Congressional deliberation is that everybody does get better educated. We come slowly to have a better understanding of what really is at stake. That is what is really at stake in a lot of

this debate is, how much containment is going to be permitted, how much treatment is going to be required.

One of the bogeyman that this program has been handicapped by not being able to deal with is, to really bring containment out of the closet and say this is an acceptable, appropriate approach which we are as a practical matter, forced by the costs to implement in a lot of cases.

If you look at, for example, the 1991 summary of ROD's that EPA has issued—and I refer to that because it's the most recent one that they have put out—you will find that at approximately 25 percent of the sites there is a containment only approach that is taken. EPA, under the mandate of doing treatment, trumpets the fact that at more like 75 percent of the sites there is treatment that is used. In virtually all of those sites it is treatment for part of the site and containment for the rest of the site.

This is not interim temporary, limited containment until a new technology comes along in 5 years. This is containment because looking at the facts of the situation to try and get that stuff out of the groundwater which you probably never can do or dig up 12 acres of soil to a depth of 100 feet, is just preposterous as to its feasibility and its cost.

The only option is containment. Everybody knows that's what is going to happen at that site. It is possible to put caps and other controls in place to break the potential chain of exposure so there is no migration offsite and there is no exposure and, therefore, there is no risk. Therefore, if containment works you are not just talking about ten to the minus sixth, you are talking about there is no risk. It is zero risk if it works. The question is, will it work.

I think what is really required is that EPA needs to step forward and say we have to acknowledge that we are doing containment in a lot of these situations. We damn well better make sure it will work, and that it will provide the long term reliability. There needs to me more emphasis placed on building up the institutional controls, and honestly facing the fact that that's what is there.

Our concern with the hot spot, to come back to the specific issue is, the language is ambiguous. I think that we are both sitting here, neither one of us knowing how is it going to be applied. My expectation is that out in the field people already think they already know what a hot spot is. It almost doesn't make any sense what Congress says or whether you have disjunctive or's or conjunctive and's, people are going to say that's a hot spot so let's call it a hot spot. Then, treatment is mandated or if not treatment, then you have only interim containment.

I think the problem does get right to the core of whether you are going to accept containment or not, and the standards by which you make a choice between the two.

Mr. SWIFT. Am I wildly oversimplifying this by saying one side really doesn't want any containment at all and the other side really doesn't want any preference for treatment at all? That's not a wild oversimplification, is it?

Mr. QUARLES. I think it may be an oversimplification because I think that everyone understands that there has to be some containment, and I think everyone in industry is prepared to accept an obligation that there is going to be some treatment.

Mr. SWIFT. But, will they accept preference for treatment under any circumstances?

Mr. QUARLES. The preference, I would say, go to the general rules. The general rules say that the Agency has to make a decision. That decision has to be geared to the result of protection of health and the environment. Among the alternatives that will ensure protection of health and the environment you make a choice among those, taking into account the effectiveness of the remedy, a long term reliability of the remedy.

Mr. SWIFT. But, but what I am getting at is—I think I understand the respective positions. They do not suggest an immediate compromise out of which each side comes up with 75 percent of what they want. What Keystone did is maybe about the best compromise you are going to find. It is a bit artificial, I suspect, although it seems to me the underlying rationale of eliminating hot spots, those that need it the most. It does give it a rationale of merit.

As I listen to both sides, aside from making the definitions a little more specific, I am not sure there's a whole lot more that we can do with that that's going to satisfy either side, very frankly. If one essentially just really hates containment and the other one just hates a preference for treatment, I don't know how else you balance that particular thing.

I am open to people suggesting it. It seems to me what you have here is fundamental difference of opinion, and either one side wins all or both sides get a little bit. It seems to me that the administration's bill comes down on the latter. Ms. Smith.

Ms. SMITH. Mr. Chairman, thank you. I would like to say clearly, we are not opposed to containment. I think reality is reality, and in some cases we simply don't have the capability. We understand that containment is a piece of this solution.

What our concern is, if you remove the preference for treatment that the treatments, because they are cutting edge, things that are being developed now, the cost may be substantially higher for treatment in many instances. So, what will happen is, if you remove the preference and you look at cost you will always opt for containment. Our concern is that we not—containment may be cheaper with today's costs, if you look at what does it cost to construct the structure at this point it may be cheaper. In the long run it may be more expensive if it fails and you have to do something else.

I think there is at least one Department of Defense site where, actually, after some experience with the site, I think the Department of Defense decided it was cheaper to go in and do cleanup than to keep having to monitor the extensive amount of groundwater contamination they were monitoring.

The concern is that we just not push containment and elevate its preference by taking away the preference for treatment.

Mr. SWIFT. The bill continues a preference for treatment under specified circumstances, which is what got Mr. Quarles all upset.

Ms. SMITH. Yes. Mr. Chairman, again, I think that the Commission came up with some good proposals. I think we should all take a close look at the kinds of things that they really came up with.

I don't think the administration bill reflects what they came up with. Maybe their cut is one reasonable way to do this.

I think, again, that the definition of hot spots is a difficult area. I don't want to narrow down the preference for treatment so drastically at one cut. I would urge the committee to carefully look at how they cut it. I think also the other very constructive thing this morning came from the last panel, from the gentleman from Ciba.

The other issue that is not dealt with, if you are going to be having a lot of containment, is appropriate contingency funds to deal with continuing to monitor these sites. If something happens and the PRP is gone or its money is gone, that you would have some means of addressing the problems.

Mr. SWIFT. Mr. Barth also said that he thought that he could tell a hot spot when he saw one. Is this a little like pornography, but you can't define it? Do you think that we ought to be able to clarify the definition of a hot spot?

Ms. SMITH. I believe, Mr. Chairman, in the interest of fairness, we have to attempt to clarify it far beyond what's in the administration bill. If you think about it, there are people who have read record of decision or remedial investigation after remedial investigation and they say OK, now I get it. Now, I understand what it is.

If you live in a community, and suddenly you are thrust into a Superfund debate, you want to have some idea of how you are going to be protected. You should have some assurance in the law. I think that's why we have to try to be as clear as possible. We won't be able to pin it down exactly, but we have to be much clearer than what the administration is.

Mr. SWIFT. That may be the only thing that there's any agreement on is, we have to try to reduce the ambiguity somewhat. Thank you.

Let me ask Mr. Eden a question. The bill requires EPA to promulgate national goals, to ensure protection to human health and the environment for all communities affected by Superfund sites. We understand that the language in the bill would allow the national goals to be expressed in a risk range.

Your testimony indicates that your organization believes that a single risk level rather than a risk range is appropriate. Could you explain for us why you believe that, and that you think that a risk range would pose some kind of a problem?

Mr. EDEN. I think part of the problem that we have had from the risk range has been that we have had a lack of consistency from site to site. You can have two sites that are basically the same kind of site. Take, for example, a creosote site. You could have two sites that have the same contamination, similar land use around it, and it can be dealt with differently.

If you go to ten to the minus four standard versus ten to the minus six standard, that creates a great deal of uncertainty on the part of all of the parties involved in a cleanup if you have that range. I think that's the problem that we see with having that risk range, people need to know up front what is the goal, recognizing that there may be a need for some type of interim remedy in some cases.

Mr. SWIFT. Thank you. Those are the bells. I think that out of deference to you people who have been here too long, we are going to try and wrap this up before the vote, rather than make you hang around any longer. I just have one last question for Ms. Smith, and then I am going to recognize Mr. Oxley for his time.

Ms. Smith, I don't think there's a lot in this bill that you are overwhelmingly enthusiastic about. I don't think it's an unfair question, because I don't mean it in any kind of critical way.

Do you think there's a fundamental problem in the Superfund law? I mean, do you think we are just spinning our wheels here, or do we really need to address this? Do you disagree with the general view that this thing is broke, and it needs some fixing?

Ms. SMITH. Mr. Chairman, I don't disagree with the notion that we need to reform Superfund. I think there's much that we can do to make this a better program to make it less frustrating both to the citizens who live at the sites and the businesses who are on the hook for the liability. I think the administration took a long time—and all of us took a long time—focused on liability. My concern—I am talking today about remedy selection.

My concern is that I am fearful at this point that maybe we haven't spent as much time as was needed for remedy selection, because this is really a thorny and difficult part of the reform. I do think we need to have reforms. I think that there are things that can be done in this area that aren't reflected in the bill.

I think we can have things on land use, but land use is almost like a footnote in here. It says we will consider land use, but there's not a thorough proposal for how are we going to incorporate this.

Mr. SWIFT. It just seems to me that you can always use more time, no matter how much time you have. If we don't do it this year—the funding is going to run out in the middle of next year. It seems to me that you are going to have the same pressure to operate in the same short time period, and that an awful lot of people, and I am certainly not directing this just to the environmental movement, on both sides of these issues you are sitting around saying 25 percent isn't good enough and we have to have 35 percent.

There is an awful lot of argument over details, and the ability to solve them better from any perspective isn't going to be any better next year than it is this year. I recognize the gentleman from Ohio.

Mr. OXLEY. Thank you, Mr. Chairman. I may not get finished, but I ask unanimous consent that I am able to submit questions in writing.

Mr. SWIFT. Without objection, absolutely.

Mr. OXLEY. I have a couple of questions. Mr. Quarles, would you please expand on why section 501 states that one of the purposes and objectives is to ensure that the costs of remedial actions are reasonable and that the program is cost effective.

Mr. QUARLES. I will give a very short statement on that, and simply say that there has been a tremendous amount of discussion about the fact that Superfund does not provide a good return on the dollar, either for the taxpayers or industry, or whoever is paying the cost. A purpose of the reform is to make it more cost effective. If that purpose is to be accomplished, I think we have to hon-

estly acknowledge that that's the problem we are trying to solve, and state it as a purpose. Right now, it's omitted.

Mr. OXLEY. Thank you. I would also like to ask you, in your testimony you state the need for accurate and realistic assessment of risk and the need for balanced risk communication. Can you explain some of the problems with EPA risk assessment methods, and do you believe some of the principles in H.R. 2910, the Risk Communication Act, could provide a better risk communication to community work groups, citizens, information access, office of states, EPA remedial managers and the general public?

Mr. QUARLES. Yes, sir. I am familiar with H.R. 2910. I think that has a much broader and better developed set of directives, as to how risk assessment should be accomplished and how risk communication should be carried out. I think some of those principles could be incorporated into this bill, and that would benefit the validity of the analyses that are done and the understanding that the public has of where their money is being spent.

Mr. OXLEY. You describe in your testimony the tale of two programs, the removal program which generally is considered pretty successful and the remedial program, which is generally recognized as needing significant reform. Can you explain the type of risks addressed by the removal program and the type of risks addressed by the remedial program, and are the risks for the remedial program more hypothetical?

Mr. QUARLES. They are more hypothetical. I think one of the elements of the record that is usually slighted both in terms of the public understanding of what has been accomplished and EPA getting credit for what the Agency has done is, the removal program. In point of fact, in situations where there is an identifiable present threat through the removal program, the Agency has put in place control measures or actually removed the contaminants in such a way that present risks have by in large been eliminated.

What we are talking about in the Superfund sites is almost universally future risks that may or may not come into play. Those tend to be hypothetical risks, and that's why we have such a low benefit for the expenditures that are being poured into this program.

Mr. OXLEY. Thank you. Thank you, Mr. Chairman.

Mr. SWIFT. I thank you. We thank all of our witnesses today, but particularly those of you who had to stay so long in order to help the committee so much. We appreciate it. Thank you.

[Whereupon, at 1:42 p.m., the subcommittee adjourned, to reconvene at the call of the Chair.]

[The following information was received for the record:]

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November 29, 1993

Len Barson, Esquire
Counsel
Subcommittee on Transportation
and Hazardous Materials
House Energy and Commerce Committee
324 Ford House Office Building
Washington, D.C. 20515

RE: CERCLA Reauthorization

Dear Mr. Barson:

I am an attorney in the Philadelphia Office of Reed Smith Shaw and McClay, where I practice environmental law, primarily relating to CERCLA. I have recently had a major Superfund case settled, and several others are in various stages of litigation. It seems to me that the issue of how to deal with EPA remedies that cost upwards of $100 million has not been clearly addressed in the various proposals for CERCLA reauthorization. I am proposing in the enclosed article (that has been submitted for publication to BNA) that we use ADR, particularly mini-trials, for this purpose.

I define the problem under Superfund as the following:

1. EPA has adopted and continues to adopt remedies based on non-scientific considerations and then refuses to reconsider its decisions despite enormous adverse impact on American businesses.

2. The public-private partnership for clean-up of hazardous waste sites has collapsed. Although the liability issues are important, in my opinion the remedy issues have now come to the forefront and unless a solution is found, no amount of tinkering with the liability scheme will solve the problem.

3. The district courts are ill-suited and unwilling to afford meaningful and timely judicial review of complex remedies. The courts of appeals have much more experience in reviewing complex, technical

administrative records but the time spent in an appeal is considerable.

4. There is no mechanism for injecting reality into the decision-making process short of waiting for a trial. The courts are adept at postponing the day when they have to look at the scientific reports. In the meantime, millions, even billions, of dollars are being spent wastefully.

The solutions to the problem are as follows:

1. Bring science back into the remedy decision-making process.

2. Amend CERCLA to require mandatory (but not binding) alternative dispute resolution relating to remedies. Section 113 of CERCLA prohibits an early review of the remedy issues, which is totally contrary to the goal of expediting these cases. By establishing a procedure for mandatory ADR of remedy decisions, hopefully we would promote a lot more settlements and private clean-ups.

3. Congress should reconsider the concept of an environmental court to handle CERCLA cases. When I was at Justice in the 1970's, we debated this issue a number of times and always came out against an environmental court. However, times have definitely changed. The district courts are inundated with diversity cases and criminal matters that prevent them from giving timely review. Also, the nature of the disputes is much more complex from a technical standpoint than was envisioned. Therefore, I am now in favor of an environmental court being created that would be similar to the U.S. Court of Federal Claims and would be based in Washington but with judges travelling the circuit to hold trials. You would find a rapid movement of CERCLA cases if such a court were created.

In any event, I would like to have my views considered by the House Energy and Commerce Committee, Subcommittee on Transportation and Hazardous Materials. I am enclosing a copy

of my biography. I practiced for eight years in the 1970's with the U.S. Department of Justice in Washington representing EPA. I handled the prosecution of the two largest civil and criminal cases filed, Reserve Mining and Allied Chemical (Kepone). I have written extensively on the subject of Superfund. In addition to articles published by BNA and elsewhere, I have authored a book entitled Superfund Law and Practice, which was published by ALI-ABA.

I believe I have special expertise in the area of Superfund remedies as a result of handling some of the leading cost recovery actions, particularly in New Jersey. If I were to testify, I would be speaking on my own behalf, and not representing any particular company or association.

Thank you for considering these views.

Sincerely yours,

Bradford F. Whitman

BFW/cam

Enclosure

cc: (w/ enclosure)
Honorable Marjorie Margolies-Mezrinsky
Note: I am your constituent and thought you would be interested in this article

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JAN 28 1994

OFFICE OF
SOLID WASTE AND EMERGENCY
RESPONSE

Honorable Al Swift
Chairman
Subcommittee on Transportation
and Hazardous Materials
U.S. House of Representatives
Washington, D.C. 20515-6115

Dear Mr. Chairman:

I am pleased to forward to you the responses to the 21 questions on the Superfund program you submitted in your July 19, 1993, letter to Administrator Browner.

As you know, over the past several months we visited our ten EPA Regions and obtained information on the 1,249 current and deleted sites on the National Priorities List. We discussed site specific issues with over 450 Regional Remedial Project Managers as well as other staff. We believe the information we have gathered will assist Congress in its evaluation and oversight of the Superfund program.

During the process of gathering and analyzing data, we had periodic meetings with your staff and the suggested outside policy analysts to review our progress. We now look forward to working with you and your staffs as you review the information.

Sincerely,

Elliott P. Laws
Assistant Administrator

Enclosures

U.S. House of Representatives
Committee on Energy and Commerce
Room 2125, Rayburn House Office Building
Washington, DC 20515-6115

July 19, 1993

The Honorable Carol M. Browner
Administrator
Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

Dear Administrator Browner:

As we undertake reauthorization of the Comprehensive Environmental Response Compensation and Liability Act of 1980, as amended, in the Committee on Energy and Commerce, we are interested in obtaining certain basic information to assist Congress in its evaluation and oversight of the Superfund program.

This letter seeks certain specific data about each facility on the Superfund National Priorities List. The data requested has been identified with the assistance of a number of outside policy analysts and we believe is essential to a better understanding of this complex and regionally delegated program.

We request this information pursuant to Rules X and XI of the Rules of the House of Representatives, and ask that it be provided to the Committee no later than September 15, 1993.

Sincerely,

John D. Dingell, Chairman
Committee on Energy
and Commerce

Al Swift, Chairman
Subcommittee on Transportation
and Hazardous Materials

cc: The Honorable Carlos J. Moorhead, Ranking Minority Member
Committee on Energy and Commerce

The Honorable Michael G. Oxley, Ranking Minority Member
Subcommittee on Transportation and Hazardous Materials

Attachment
to Letter of Chairmen Dingell and Swift
July 19, 1993

Please provide the following data, on a facility-by-facility basis, for each facility on the National Priorities List, separated into two categories: 1) non-federal and 2) federal.

1. What is the current expected total capital cost for cleanup? What is the expected average annual operations and maintenance (O&M) cost for each facility, and the number of years that O&M will be required? If the facility has been added to the NPL so recently that reliable cost estimates can not be made, please so indicate, and indicate the date of listing.

2. Please indicate if the facility is expected to cost over $20 million in capital costs. If so, what factors are responsible (please respond in terms of the factors listed on the attached, "Checklist of Factors for Analysis of Expensive Facilities")?

3. How many RODs have been signed? What media (groundwater, surface water, sediment, surface waste, or soil) have been addressed by each ROD signed to date? How many additional RODs are expected, and what media remain to be addressed in the future RODs?

4. When is construction completion expected?

5. For each facility for which an RI/FS was initiated after October 17, 1986 and for which a risk assessment has been performed, please indicate: the date of risk assessment completion; media addressed (groundwater, surface water, sediment, surface waste, or soil); and whether additional risk assessments are anticipated for the facility. On the basis of these risk assessments, please quantify:

   a. the baseline risk posed by the facility;
   b. the future risk projected to be posed by the facility if unremediated;
   c. the future risk projected by the facility when remediated.

6. Where a remedy has been selected for contaminated soil, please indicate the remedy that was selected and the principal contaminants addressed.

7. For each facility at which a ROD addressed groundwater, please provide the following:

   a. current use of groundwater adjacent to the facility (e.g., drinking, irrigation, industrial);
   b. current groundwater classification adjacent to the facility (e.g., sole source, potential source, etc.);

c. assumption for future groundwater use;
d. whether risk assessment assumed future consumption of plume *per se* or future downgradient consumption of groundwater; and
e. if the remedy relied upon natural attenuation for cleanup of plume.

8. For each facility where a remedy has been selected for groundwater, please indicate the remedy that was selected and whether DNAPL contamination is highly likely. For each groundwater remedy where DNAPL contamination is highly likely, please provide the following information:

a. Was the ROD(s) involving groundwater signed before or after EPA's May 1992 guidance on DNAPL sites?
b. Did the selected remedy seek to return groundwater to drinking water standards?
c. Did the selected remedy have containment pumping as its goal?
d. Did EPA invoke a technology feasibility waiver to avoid applying ARARs to the DNAPL cleanup?

9. Please provide the complete set of cleanup standards (contaminant by contaminant, for each media) used at the facility. Indicate whether the standard was based on risk assessment, MCL, state standard, or other (indicate what other). Where a cleanup standard has been established for soil based on a risk assessment initiated after October 17, 1986, please indicate the date of completion of the risk assessment and each of the exposure assumptions used for each cleanup standard as follows:

a. whether the driving factor establishing the standard was soil ingestion, leaching to groundwater or other route of exposure, (please indicate what other, e.g., dermal, inhalation);
b. number of total years and number of days per year of exposure to the facility, broken down by age of exposed individual where appropriate;
c. amount of soil ingested, contacted, or inhaled per day of exposure, broken down by age of exposed individual where appropriate;
d. whether exposure to contaminated soil is assumed to occur to maximum concentrations found at the facility, average concentrations, or other (indicate what other);
e. whether any of the contaminants used to calculate risk are assumed to degrade in soil over time (thereby decreasing exposure).

10. Please provide the following information:

a. current land use of facility *per se*;
b. current adjacent land use;
c. if current adjacent land use includes residential use, number of people within 1/4 mile of the facility, 1 mile of the facility;

d. assumption for future land use of facility per se (industrial, residential, etc.); and
e. assumption for future adjacent land use (industrial, residential, etc.).

11. Please identify whether ATSDR has indicated that a more in-depth study under section 104(i) is needed after the health assessment is completed. Indicate for each such facility whether such a study is planned, underway or completed, and identify the type of study.

12. For non-federal sites only, please identify what kind of operation/activity was present at the facility, from the list of possible operations/activities listed below. Only one category should apply to each facility.

A. Industrial

Chemical manufacturing
Wood preserving
Petroleum refinery
Tannery
Printing
Paper mill
Asbestos manufacturing
Foundries
Textile mill
Rubber and plastics
Primary metals
Fabricated metals products
Electronic and electrical equipment
Electric power production and distribution
Mining -- please specify one of the following categories:
a) metals
b) coal
c) oil and gas
d) non-metallic mineral
Coal gasification plant
Oil and gas pipelines
Dry cleaners
Pesticides formulators
Other: _____

B. Waste Management

(Facilities would be placed in a "waste management" category only if the primary operations at the facility are/were waste management activities, e.g., a chemical plant that has an on-site landfill should be categorized as a chemical plant; a public landfill, commercial landfill that takes waste on a fee-for-service basis or an off-site private landfill would all fall under the category of waste management.)

1. Recycling
   a) drum reconditioning
   b) used oil recycling
   c) battery recycling
   d) solvents recycling
   e) other recycling: _____

2. Landfills

   (Should be used for sites where the only or primary waste management activity is a landfill/ landfills. Facilities with a variety of waste management activities are categorized more broadly under "other waste management.")

   a) municipal landfill: publicly owned, fee-for-service (or for municipally generated trash only), only municipal-type waste.
   b) municipal co-disposal landfill: publicly owned, fee-for-service, both municipal-type and industrial wastes.
   c) Commercial landfill: privately owned, fee-for-service, municipal or industrial waste, but not both.
   d) Commercial co-disposal landfill: privately owned, fee-for-service, municipal-type and industrial waste.
   e) Captive industrial landfill: privately owned, not fee-for-service, (i.e., landfill is for the use of one company/organization), only industrial waste.
   f) Captive co-disposal landfill: as above, but mixed industrial and office/municipal-type waste.

3. Other waste management

   (These sites could include a landfill, but also have other waste management operations, such as incinerators, surface impoundments, waste piles, etc.)

   a) Municipal waste management -- has waste management activities other than or in addition to a landfill: publicly owned, municipal-type and industrial wastes managed.
   b) Commercial industrial waste management -- includes a variety of waste management activities/ operations, e.g., incinerators: privately owned, fee-for-service, industrial waste managed.
   c) Captive industrial waste management: same as above, except that facilities are only for the use of one company/organization (i.e., not commercially available on a fee-for-service basis).

C. "Miscellaneous" facilities

(Some Superfund facilities do not have either industrial or waste management operations on-site. The facilities are often contaminated by off-site operations or activities or as a result of spills.) Specific categories include:

Retail/office/industrial areas: industrial area/park/complex/development/property/operations
Wells/water areas: municipal/private/residential/commercial wells, groundwater contamination, tidal estuaries/waterways/creeks/rivers, hydroelectric dams
Railroads: railroad yard/property, electric train repair operations, railroad loading and storage areas
Airports: airports, airfields
Trucking operations: trucking operations, truck leasing operations, vacuum truck terminals
Farms/other pesticide application areas: farms, farmers' cooperatives, horse stables, cropland, pig farms, dairy farms, orchards
Universities: universities, research laboratories, agricultural research centers, schools
Illegal disposal areas: illegal dumping/disposal areas
Storage areas: warehouses, storage facilities
Residential areas: apartment complexes, residential areas/developments/property, city contamination
Repair operations: aircraft and electrical appliance repair operations (NOT recycling operations)
Cleaning operations

D. Other

Multiple operations: sites with multiple operations currently on-site

Other: (describe)_____

13. Please identify whether the best estimate of the total number of PRPs associated with the facility that could potentially by held liable under section 107 (irrespective of whether EPA decides to pursue all of them) is: (1), (2-10), (11-50), (51-100), (101-300), (301-1000), (1001+).

14. For each facility where there is only one potentially responsible party, please indicate whether that PRP is an owner/operator.

15. Please indicate where the only potentially responsible parties are owner/operators (i.e., no hazardous substances were contributed to the facility by offsite generator/transporters).

16. Please indicate whether sufficient volumetric data exists to establish whether there are PRPs who contributed small amounts of hazardous substances to the facility and could be considered de

minimis parties. For each such facility, indicate the number of potential de minimis parties. For each such facility, please identify where a waste-in list has been or could be prepared based on the data available to EPA.

17. Please indicate where there are orphan parties (i.e., parties who are not financially viable or can not be located) and where sufficient volumetric data exists, please provide the best estimate of the percentage, by volume, of waste contributed to the site by generator/transporter orphan parties. For each of those same facilities, indicate whether all the owner/operators are orphan parties.

18. Please indicate whether the government believes that there are no financially viable parties, or no parties that can be found, and that the Trust Fund will have to pick up 100% of site study and cleanup costs?

19. Please indicate whether the facility is fund-lead or expected to be fund-lead.

20. Please indicate where EPA has expended funds that are recoverable under section 107, indicate the amount of those recoverable expenditures, indicate whether a cost recovery action has been filed to recover those funds, whether funds have been recovered and the amount that has been recovered, and indicate whether or not the statute of limitations is expected to be a bar to cost recovery of any amount.

21. Please obtain from regional officials in each region their best informed judgment with respect to the number of facilities in their region that will be added to the NPL in the period from October 1, 1993 to October 1, 1994, and in the five year period from October 1, 1994 to October 1, 1999. To the extent possible, please obtain information concerning the types of facilities that will be added to the NPL during the periods referenced above. In addition, please obtain the opinion of regional officials with respect to the number of facilities currently on CERCLIS, other than those for which a determination has been made not to list, which are likely ultimately to be added to the NPL.

SUB ADM P09

CHECKLIST OF FACTORS FOR ANALYSIS OF EXPENSIVE FACILITIES
(Mark primary factors with a "1"; check all other major factors.)

Facility characteristics:
- large volume of contaminated soil/sediment
- large volume of contaminated groundwater
- facility hazards pose danger to cleanup workers
- other _____

Remedy characteristics:
- high-unit-cost treatment of soil/sediment
- high-unit-cost treatment of groundwater
- high-unit-cost treatment of surface water
- second remedy required after first failed
- other _____

EXECUTIVE SUMMARY

INTRODUCTION

Over the past year, as the debate over the latest reauthorization of Superfund got underway, EPA faced increasing requests for data about the Superfund program from Congress, independent researchers and advocacy groups. These requests coincided with a major Agency effort to make Superfund data more comprehensible, comprehensive and accessible to a broader audience. Also, in July 1993, Congressmen Swift and Dingell wrote to Administrator Browner requesting detailed information on NPL sites in preparation for upcoming reauthorization hearings. To address these requests, EPA interviewed Regional site managers and collected information from site documents about every National Priorities List (NPL) site.

EPA compiled the results of months of data gathering and analysis in the form of responses to the Congressmen's twenty-one specific questions. These data have the advantage of reflecting the experiences of the Regional site managers on a site-by-site basis rather than relying on anecdotal information. Considered as a whole, they represent an important step forward in using real-world data to analyze vital areas of the Superfund program and help set the stage for reauthorization.

THE QUESTIONS

Congressmen Swift and Dingell asked twenty-one questions on topics ranging from capital costs to identifying the past and potential future uses of NPL sites. The Congressmen's original letter appears as Attachment A to this report. The questions appear in this report in the order asked, and each response is labelled with the corresponding question number. The responses begin with a summary statement, followed by more detailed information as requested by the Congressmen. The data sources for each answer are provided, along with any necessary background information.

Some of the answers confirm what past analyses had shown, while others offer new insights into the program. For example, the average cost to clean up a non-Federal facility site is about $25 million. Many sites however, cost significantly less than the average would indicate. Only a small percentage of sites fall into the high cost category (more than $100 million). Large volumes of contaminated media was the most common factor contributing to capital costs exceeding $20 million.

Despite a common perception of sites having large numbers of potentially responsible parties (PRPs), our data show that more than half of NPL sites have fewer than ten responsible parties, and about one fifth have only a single PRP. On the other hand, about one third of sites have at least one non-viable responsible party, and about one half of sites have potential *de minimis* parties.

As expected, an overwhelming number of sites have groundwater and/or soil contamination as the primary contamination problems, and drinking water supplies are affected at most sites with groundwater problems.

The most common current on-site land uses are industrial, abandoned and commercial, although 15% of sites currently have residents living on-site. The most common current land use surrounding sites is residential. About 73 million people live within 4 miles of an NPL site (based on 1990 Census data). The most common expected future site uses were industrial, residential and commercial, while land use adjacent to the site is expected to be residential. Future human consumption of groundwater is assumed at more than half of the sites.

EPA expects about 75 to 95 sites to be added to the NPL in 1994. From 1995 through the end of 1999, between 340 and 370 sites will be added. By the end of the year 2000, we expect to complete construction at between one half and two thirds of current NPL sites.

CONCLUSION

EPA is committed to protecting public health and the environment through the Superfund program. The Agency recognizes that there are areas of the program that can and should be made more effective and efficient. The data presented in this report and the new information EPA has collected ensure there will be reliable data that reflect actual field experience at Superfund sites to support the reauthorization debate.

Question #1

Capital Costs for National Priorities List (NPL) Sites:

Site cleanup activities are typically divided into multiple projects, called operable units (OUs). On average, there are 1.8 OUs per non-Federal Facility site. The average capital cost to conduct an OU remedial action project is $12.1 million for a non-Federal Facility site. This translates to an average site capital cost of $21.8 million for the typical non-Federal Facility site. Site assessment, studies and design comprise approximately 11% of total site costs, resulting in an average cost estimate of approximately $25 million for non-Federal Facility sites.

In addition, most sites have annual operation and maintenance (O&M) costs of $50,000 or more for each OU extending for approximately 21 years.

NOTE: The cost estimates were collected from site manager surveys which reported costs in ranges for each OU. The average OU capital costs were calculated by averaging the midpoint of the estimated cost ranges.

What is the current expected total capital cost for cleanup?

The average cost to clean up non-Federal Facility sites listed as final or deleted on the NPL is expected to be approximately $25 million. This average is impacted by the relatively small number of sites with very high cleanup costs; 16% of the OUs account for over 60% of all capital cleanup costs incurred at NPL sites. The majority of projects (69%) have capital costs of less than $10 million and 38% have capital costs of less than $3 million. Approximately 89% of the total site cleanup cost is for capital costs; the remaining 11% includes site assessment, study and design activities.

The approach used to calculate the reported capital costs was to average the midpoint of the remedial action OU cost range estimates provided by site managers (i.e., $12.1 million for non-Federal Facility sites and $11.3 million for Federal Facilities) and take into account the 11% of total site costs commonly spent on site assessment, study and design activities. This calculation resulted in an average OU cost of $13.6 million for non-Federal Facility sites and $12.7 million for Federal Facilities. The average site cost of close to $25 million for non-Federal Facility sites was extrapolated by multiplying the average OU cost by the average number of OUs (1.8 at non-Federal Facility sites). The estimate for non-Federal Facility site cleanup cost is in line with the previously reported estimate of $25 million derived from an analysis of non-Federal Facility RODs. *(No corresponding exhibit).*

What is the expected average annual O&M cost for each facility?

For all OUs (Fund-lead, PRP-lead and Federal Facilities), most O&M costs were more than $50,000 annually. *(No corresponding exhibit).*

What is the expected number of years that O&M will be required?

For State-lead O&M OUs, the estimated average number of years for O&M is 19. On average, O&M is expected to last 21 years for PRP-lead OUs and 23 years for Federal Facility OUs. *(No corresponding exhibit).*

If the facility has been added to the NPL so recently that reliable cost estimates cannot be made, please so indicate and indicate the date of listing.

Reliable site cleanup cost estimates are not available for 316 sites. Of these 316 sites, 168 have PRP-lead cleanups for which cost data are proprietary and not readily available to EPA. Seventy (70) cleanups are at Federal Facilities for which the Federal agencies have not made their cost information available to EPA. Twelve (12) are sites where the State has taken responsibility for cleanup activities and no Fund dollars are involved. Sixty-six (66) are Fund-lead sites that are listed on the NPL, but reliable estimates for total capital cleanup costs are not available. These 66 sites were published as final NPL sites in the Federal Register as follows:

1983	26 sites listed
1984	5 sites listed
1986	7 sites listed
1987	2 sites listed
1989	14 sites listed
1990	7 sites listed
1992	5 sites listed

(No corresponding exhibit).

Data Source

1) *The source:* 1) August 1993 RPM Data Collection (questions E13, E32, E48, E51 and E52a), 2) CERCLIS and 3) EPA cost analysis of RODs.
2) *The full universe of sites addressed by the question:* The 1,249 final and deleted sites listed on the NPL as of August 1993.
3) *The subset of the universe for which data are provided* The 1,161 final and deleted sites listed on the NPL responding to the questions

Background Information

What is an Operable Unit (OU)?
An OU is the division of a project into meaningful work elements (events) that can be implemented on different schedules, resulting in acceleration of cleanups. OUs allow certain elements of a project to be started ahead of others to lessen the hazards present at the site and to complete some work elements ahead of more complex and hazardous work elements. Thus, each element can move at its own rate to completion. Examples of two separate OUs are source control and groundwater cleanup.

What is a median?
A median has a two-part definition: 1) the median is defined as the middle observation of an odd-numbered group of observations that are ordered from smallest to largest; or 2) the median is defined as the number halfway between the two middle observations of an even-numbered group of observations that are ordered from smallest to largest.

What is the definition of capital costs?
Capital costs include all remedial action costs, including construction, up to 10 years of operating a groundwater treatment system, any operational and functional period prior to acceptance of the project and can include any service contracts for operating costs (e.g., burning materials in an incinerator). Operation and maintenance and removal costs are not covered in capital cost estimates.

What is Operation and Maintenance (O&M)?
O&M encompasses those activities necessary to ensure the continued effectiveness of the remedy after the remedial action goals are met, or after the 10 year operational period that EPA can pay for groundwater treatment systems. The cost of O&M is borne by the PRP or a State government (except in a very limited number of circumstances). Therefore, there is no Fund-lead O&M.

Question #2

Factors Contributing to High Cleanup Costs:

Site managers expect capital costs to exceed $20 million at 296 sites (232 non-Federal Facility sites and 64 Federal Facilities). The most common factors contributing to these estimates are large volumes of contaminated media, site complexities and high treatment costs

Please indicate if the facility is expected to cost over $20 million in capital costs. If so, what factors are responsible?

Overall, 64 of the 123 Federal Facilities reporting (52%) expect to have capital costs greater than $20 million, while only 232 of the 1,126 non-Federal Facility sites reporting (21%) expect to have capital costs greater than $20 million.

The most common factor for sites with capital costs expected to exceed $20 million is large volumes of contaminated media (e.g., soil, groundwater). This reason was cited in 205 (88%) of the 232 non-Federal Facility sites and 48 (75%) of the 64 Federal Facilities expecting capital costs greater than $20 million. Site complexities and high technology costs also were cited often as major factors driving high cost sites. (*See Exhibit 2-1*).

NOTE: Similar cost factors were grouped to facilitate data analysis. (See "Major Cost Factor Groups" in *Exhibit 2-1*). The factors, that make up each group, are individually described in the key above. *Exhibit 2-1* More than one factor may be cited for any given site, therefore, the number of sites providing individual cost factors in the table in *Exhibit 2-1* does not total to the cost factor groups illustrated in the graphic.

Data Source

1) *The source*: August 1993 RPM Data C[illegible] (questions E49 and E50)
2) *The full universe of sites addressed by the question*: The 1,249 final and deleted sites [illegible] NPL as of July 1993
3) *The subset of the universe for which data are provided*: Those 296 sites for which site manager expected capital costs to exceed $20 million (of 1,249 sites reporting)

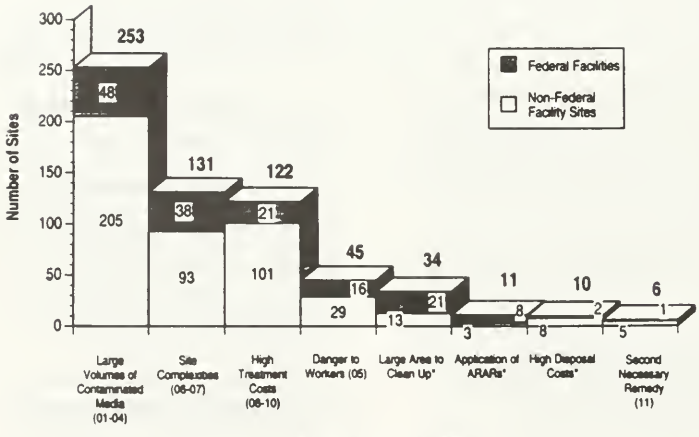
Background Information

What is the definition of capital costs?
Capital costs encompass all remedial action costs including construction, up to 10 years of operating a groundwater treatment system, any operational and functional period prior to acceptance of the project and can include service contracts for operating costs (e.g. burning materials in an incinerator). Operation and maintenance, and removal costs are not covered in capital cost estimates.

Exhibit 2-1

Major Factors Contributing to Capital Cleanup Costs Expected to Exceed $20 Million

Descriptions of Individual Factors	% Non-Federal Facility Sites (of 232)	# Non-Federal Facility Sites	% Federal Facilities (of 64)	# Federal Facilities
01 = Large volume of highly contaminated soil/sludge/acid waste	59.1%	137	45.3%	29
02 = Large volume of soil overall	37.5%	87	48.4%	31
03 = Large volume of contaminated sediment	16.4%	38	23.4%	15
04 = Large volume of contaminated groundwater	46.6%	108	57.8%	37
05 = Site hazards pose dangers to cleanup workers	12.5%	29	26.6%	17
06 = Complex hydrogeology	26.3%	61	35.9%	23
07 = Complex mixture of contaminants	25.0%	58	37.5%	24
08 = High unit cost of treatment of soil/sludge/acid waste	33.2%	77	21.9%	14
09 = High unit cost of treatment of groundwater	20.7%	48	25.0%	16
10 = High unit cost of treatment of surface water	3.9%	9	6.3%	4
11 = Second remedy was required after first remedy failed	2.2%	5	1.6%	1
12 = Other (specified by site managers)	31.0%	72	64.1%	41
* = Large area to clean up (from 'Other' responses)	5.6%	13	32.8%	21
* = High disposal costs (from 'Other' responses)	3.4%	8	3.1%	2
* = Application of ARARs (from 'Other' responses)	3.4%	8	4.7%	3
99 = Unknown	0.9%	2	3.1%	2



More than one factor can be cited for any given site. Seventy-four (74) non-Federal Facility sites and 43 Federal Facilities reported 'Other' and/or 'Unknown' factors. These responses cited by site managers include such factors as difficulty of wetland remediation and presence of DNAPLs.

Question #3

Media Evaluated in Records of Decision (RODs):

A wide variety of media are affected by Superfund site contamination. Contamination of the groundwater and soil media are the most frequent problems identified at sites. Site managers report two-thirds of the signed RODs addressed groundwater and one-half addressed soils. More than one-half of the planned RODs are also expected to address contaminated groundwater and soil.

How many sites have signed RODs?

Site managers reported information on 789 National Priorities List (NPL) sites with signed RODs. Site managers reported on 1,135 RODs at these 789 sites. (At the end of fiscal year 1993, 885 sites had signed RODs.) The number of RODs signed is greater than the number of sites because more than one ROD may be signed at a site. (*No corresponding exhibit.*)

How many media are addressed by each signed ROD?

A ROD may address more than one contaminated media. A wide variety of media are affected by Superfund sites (*See Exhibit 3-1*). The groundwater medium was addressed in two-thirds of the RODs. These RODs were signed at 622 sites. The soil medium was addressed in one-half of the RODs. These RODs were signed at 478 sites.

NOTE: Some sites may have RODs that address both groundwater or soil.

Background Information

What is a Record of Decision (ROD)?
Upon completion of site studies, EPA selects a remedy for site contamination. This remedy is detailed in the ROD. The ROD can either address the entire site cleanup (more than one medium), one phase of the site cleanup (for example, soil contamination), or determine that no further action is needed.

How many additional RODs are expected, and what media remains to be addressed in the future RODs?

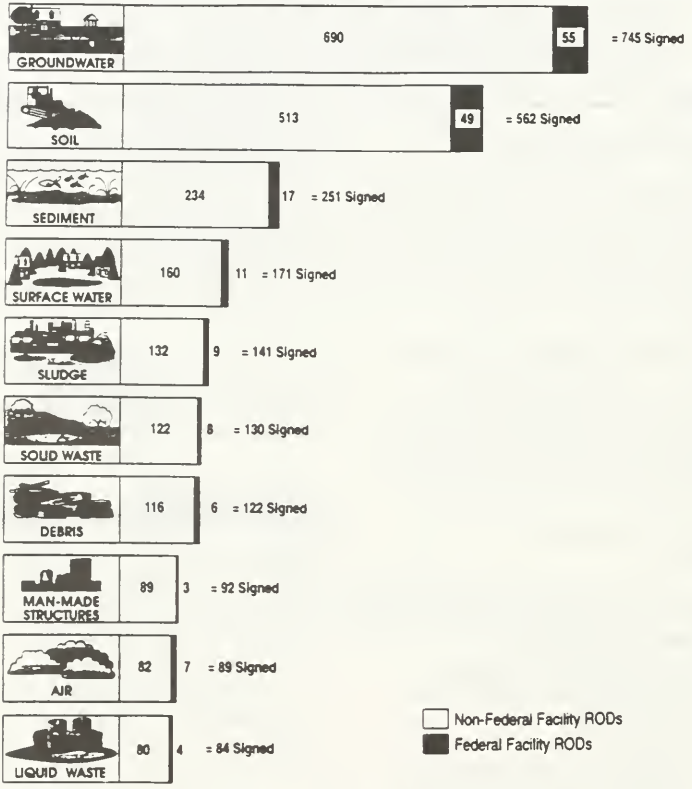
Site managers reported that 542 sites will need a ROD in the future. They expect 986 RODs at these 542 sites. (*See Exhibit 3-2*). The groundwater medium is expected to be addressed in 625 RODs. These RODs are planned at 442 sites. The soil medium is expected to be addressed in 555 RODs. These RODs are planned at 348 sites.

The data provided here cannot answer the question of how much work remains to be done at NPL sites. The data provided do not consider the areal extent of problems at sites, the risk yet to be remediated, the complexity of site problems, nor do they exclude those media where no action is needed.

Data Source

1) *The source*: August 1993 RPM Data Collection (questions E32, E34 and E36).
2) *The full universe of sites addressed by the question*: The 1,249 final and deleted sites listed on the NPL as of July 1993 (1,126 non-Federal Facility sites and 123 Federal Facilities).
3) *The subset of the universe for which data are provided*: RPMs reported on 1,170 sites with signed or planned RODs. The number of sites is less than the total number of RODs because more than one ROD may be signed or planned at a site.

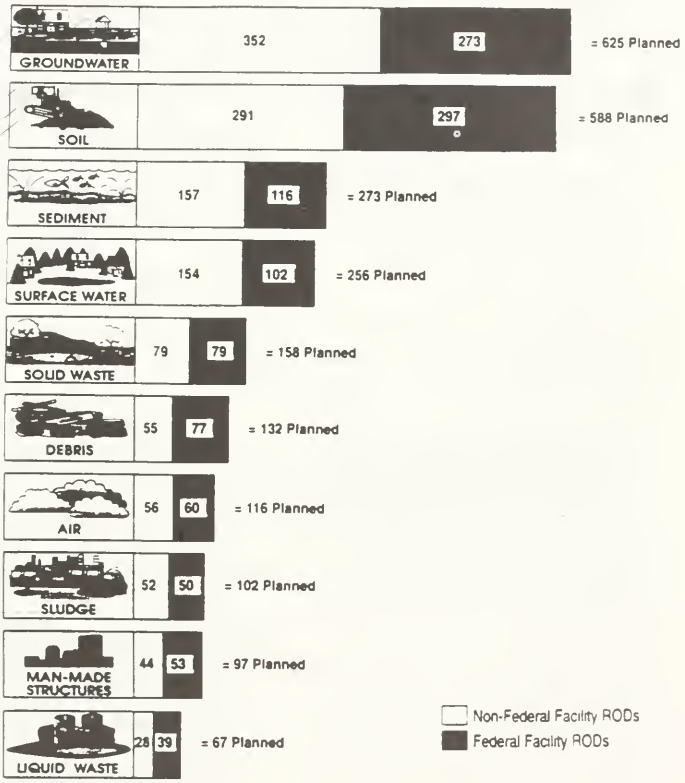
Exhibit 3-1
Signed Superfund Records of Decision (RODs)
Address Contamination of Different Media



NOTE: Other media have been evaluated in 19 signed RODs. The signed numbers total more than the 1,135 signed RODs reported because a ROD may analyze more than one contaminated medium. In addition, the number of RODs signed is greater than the number of total sites with signed RODs because more than one ROD may be signed at a site.

Exhibit 3-2

Planned Superfund Records of Decision (RODs)
Will Address Contamination of Different Media



NOTE. Other media will be evaluated in 128 planned RODs. Site managers answered 'Unknown' for the type of media that will be evaluated in 77 planned RODs. The planned numbers total more than the 986 planned RODs reported because a ROD may analyze more than one contaminated medium. In addition, the number of planned RODs is greater than the number of total sites with planned RODs, because more than one ROD may be planned at a site.

Question #4

Construction Completions:

By the end of the year 2000, over one-half of the 1,249 sites listed as final and deleted on the National Priorities List (NPL) are projected to have construction completed. This number could go as high as two-thirds of all sites. Construction completions beyond the year 2000 are difficult to project and can be assessed later when more site-specific information is available.

When is construction completion expected?

To determine when construction will be completed for sites currently on the NPL, EPA looked to two sources of information: 1) historical data and trends, and 2) site-specific projections. The first approach is the more conservative of the two because it accounts for real world delays encountered during past cleanups.

EPA first looked at historical trends to determine future rates of construction completion. In fiscal year 1992 (FY 92), EPA completed construction at 86 sites, while in FY 93, EPA reported construction completion at 68 sites, for a total of 217 sites by the end of FY 93. Because the construction completion definition was established in 1992, the FY 92 accomplishments included "old" sites that would have met the criteria in previous years. In both FY 92 and FY 93, the construction completion accomplishments were most likely less complex than are expected in future years. Consequently, EPA estimates construction completion at 63 sites per year through the end of the century. This yearly rate combined with the 224 sites completed by December 31, 1993, brings the projected total to 665 sites with construction completion by the end of calendar year 2000. *(See Exhibit 4-1.)*

Construction completions also were assessed using responses from site managers to a site-specific question that asked the year construction completion is expected. The site-specific answers may not account for real world delays that are difficult to predict. Examples of possible delays are Superfund resource limitations, unforeseen site conditions encountered after remedy selection and enforcement issues. Using the site-specific approach, the projection is 965 construction completions by the end of calendar year 2000. *(See Exhibit 4-1.)*

How many of the sites for which construction is complete were single party sites?

Of the 217 sites where construction was completed by September 30, 1993, 49 sites (23%) are single party sites. *(No corresponding exhibit)*

What is the mean and median number of PRPs at sites for which construction is complete?

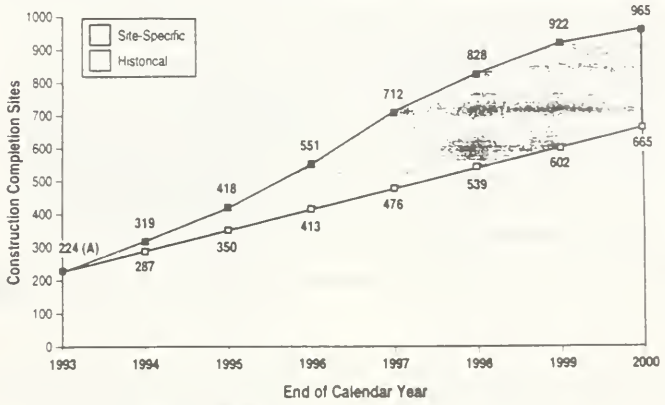
Since the data were reported in ranges, the mean and median cannot be calculated. The most frequently selected range - between 2 and 10 PRPs - was reported at 46% of the sites. *(No corresponding exhibit)*

Background Information

What is construction completion?

Construction completion at sites refers to the point in the cleanup process at which physical construction is complete for all remedial and removal work required at the entire site. Construction is officially complete when a document has been signed by EPA stating that all necessary remediation has been finished. While no further construction is anticipated at the site, there may still be a need for long-term, on-site activity before specified clean-up levels are met (e.g., restoration of groundwater and surface water). Although physical construction may not be necessary at some sites, these sites are also included in this category to fully portray EPA's progress.

Exhibit 4-1
Construction Completion Estimates for Sites on the NPL



(A) - Actual Construction Completion Data

Looking at historical trends to determine future rates of construction completions, EPA estimates construction completion at 63 sites per year, bringing the projected total of sites with construction completion to 665 sites by the end of the calendar year 2000. Site-specific answers from site managers, which may not account for real world delays that are difficult to predict, project 965 construction completions by the end of calendar year 2000.

Data Source

1) *The source*: August 1993 RPM Data Collection (questions E10 and E13).
2) *The full universe of sites addressed by the question*: The 1,249 final and deleted sites listed on the NPL as of July 1993.
3) *The subset of the universe for which data are provided*: The 1,249 final and deleted sites listed on the NPL as of July 1993.

Question #5

Risk Assessments:

This analysis evaluated site risk information from approximately one-half of the sites that have had risk assessments produced since the passage of the Superfund Amendments and Reauthorization Act (SARA) and that also have a signed Record of Decision (ROD). For the 216 sites evaluated, exposure to soil was addressed in 166 risk assessments, exposure to groundwater in 103, exposure to sediment in 28 and exposure to surface water in 21 site risk assessments. When comparing risk and hazard levels before and after remediation, both cancer risks and non-cancer hazards show a reduction following remediation. Individual cancer risks for current as well as future unremediated exposures between 10^{-5} and 10^{-3} were most common. Individual cancer risk estimates after remediation were most frequently reported to range between 10^{-6} and 10^{-5}. Non-cancer hazards for current exposures were most commonly reported to be between 0.1 and less than 100. The reported non-cancer hazard estimates for sites after remediation were less than 10. While these trends are consistent with expectations, the levels reported are based on limited analysis that should be refined before definitive conclusions are drawn.

Overview

Two factors were considered in the selection of risk assessments because it was not possible to collect and analyze all available risk assessments. First, a priority was placed on collecting risk assessments associated with sites that had a Remedial Investigation/Feasibility Study (RI/FS) that was started after October 17, 1986 (date of the passage of SARA) and a ROD signed after September 30, 1990. According to the Comprehensive Environmental Response, Compensation and Liability (Act) Information System (CERCLIS), 387 sites fit these criteria. Second, a priority was placed on the analysis of sites that were non-Federal Facility sites. Risk assessments for 216 sites were collected and analyzed, which corresponds to approximately one-half of the expected risk assessments. Moreover, the process of collecting and analyzing risk assessment information is an ongoing effort.

Risk information is developed to characterize a site and support site cleanup decisions. As outlined in the answer to Question 9, there are several ways that a ROD will specify that site risk should be addressed. More specifically, RODs recommend some or all of the following:

- clean up media to risk-based levels based on data from the baseline or other risk assessment;
- remove/treat contaminated soil;
- clean up groundwater to Maximum Contaminant Levels (MCLs) or other ARARs; and
- eliminate exposure using engineering or institutional controls.

The use of these other approaches to determining the need for site cleanups is one reason that risk/hazard estimates are not generated for all media. Another reason that risk/hazard estimates may not be reported is that either the site evaluation does not indicate the presence of contamination (no estimates were generated) or risk/hazard estimates were below the reporting thresholds for this analysis (cancer risk levels of 10^{-6} or greater or a hazard index of 0.1 or greater were targeted).

[redacted]

For each facility for which an RI/FS was initiated after October 17, 1986 and for which a risk assessment has been completed, please indicate:

- **the date of risk assessment completion and whether additional risk assessments are anticipated for the facility.**

  Exhibit 5-1 summarizes the dates that risk assessments examined in this exercise were completed. The reported number of completed risk assessments was under-reported because the timing for the data collection effort of this project did not allow for collection and analysis of many of the risk assessments. In addition, 7 sites have been omitted from this compilation because the date of the risk assessment needs to be verified before reporting. Another 7 sites were analyzed from fiscal year 1988 (FY 88) and FY 89. As of the time of data collection (September 1993), risk assessments were underway for 45 sites and anticipated for an additional 74 sites.

- **the media addressed (groundwater, surface water, sediment, surface waste or soil).**

  Of the 216 sites evaluated, 166 site risk assessments addressed exposure to soil, 103 site risk assessments addressed exposure to groundwater, 28 site risk assessments addressed exposure to sediments and 21 site risk assessments addressed exposure to surface water. *(No corresponding exhibit).*

On the basis of these risk assessments, please quantify:

a. **the baseline (current) risk posed by the facility;**
b. **the future risk projected to be posed by the facility if unremediated; and**
c. **the future risk projected by the facility when remediated (residual risk).**

Total "facility cancer risk/non-cancer hazard" was generally not provided. However, total "facility cancer risk/non-cancer hazard" can be calculated by combining appropriate individual scenarios where it is known that the same person had the potential to be exposed via multiple scenarios. A total "facility risk/hazard" was not available for many sites because site specific cleanup decisions are typically based upon evaluation of specific media.

a. **the baseline (current) risk posed by the facility;**

The reported cancer risks for current exposures at Superfund sites tend to range between 10^{-5} and 10^{-3}. Reported hazard index (HI) levels for current exposures tended to range between 0.1 and 100. In some instances, hazard levels exceeded these values. *(No corresponding exhibit).*

b. **the future risk projected to be posed by the facility if unremediated; and**

Future uncontrolled risks are similar to current cancer risk and non-cancer hazard levels examined. *(No corresponding exhibit).*

c. **the future risk projected by the facility when remediated (residual risk).**

Although a systematic comparison of site specific risk reduction was not performed, there is a general tendency for post remediation risk levels for cancer risk and non-cancer hazard levels to be lower than current or future unremediated estimates. Individual future cancer risk estimates after remediation were most frequently reported to range between 10^{-6} and 10^{-5}. The reported non-cancer hazard estimates from sites after remediation were less than 10. Comparing these values with reported typical values for current and future unremediated risk estimates suggest reductions of around two orders of magnitude. Nevertheless, some sites were reported to have residual risks within the risk range (10^{-6} to 10^{-1}) following remediation.

In general, these findings are consistent with overall expectations for changes in risks and hazards at Superfund sites. The overall risk/hazard levels are similar to those reported for other types of sites associated with hazardous waste.

Background Information

What is a baseline risk assessment and how are the results used?
A baseline risk assessment characterizes current and future cancer risks and non-cancer hazards posed by exposure to site contaminants. Cancer risks and non-cancer hazards are generally calculated by combining estimates of exposure to contaminants with toxicity levels.

Risk managers use the results of the baseline risk assessment or chemical specific standards (such as Maximum Containment Levels (MCLs) or other Federal and State Applicable or Relevant and Appropriate Requirements (ARARs)) to establish the need to clean up a site. Generally cleanup is warranted where the baseline risk assessment for an individual, using Reasonable Maximum Exposure (RME) assumptions, indicates that the risk exceeds a greater than 10^{-4} lifetime excess cancer risk or the Hazard Index (HI) for non-cancer hazards exceeds one.

What is an exposure scenario?
An exposure scenario is comprised of six elements: a medium (e.g., groundwater, soil, sediment, or surface water), an exposure route (ingestion, inhalation or dermal contact), a time frame (current or future), a location (on-site or off-site), a land use (residential or industrial) and a receptor population (e.g., workers, children or trespassers). The average number of exposure scenarios for a specific medium is between 5 and 10. Generally, the scenario that presents the highest risk is used to define the risk posed by that specific medium. Specific exposure scenarios combine contaminant concentration with other parameters such as contact rate, exposure frequency and duration and body weight.

What is a cancer risk estimate?
Cancer risk estimates represent a statistical upper limit probability of excess cancer cases (above background level) that is associated with environmental contamination. For example, if the risk for a scenario was 1×10^{-4} this would present an upper limit risk of 1 excess cancer case (above background level) per 10,000 people. The table below indicates the various probability estimates used.

Cancer Risk Probability Estimate	Excess Cancer Cases in a Given Population
1×10^{-1}	1 in 10
1×10^{-2}	1 in 100
1×10^{-3}	1 in 1,000
1×10^{-4}	1 in 10,000
1×10^{-5}	1 in 100,000
1×10^{-6}	1 in 1,000,000

What is a Hazard Quotient (HQ)?
The HQ is the ratio of a contaminant's estimated exposure level to a reference dose for that contaminant. (The reference dose is the threshold level below which it is unlikely for a population to experience adverse non-cancer health effects). If the exposure level exceeds the reference dose, then there may be adverse non-cancer health effects.

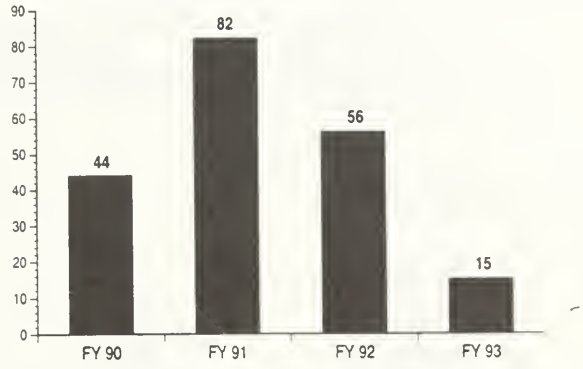
What is the non-cancer Hazard Index (HI) estimate?
The HI is the level below which it is unlikely for a population to experience adverse non-cancer health effects (such as nerve damage, birth defects and liver damage) resulting from exposure to more than one chemical. The HI is the sum of individual HQs for each chemical (e.g., if an individual were exposed to four contaminants in soil, the sum of the four HQs for these contaminants would provided the HI estimate for the exposure scenario).

The greater the HI value for a group of contaminants in a medium is above 1, the greater the chance that adverse non-cancer health effects may result from exposure to that medium.

What is Reasonable Maximum Exposure (RME)?
RME is a measure used to estimate the likelihood of exposure to contaminants at sites. It is the maximum exposure that is reasonably expected to occur at a site, and is therefore a measure of "high-end" exposure, rather than "average" or "worst-case" exposure.

Exhibit 5-1

Distribution by Fiscal Year (FY) of 216 Completed Risk Assessments



This exhibit presents a distribution by FY of the 216 sites for which risk information was taken to support this analysis. Risk information was also obtained from 7 sites where risk assessments were conducted in FY 88 and FY 89. Approximately twice as many risk assessments were expected to have been performed over the period shown (dates not available). As of the time of data collection (September 1993), risk assessments were underway for 45 sites and anticipated for an additional 74 sites.

Data Source

1) *The source:* CERCLIS and Risk Information Collection Forms.

Question #6

Soil Remedies and Principal Contaminants:

As of August 1993, site managers reported 562 Records of Decision (RODs) were signed that address contaminated soil. These RODs have been signed at 478 sites. Treatment was a principal element of the selected remedy in 308 (67%) of the RODs. Almost three-quarters of the RODs where treatment was selected also included a containment technology. The principal contaminants found in the soil at these sites are lead, arsenic, trichloroethene, chromium, cadmium, toluene, tetrachloroethene and benzene.

Where a remedy has been selected for contaminated soil, please indicate the remedy that was selected.

As of August 1993, site managers reported that 562 RODs were signed that address contaminated soil. These RODs have been signed at 478 sites. *(No corresponding exhibit).*

NOTE: The number of RODs signed is greater than the number of total sites because more than one ROD that addresses soil may be signed at a site.

Of the 463 RODs where remedy information is available, site managers reported that 389 RODs that address contaminated soil were signed post-Superfund Amendments and Reauthorization Act (SARA) (between October 17, 1986 and August 1993). These RODs were signed at 347 sites. The remedy selected in 277 of these RODs (71%) included treatment as a principal element and containment was selected in 73 RODs (19%). Non-engineering controls (e.g., institutional controls, monitoring, no action) were selected in 39 RODs (10%). The majority of the RODs (73%) where treatment was a principal element of the selected remedy also included some form of containment.

Of the 463 RODs where remedy information is available, site managers reported that 74 RODs that address contaminated soil were signed pre-SARA (i.e., prior to October 17, 1986). These RODs were signed at 73 sites. The remedy selected in 31 of these RODs (43%) included treatment (e.g., solidification/stabilization, incineration, soil vapor extraction) as a principal element. Containment (e.g., off-site landfilling, surface capping) was selected in 37 RODs (49%). Non-engineering controls (e.g., institutional controls, monitoring, no action) were selected in 6 RODs (8%). The majority of the RODs (68%) where treatment was a principal element of the selected remedy also included some form of containment. *(See Exhibit 6-1).*

These data show a 28% increase in the number of treatment remedies selected after the passage of SARA in 1986. *(See Exhibit 6-1).*

Where a remedy has been selected for contaminated soil, indicate the principal contaminants addressed.

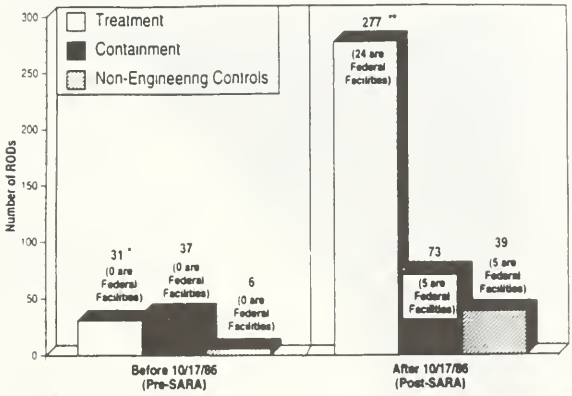
Site managers reported that 562 RODs have been signed to address contaminated soil at 478 sites. At 263 of these sites, at least one of the chemicals on EPA's list of principal contaminants is found in the soil and is being addressed by the remedy selected. At the remaining sites, the RODs may have been signed recently (i.e., fiscal year 1993) and the data is not yet available or the chemicals found at the site are not on EPA's list of principal contaminants.

The contaminants found most frequently in the soil are lead (50%), arsenic (40%), chromium (35%), trichloroethene (35%), cadmium (33%), toluene (30%), tetrachloroethene (29%) and benzene (27%). *(See Exhibit 6-2).*

NOTE: The number of contaminants addressed by RODs is greater than the number of total RODs because more than one contaminant is generally found in the soil at a site.

Exhibit 6-1

Types of Remedies Chosen to Address Soil Contamination



NOTE: The number of RODs is greater than the number of total sites because more than one ROD is often signed at a site

* Includes 21 RODs where containment was also a component of the remedy.

** Includes 202 RODs where containment was also a component of the remedy.

Background Information

What does the Superfund Amendments and Reauthorization Act (SARA) say about remedy selection?

Comprehensive Environmental Recovery, Compensation and Liability Act (CERCLA) was amended in 1986 by SARA. Section 121 of SARA required EPA to select remedies that "utilize permanent solutions and alternative *treatment* technologies to the maximum extent practicable."

What are principal contaminants?

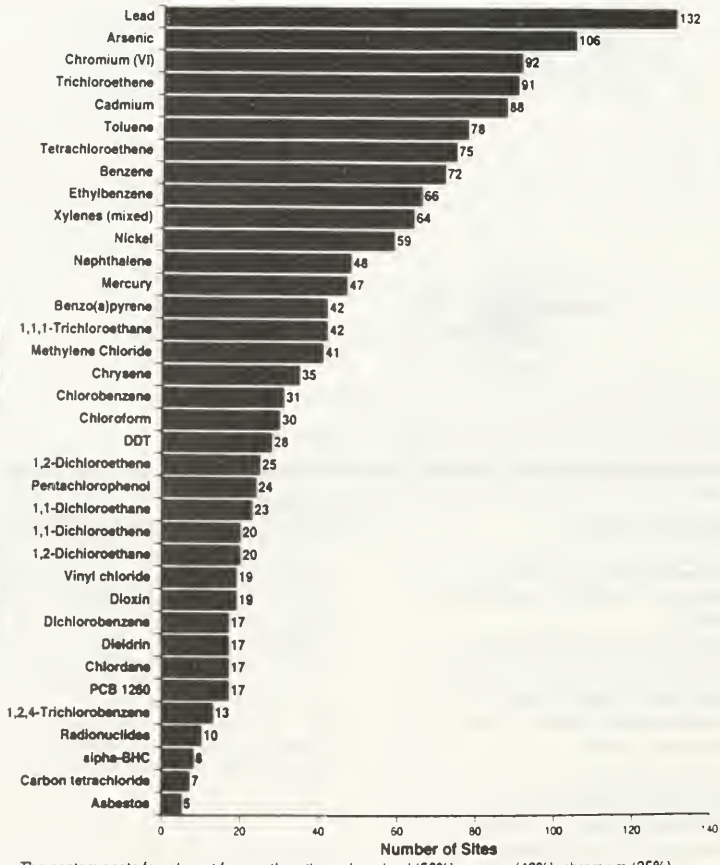
Principal contaminants are those chemicals that represent the most significant threat, in terms of prevalence or toxicity, at sites, or represent unique classes of chemicals (e.g., asbestos or radionuclides) that appear at sites.

Data Source

1) *The source:* August 1993 RPM Data Collection (questions E32 and E36) with information integrated from the ROD Information Database System.
2) *The full universe of sites addressed by the question:* The 1,249 final and deleted sites listed on the NPL as of July 1993 (123 Federal Facilities and 1,126 non-Federal Facility sites)
3) *The subset of the universe for which data are provided:* Those 463 RODs signed to address soil contamination with available remedy data.

Exhibit 6-2

Sites with Principal Contaminants in the Soil Addressed by Signed RODs



The contaminants found most frequently in the soil are lead (50%), arsenic (40%), chromium (35%), trichloroethene (35%), cadmium (33%), toluene (30%), tetrachloroethene (29%) and benzene (27%)

Question #7

Groundwater Adjacent to Superfund Sites:

Most groundwater at or in close proximity to Superfund sites is used as a current source of drinking water and the majority of groundwater aquifers are classified as potential drinking water supplies. Future human consumption of groundwater both on-site and downgradient of the plume was assumed at over one-half of the sites. Approximately 20% of sites with a Record of Decision (ROD) addressing groundwater contamination relied upon natural attenuation as the sole remedy or in conjunction with other technologies.

For each facility at which a ROD addressed groundwater, please provide the following:

a. **current use of groundwater adjacent to the facility (e.g., drinking, irrigation, industrial).**

Of the 582 non-Federal Facility sites reporting RODs signed to address groundwater contamination, site managers reported that groundwater was most commonly used as a source for private domestic wells at 251 sites (43%), while 143 sites (25%) cite groundwater use for the public water supply. Of the 40 Federal Facilities reporting RODs signed to address groundwater contamination, site managers reported that groundwater was mostly used for the public water supply at 20 sites (50%), while 17 sites (43%) cite primary groundwater use for agricultural purposes. Other uses of groundwater adjacent to National Priorities List (NPL) sites are provided in *Exhibit 7-1*.

NOTE: To ensure a response that would show all uses of the aquifer in close proximity to the site, EPA site managers were asked to identify uses of the groundwater **underneath and** adjacent to the site. This ensures that any uses within the site boundaries, but not directly affected by contamination, are represented.

b. **current groundwater classification adjacent to the facility (e.g., sole source, potential source, etc.).**

For those sites reporting that groundwater adjacent to either non-Federal Facility sites or Federal Facilities has been classified, the majority have groundwater that is usable or potentially usable as a drinking water source (i.e., Class II designation). In addition, 21% are special groundwaters designated as Class I. *(See Exhibit 7-2).* Of the 388 sites where people are using groundwater for drinking, site managers reported that 67% were potentially threatened by a contaminated plume. *(No corresponding exhibit).*

In addition, many aquifers exchange water with other important water sources. *(See Exhibit 7-3).*

c/d. **assumption for future groundwater use and whether the risk assessment assumed future consumption of the plume *per se* or future downgradient consumption of groundwater.**

Of the 582 non-Federal Facility sites reporting RODs signed to address groundwater contamination, 328 sites (56%) assumed future human consumption of groundwater both on site and downgradient (i.e., beyond the extent) of the plume while 65 sites (11%) assumed future consumption of groundwater only downgradient of the plume. Sixty-nine (69) sites (12%) assumed future consumption of groundwater only on site. Of the 40 Federal Facilities reporting RODs signed to address groundwater contamination, 24 sites (60%) assumed future consumption of groundwater both on site and downgradient of the plume, while 4 sites (10%) assumed future consumption of groundwater only downgradient of the plume. Three (3) sites (8%) assumed future consumption of groundwater only on site. *(See Exhibit 7-4).*

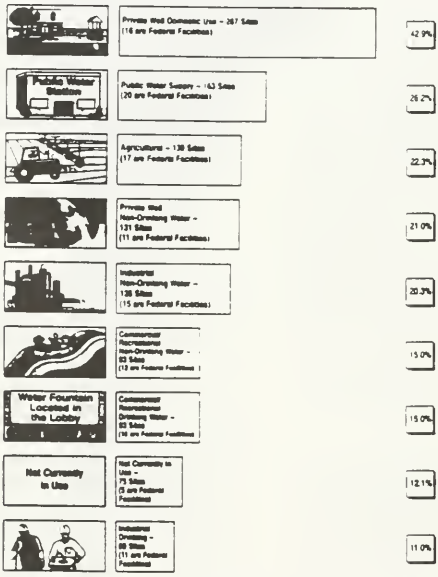
e. If the remedy relied upon natural attenuation for cleanup of plume.

Of the 582 non-Federal Facility sites reporting RODs to address groundwater contamination, 127 sites (22%) relied upon natural attenuation of contamination as the sole remedy or in conjunction with other technologies (i.e., a component of the remedy). Of the 40 Federal Facilities reporting RODs to address groundwater contamination, 8 sites (20%) relied upon natural attenuation of contamination as a component of the remedy. *(No corresponding exhibit).*

NOTE. Preliminary investigations being conducted by EPA to develop groundwater presumptive remedies indicate that the survey estimates of reliance on natural attenuation may be high

Exhibit 7-1

Uses of Groundwater Underneath and Adjacent to Superfund Sites

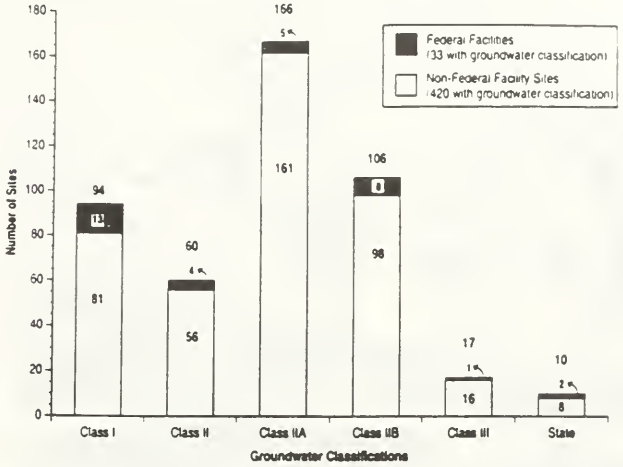


Groundwater in the vicinity of non-Federal Facility sites is most commonly used as a source for private domestic wells. Groundwater in the vicinity of Federal Facilities is most commonly used for the public water supply

NOTE: 1) A single source of groundwater can be used for multiple purposes. For this reason, the percentages shown in the chart do not add up to 100%.

2) Site managers answered 'Unknown' for 10% of non-Federal Facility sites and 5% of Federal Facilities. Answers were not provided for 7.4% of non-Federal Facility sites and 2.5% of Federal Facilities.

Exhibit 7-2
Groundwater Classifications at Superfund Sites



EPA Description

Class	Description
I	Special groundwaters. Either irreplaceable sources of drinking water (e.g., sole source aquifers) or those supporting ecologically vital environments (e.g., habitat for endangered species)
II	Current and/or potential sources of drinking water. In this survey the distinction between current and potential was not provided.
IIa	Current sources of drinking water
IIb	Potential sources of drinking water, based on water quality and potential yield.
III	Not a potential source of drinking water and of limited beneficial use, based on water quality and potential yield.

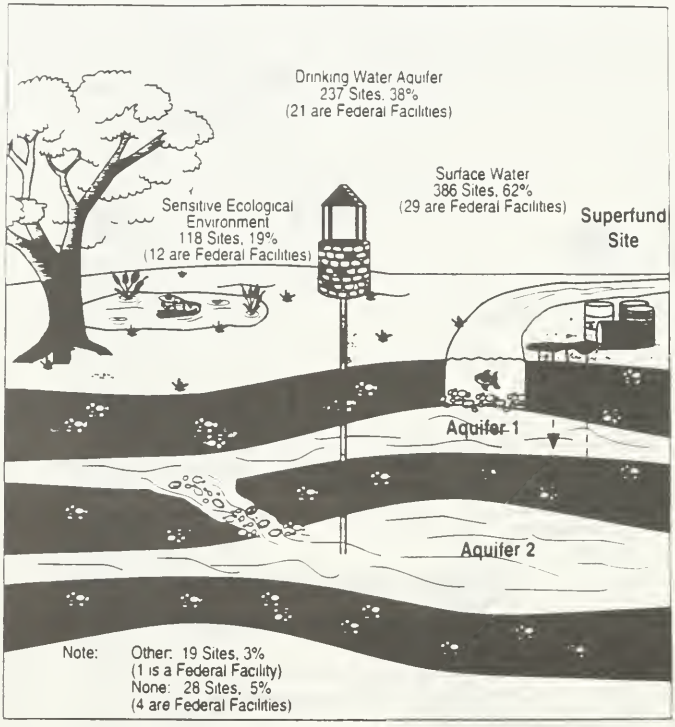
Other Classifications

State	Classification is based on a State law or regulation. Such a classification is unique to the State in which it is located.

For those sites reporting that groundwater adjacent to either non-Federal Facility sites or Federal Facilities has been classified, the majority have groundwater that is usable or potentially usable as a drinking water source (i.e., Class II designation).

NOTE: Groundwater was either not classified or the classification was unknown at 169 sites. The Superfund program classifies groundwater when necessary to determine a remedial action. In some cases, the groundwater is not classified (e.g., when an alternate water supply is provided). Consequently the number of sites with a groundwater classification is less than the number of sites with a groundwater ROD.

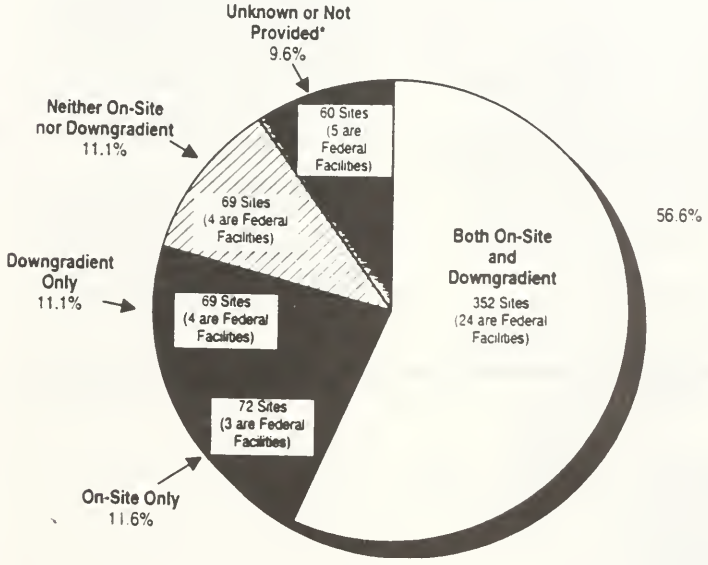
Exhibit 7-3
Where Does the Affected Aquifer Discharge?



Aquifers underneath and adjacent to both non-Federal Facility sites and Federal Facilities most often discharge into surface water

NOTE: The number of affected areas exceeds the number of Superfund sites because one aquifer may discharge into multiple environs. Site managers answered 'Unknown' for 72 sites and 'Not Applicable' for 9 sites. Answers were not provided for 24 sites.

Exhibit 7-4
Projected Human Consumption of Groundwater at NPL Sites



* Sites are only included in this category where site managers responded 'Unknown' or did not respond to assumptions for *both* on-site and downgradient human consumption.

Data Source

1) *The source:* August 1993 RPM Data Collection (questions E37a, E37b, E37c, E38a, E38b, E39, E40, E42 and E43)
2) *The full universe of sites addressed by the question:* The 1,249 final and deleted NPL sites as of July 1993.
3) *The subset of the universe for which data are provided:* Those sites with groundwater RODs signed prior to July 1993. 622 sites and 745 RODs, which include 582 non-Federal Facility sites reporting 690 RODs and 40 Federal Facilities reporting 55 RODs.

Background Information

There have been 690 RODs signed to evaluate contamination of groundwater at 582 non-Federal Facility sites and 55 RODs signed to address groundwater contamination at 40 Federal Facilities with groundwater contamination.

How is groundwater classified?
Groundwater is generally classified according to its quality, quantity and intended use. The Federal classification scheme distinguishes between groundwaters that are currently used for drinking water purposes, those that are potentially usable for drinking water and those that, due to poor quality or insufficient quantity, are not suitable for drinking water purposes. States also may have their own, unique classification scheme.

What is natural attenuation?
Natural attenuation refers to the processes of biodegradation, dispersion, dilution and absorption of contaminants found in groundwater. In limited situations where the chemical and biological conditions of the contaminated aquifer are favorable, natural attenuation may be capable of reducing contaminant concentrations to acceptable health-based levels over time. However, for natural attenuation to be effective, it must generally be preceded by source removal or control measures and other active forms of remediation.

When is a water supply considered to be a public water supply?
EPA considers water supplies to be public if the water system has at least 15 service connections or serves an average of at least 25 year-round residents. EPA regulations under the Safe Drinking Water Act apply to all public water supplies. Certain EPA drinking water standards also apply to water systems that regularly serve at least 25 of the same people for more than 6 months per year (e.g., rural schools).

Question #8

Groundwater Contamination:

As of August 1993, site managers reported 745 Records of Decision (RODs) were signed that address groundwater contamination. These RODs were signed at 622 sites. The primary objective of RODs at the vast majority of the sites (84%) is to restore the groundwater to beneficial use.

Based on the September 1993 Dense Non-Aqueous Phase Liquid (DNAPL) survey results, EPA estimates that there is a medium to high likelihood that DNAPLs will be present at almost 60% of all National Priorities List (NPL) sites.

For each facility where a remedy has been selected for groundwater, please indicate the remedy that was selected.

Site managers reported 745 RODs for 622 sites that address groundwater contamination have been signed as of August 1993 *(No corresponding exhibit)*.

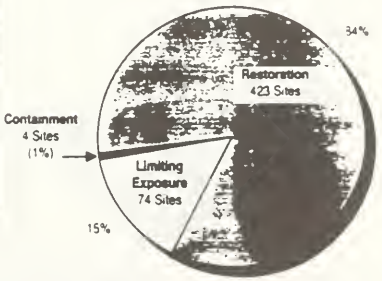
EPA selects remedies to address groundwater contamination that meets one or more of the following three objectives (in priority order): 1) restoration of the groundwater to beneficial use through the use of treatment technologies or natural attenuation; 2) containment of the contaminated groundwater through the use of subsurface barriers (e.g., slurry wall); or 3) controlling or limiting direct exposure to the contamination (e.g., providing an alternate water supply, closing wells).

Remedy data are available for 501 of the 622 sites with RODs that address groundwater. Of these 501 sites, the highest objective to be achieved at 423 sites (84%) is restoration of the groundwater to beneficial use. At least 25% of these 423 sites include the achievement of one additional objective, such as providing an alternate water supply or containing a portion of the contaminated groundwater aquifer. In addition, 4 sites (1%) have as their highest objective to contain the contaminated groundwater; and 74 sites (15%) have the sole objective to limit/control exposure *(See Exhibit 8-1)*.

At 80% of the sites, remedies were selected that include pumping and treating the contaminated groundwater.

NOTE: The number of RODs signed is greater than the number of total sites because more than one ROD that addresses groundwater may be signed at a site.

Exhibit 8-1
Objectives of Groundwater Remedies at Sites



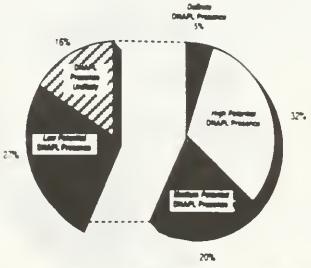
Of the 501 sites where remedy information is available, 84% have as their highest objective restoration of the groundwater to beneficial use.

NOTE: During implementation of a specific technology to restore the groundwater, EPA may also take action to limit exposure to the contamination.

For each facility where a remedy has been selected for groundwater, please indicate whether DNAPL contamination is highly likely.

The study released in September 1993, titled "An Evaluation of the Likelihood of DNAPL Presence at NPL Sites," surveys existing data for sites to retrospectively determine the potential for DNAPLs to be present in the groundwater. In the study, EPA estimates that approximately 5% of NPL sites will exhibit definite DNAPL presence via a visual observation and 52% of sites have a medium to high likelihood of DNAPL presence. Twenty-seven percent (27%) of sites have a *low potential*, and 16% of the sites are *unlikely* to have DNAPLs present. The study shows that certain factors, such as site use and site contaminants, correlate well with the presence of DNAPLs. *(See Exhibit 8-2)*

Exhibit 8-2
DNAPL Contamination in Groundwater



NOTE: This graphic reflects the entire NPL as extrapolated from a focused sample of sites in five of the ten EPA Regions.

For each groundwater remedy where DNAPL contamination is highly likely, please provide the following information:

a. **Was the ROD(s) involving groundwater signed before or after EPA's May 1992 guidance on DNAPL sites?**

The September 1993 DNAPL study focuses on 302 sites, 185 of which have signed RODs that address groundwater. The DNAPL study further indicates that at 97 of these sites, the presence of DNAPLs is *definite* or *highly likely*. Site managers reported that 135 RODs that address groundwater have been signed at these sites. Of these, only 19 RODs (14%) have been signed since EPA issued the new DNAPL guidance in May 1992. One (1) of these RODs was signed at a Federal Facility. The remaining 116 RODs were signed prior to May 1992. Two (2) of these RODs were at Federal Facilities. *(No corresponding exhibit)*

Data Source

1) *Sources.* 1) "An Evaluation of the Likelihood of DNAPL Presence at NPL Sites" (NTIS #PB93-963343, September 1993); 2) EPA Analysis of Technical Impracticability Waivers, (Internal Document, June 1993), and 3) RPM Data Collection (questions E32, E36, E46 and E47 with information integrated from the ROD Information Database System)
2) *The full universe of sites addressed by the question.* The 1,249 final and deleted sites on the NPL as of July 1993 (123 Federal Facilities and 1,126 non-Federal Facility sites)
3) *The subset of the universe for which data are provided:* The 501 sites listed on the NPL with RODs that address groundwater contamination and where remedy data are available.

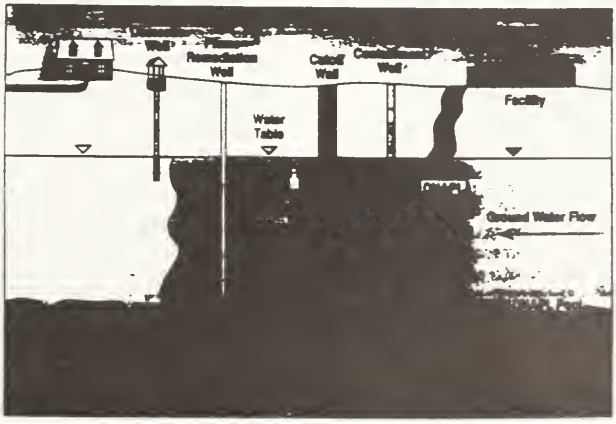
b/c. Did the selected remedy seek to return groundwater to drinking water standards and/or did the selected remedy have containment pumping as its goal?

EPA recently issued guidance on the limited exceptions to the Agency's primary objective of returning contaminated groundwater to beneficial use. This guidance states that "where it is technically practicable to contain the long-term sources of contamination, such as the DNAPL zone, EPA expects to restore the aqueous contaminant plume outside the DNAPL zone to required cleanup levels." In addition, the Agency expects to contain or remove the DNAPLs source at sites Consequently, at some sites, more than one response may be appropriate to remediate groundwater contamination Based on the conditions surrounding the source of the contamination and the nature of the dissolved plume, a remedy may include pump and treat, containment and/or natural attenuation. Particularly where free-phase DNAPLs are present, containment pumping facilitates restoration of the dissolved plume

Of the 135 RODs that address groundwater at sites where DNAPL presence is *definite* or *highly likely*, 87 RODs (64%) have a goal of returning at least some portion of the contaminated groundwater to drinking water standards. Two (2) of these remedies are at Federal Facilities. In addition, site managers report 103 RODs (76%) selected containment pumping as a component of the remedy selected. Three (3) of these RODs were at Federal Facilities.

Of the 19 RODs signed since the issuance of the new DNAPL guidance in May 1992, 12 RODs (63%) have a goal of returning at least some portion of the contaminated groundwater to drinking water standards, and 16 of the RODs (84%) include containment pumping as a component of the remedy selected *(See Exhibit 8-3)*

Exhibit 8-3
Sites With DNAPL Containment Remedy



Containment pumping is a common remedy selected to control groundwater contamination. Where free-phase DNAPLs are present, containment pumping facilitates restoration of the dissolved plume. Of 135 RODs reported to address DNAPL contamination in groundwater, 103 RODs (76%) selected containment pumping as a component of the remedy selected. Three (3) of these RODs were at Federal Facilities.

d. **Did EPA invoke a technology feasibility waiver to avoid applying ARARs to the DNAPL cleanup?**

From 1986 through 1992, EPA addressed technical impracticability at 39 NPL sites. EPA waived cleanup standards (ARARs) at the time of the ROD at 13 sites because achieving the standards was technically impracticable based on site conditions. Nine (9) of these waivers were for sites where the presence of DNAPLs may have precluded restoration of groundwater to the cleanup standards in all or part of the contaminated aquifer.

EPA also signed 23 RODs during this period that contained a contingency provision to waive groundwater ARARs due to technical impracticability. Such a contingency allows the Agency to invoke an ARARs waiver in the event that new information, obtained after implementation of the selected remedy, indicates that achieving cleanup standards is technically impracticable. At least 10 of these "contingency waivers" were related to DNAPLs.

In addition, EPA included language waiving ARARs due to technical impracticability in three ROD amendments. At least one of these waivers was related to DNAPLs. ROD amendments are issued by EPA to document a fundamental change in a remedy selected in a ROD based on information obtained after the ROD was approved. A ROD amendment may not be required if such a change was anticipated with contingency language in the original ROD. More than one-half of the 39 technical impracticability determinations were issued subsequent to EPA's May 1992 DNAPL guidance. *(No corresponding exhibit)*

Background Information

What are free-phase Dense Non-Aqueous Phase Liquids (DNAPLs)?

DNAPLs are contaminants that do not readily mix with and are more dense than water in their undiluted form. DNAPLs include a wide range of chemical types and mixtures, including chlorinated solvents, creosote, coal tars, PCBs (polychlorinated biphenyls) and some pesticides. Chlorinated solvents, the most prevalent DNAPLs, can sink to great depths and migrate over large distances from their release point. As a result, DNAPLs can be difficult to locate in the subsurface and are often undetected. As DNAPLs migrate through the subsurface, a portion becomes trapped in the soil pore spaces or fractures and the remainder can continue to migrate or form pools in the soil or aquifer matrix. The portion of DNAPLs that can continue to migrate is called **free-phase DNAPLs**. DNAPLs make groundwater cleanup more difficult because, even though they do not mix, they slowly release dissolved chemicals over a long time, forming a plume of contaminants in the groundwater adjacent to the DNAPLs.

What are Applicable or Relevant and Appropriate Requirements (ARARs)?

ARARs are State or Federal laws, regulations, standards, requirements, criteria, or limitations that are legally applicable or relevant and appropriate to the contaminant of concern or cleanup action being taken at the site. EPA is required to consider all ARARs when selecting a remedy for a site.

What is a Technical Impracticability ARAR Waiver (TI ARAR Waiver)?

Six types of ARAR waivers are identified in Section 121 of the CERCLA, as amended. One of these provisions allows ARARs to be waived if EPA finds that "compliance with such requirements is technically impracticable from an engineering perspective." A decision to waive a groundwater cleanup standard on the grounds of technical impracticability, or a **TI ARAR waiver**, is documented in a Record of Decision (ROD) along with an explanation of why the ARAR cannot be attained. (Part d of this question refers to technical impracticability ARAR waiver as a technical feasibility waiver; however, the correct terminology is technical impracticability ARAR waiver).

Question #9

Cleanup Standards and Soil Exposure Assumptions:

The most affected media at Superfund sites are soil, sediment and groundwater. For the sites where groundwater is contaminated, Federal and State Applicable or Relevant and Appropriate Requirements (ARARs) are often the basis for cleanup for most of the principal contaminants. For most sites soil cleanup levels are established to protect groundwater at the site. Risk assessments are driving cleanup levels in relatively few situations.

Please provide the complete set of cleanup standards (contaminant by contaminant, for each media) used at the facility. Indicate whether the standard was based on risk assessment, MCL, state standard, or other (indicate what other).

Exhibits 9-1 and *9-2* show the total number of sites where particular chemicals were found and the number of sites where the respective bases for cleanup standards were used to establish cleanup concentration levels for various chemicals. These exhibits present data for 42 specific chemicals and the category of radionuclides that represent the most significant threats at sites in either soil or groundwater. The 42 chemicals were chosen because of their prevalence and toxicity, or because they represent unique classes of chemicals that appear at sites (e.g., asbestos, radionuclides). These data are taken from a universe of 194 sites for which detailed risk and cleanup level data were taken from site characterization documents and Records of Decision (RODs) (from Question 5). Chemicals are listed only for media in which they have been found.

Not all chemicals are found at every site. Furthermore, cleanup standards are not necessarily developed for every contaminant at every site (e.g., a chemical may be present at a site below a level of concern, therefore, cleanup levels would not be developed for that chemical at that site). However, at some sites, chemical standards were listed for every chemical found at that site, not just those found to be posing a significant threat at that site. Also, a particular chemical may have a cleanup concentration level with more than one basis (e.g., a State ARAR and a Federal MCL) established at the same concentration level, and both serve as the basis of cleanup.

Where a cleanup standard has been established for soil based on a risk assessment initiated after October 17, 1986 please indicate the date of completion of the risk assessment and each of the exposure assumptions used for each cleanup standard.

At 33 of the 194 sites, soil cleanup standards were based on a risk assessment that was initiated after October [illegible] with a ROD signed after September 30, 1990. These 33 sites do not include sites where soil cleanup levels were based on modeling from groundwater MCLs, Maximum Contaminant Level Goals (MCLGs) or other standards applicable to soil concentration where soil contaminants leach to groundwater.

Risk-based soil cleanup standards for sites may be based on more than one exposure route. For example, ingestion and inhalation of dust-blown soil may be combined into a composite soil exposure scenario that serves as the basis for setting risk-based cleanup levels. For answers to the remainder of this question, soil cleanup standards for sites may be based on more than one set of exposure assumptions.

NOTE: Because more than one set of exposure assumptions (i.e., exposure route, durations or frequencies) may be considered in developing a soil cleanup level, the number of times different exposure assumptions appear may be greater than the total universe of sites. (*No corresponding exhibit*).

a. **Was the driving factor establishing the standard soil ingestion, leaching to groundwater or other routes of exposure, (please indicate what other, e.g., dermal, inhalation)?**

The most common exposure routes of contaminants through the soil medium used to determine soil cleanup standards are ingestion, dermal exposure and soil inhalation.

Out of a total universe of 33 sites, the ingestion route was used in establishing cleanup levels at 28 sites, dermal contact was used in 19 sites, inhalation was used in 14 sites; ingestion of contaminated food was used in 3 sites; and another exposure route was used at 1 site *(No corresponding exhibit)*

b. **What are the number of total years and number of days per year of exposure to the facility, broken down by age of exposed individual where appropriate?**

At 24 out of 33 sites, exposure to children (6 years or younger) was determined to be relevant. At 4 out of these 24 sites, exposure was assumed to occur over a period of 3 years or less for children. At 20 out of 24 sites, 4 to 6 years of exposure was assumed. (The frequency of exposure was assumed to be greater than 200 days/year at 15 of 24 sites, between 101 and 200 days/year at 5 sites, and less than 100 days/year at 4 sites.)

For adults, defined as older than 6 years, at all 33 of the sites, 17 or less years of exposure was assumed, at 27 of 33 sites between 18 and 30 years of exposure was assumed; and at 2 of 33 sites greater than 30 years of exposure was assumed. (The frequency of exposure was assumed to be less than 200 days/year at 32 of 33 sites, between 101 and 200 days/year at 17 of 33 sites and 100 or less days/year at 13 sites.)

NOTE: Because more than one duration of exposure was considered to be important at some sites, the sum of all durations of exposure for adults is greater than the universe of sites *(No corresponding exhibit)*.

c. **What is the amount of soil ingested per day of exposure, broken down by age of exposed individual where appropriate?**

At 23 of 24 sites where exposure to children was determined to be relevant, children were assumed to ingest 200 mg/day of contaminated soil. At 1 of 24 sites, 100 mg/day was the assumed ingestion rate. Adults were assumed to ingest less than 100 mg/day at 11 of 33 sites. At 30 of 33 sites, adults were assumed to ingest between 100 and 120 mg/day. At 7 of 33 sites, adults were assumed to ingest 200 or greater mg/day *(No corresponding exhibit)*.

d. **Was exposure to contaminated soil assumed to occur to maximum concentrations found at the facility, average concentration, or other (indicate what other).**

In assessing risks from soil contamination, the measure of concentration used in the baseline risk assessment was the reasonable maximum exposure (RME) at 23 of 33 sites, maximum concentration at 9 of 33 sites and another measure of concentration at one of 33 sites. (See Background Information for discussion of different measures of soil concentration) *(No corresponding exhibit)*.

e. **Were any of the contaminants used to calculate risk assumed to degrade in soil over time (thereby decreasing exposure)?**

At only 1 of 33 sites, some contaminants are assumed to degrade over time *(No corresponding exhibit)*

NOTE: Degradation of contaminants can be very uncertain and difficult to estimate. Many contaminants, such as metals and complex organic compounds, do not degrade at all or degrade extremely slowly

Data Source

1) *The source:* August 1993 Human Health and Soil Ingestion Data Collection Forms.
2) *The full universe of sites addressed by the question* 1,249 final and deleted sites listed on the NPL as of July 1993.
3) *The subset of the universe for which data are provided:* The 33 sites where an RI, FS or a combined RI/FS was started after October 17, 1986, a ROD addressing soil contamination was signed after September 30, 1990, a risk assessment has been completed and soil cleanup goals are based on a completed risk assessment.

Exhibit 9-1

Basis of Standards for Principal Contaminants in Groundwater at 103 Sites

Contaminant	Number of Sites per Basis of Cleanup Standard					
	MCL	MCLG	RCRA Land Disposal	Risk Assessment	State ARAR	Other
1,1 Dichloroethene	3	1		1	3	2
1,2 Dichloroethane					1	
1,2 Dichloroethene					5	
Arsenic	21	1	1		5	
Benzene	7					
Benzo (a) pyrene	2					
BHC, alpha						1
Cadmium	14		1		5	5
Carbon Tetrachloride	7					
Chlordane	2					
Chlorobenzene	7			1	6	3
Chloroform	12			2	6	3
Chromium	4					
DDT				2		1
Dichlorobenzene	1			1		
Dieldrin				2	1	2
Dioxin	1					1
Ethylbenzene	10	1		1	14	4
Lead	9		1		9	21
Mercury	9				6	1
Methylene Chloride	4			1	3	1
Naphthalene	1			4	3	4
Nickel	4					
Pentachlorophenol	4			1		
Radionuclides	1					2
Tetrachloroethene	6			1	3	4
Toluene	17	2			13	4
Trichloroethane		1		1	1	3
Trichloroethene	10			1	2	4
Vinyl Chloride	29	1		2	24	7
Xylenes	1				12	

MCL - Maximum Contaminant Level
MCLG - Maximum Contaminant Level Goal

RCRA - Resource Conservation and Recovery Act
ARAR - Applicable or Relevant and Appropriate Requirements

NOTE: A particular chemical may have a cleanup concentration level with more than 1 basis (e.g., a State ARAR and a Federal MCL) established at the same concentration level, and both serve as the basis for cleanup.

Exhibit 9-2

Basis of Standards for Principal Contaminants in Soil at 166 Sites

Contaminant	Number of Sites per Basis of Cleanup Standard							
	MCL	MCLG	RCRA	RCRA Land Disposal	Clean Water Act	Risk Assessment	State ARAR	Other
1,1 Dichloroethene	1							2
Arsenic	1	1	1	3	1	12	2	
Asbestos								1
Benzene			1					
BHC, alpha						2		
Cadmium				5		3	3	4
Chlordane						1		
Chlorobenzene						1		
Chloroform	1						1	
Chromium			1					
Chrysene			1			1	1	
DDT			1			2		1
Dieldrin						2		
Dioxin						2	1	1
Ethylbenzene			1			1	3	5
Lead				2	1	8	4	15
Mercury						5	2	1
Methylene Chloride						3	1	1
Naphthalene			1			1	1	4
Nickel			1					
Radionuclides						1		1
Tetrachloroethene	1							1
Toluene	1		1		1	2	3	
Trichloroethene	1							2
Vinyl Chloride	1						2	1

MCL - Maximum Contaminant Level
MCLG - Maximum Contaminant Level Goal
RCRA - Resource Conservation and Recovery Act
ARAR - Applicable or Relevant and Appropriate Requirements

NOTE: A particular chemical may have a cleanup concentration level with more than 1 basis (e.g., a State ARAR and a Federal MCL) established at the same concentration level, and both serve as the basis for cleanup. Generally, the baseline risk assessment basis for the cleanup level applies to sites where direct contact (inhalation, dermal contact, or ingestion) are actual or potential threats. In some situations, it may include modeling of contaminants leaching from soil to groundwater. The MCL, MCLG, and "other" basis for cleanup standards reflect the threat posed by contaminants leaching from soil to groundwater. "Other" also includes partitioning of contaminants from sediment to surface water and application of ambient water quality criteria in surface water.

Background Information

What are cleanup standards?
Cleanup standards, developed by State or Federal agencies, are concentrations of contaminants that are considered acceptable (i.e., do not pose a threat to potential receptors). In the Superfund program, many cleanup standards are adopted from other Federal and State environmental laws. For example, Maximum Contaminant Levels (MCLs) and MCL Goals (MCLGs) from the Safe Drinking Water Act have been adopted as standards for Superfund. States can have their own standards which may be more stringent than Federal standards. Some States have also developed cleanup standards for soil. Other Applicable or Relevant and Appropriate Requirements (ARARs) also may provide cleanup levels.

What is a risk assessment?
A risk assessment characterizes risks, either actual or potential, posed to human health and the environment by site contaminants. Site managers use the results of the assessments to help determine whether a cleanup is warranted and the appropriate remedies for addressing the risks posed by the site.

How are populations categorized for risk assessment?
Risk assessment assumptions are often categorized into child and adult age groups. These groups account for significant differences in behavior, activities and body weight that would affect exposure to contaminants. Risk assessors take into consideration that these situations may change, for example, children growing into adults while living near a Superfund site.

What are different exposure concentrations?
EPA guidance states that an arithmetic average soil concentration should be used in all Superfund exposure/risk assessments. However, the number of samples collected at each site varies considerably, and over the years assessments have been submitted to the Agency with averages based on a limited number of samples. As a way to deal with the uncertainty involved in calculating the "true" average soil concentration at a site (especially with limited data sets), the 95 percent upper-confidence limit (UCL_{95}) on the arithmetic mean is preferred.

This term is referred to here as the reasonable maximum exposure (RME) concentration. In cases where the data are limited or there is extreme variability in the measured (or modeled) data, the UCL_{95} can be much higher than the highest concentration measured at the site. If additional samples cannot be collected, the highest measured (or modeled value) is often used as a default to represent the exposure point concentration. However, the true site mean may actually be *higher* than this maximum value, because the UCL_{95} indicates that a higher mean is possible.

Question #10

Land Use:

Less than one-half (44%) of National Priorities List (NPL) sites have a single on-site land use. The most common current land uses on sites are industrial, none (e.g., abandoned) and commercial. In addition, 15% of the sites currently have residents living on site.

More than three-quarters (76%) of sites have a mixed land use surrounding the site. Seventy-nine percent (79%) of sites have residential land use surrounding them. About 72.8 million people live within 4 miles of a site.

In the future, one-half of the sites are expected to have a single land use. Land uses at sites are expected to be industrial, residential and commercial. In the future, land uses adjacent to sites are expected to be primarily residential.

NOTE: Due to the nature of the land use questions, site managers may not have been able to answer all questions for each site. There are four types of land use portrayed (current site land use, current land use surrounding the site, expected future land use and expected future land use surrounding the site), the number of responses differs for each.

Please provide the following information:

a. current land use of the facility *per se*.

Forty-four percent (44%) of sites currently have a single land use, 29% have no active current land use, and 26% have two or more current land uses based on the 1,247 sites reporting (out of all 1,249 sites). Current site use is Unknown at 1% of the NPL sites reporting.

Of the 551 sites reporting a single on-site land use, the most frequent uses are other (e.g., closed landfill, wetlands), industrial and commercial. Of the sites reporting multiple on-site land uses, the most frequent uses are industrial, commercial and residential. *(See Exhibit 10-1 for a comparison of current and future expected single and multiple on-site land uses.)*

Combining *all* (single and multiple) current on-site land uses reported, the most frequent uses are industrial, none, (e.g., abandoned) and commercial. *(See Exhibit 10-2 for a comparison of all current on-site and surrounding land uses.)*

b. current adjacent land use.

Seventy-six percent (76%) of sites have mixed land use (two or more uses) surrounding the site, while 23% have a single land use. Of the 1,245 sites reporting, only one is surrounded by land that is not in use. *(No corresponding exhibit).*

Of the 1,245 sites reporting current land uses surrounding the site, the majority are residential, commercial and agricultural. *(See Exhibit 10-2 for a comparison of all current on-site and surrounding land uses.)*

NOTE: In this survey, land use for areas *surrounding* sites was defined as any use in "close proximity" to sites. This term allows for more than simply abutting or adjacent land uses.

c. if current adjacent land use includes residential use, number of people living near the site.

A preliminary review of Census data suggests approximately 72.8 million people living within 4 miles from the center of 1,193 sites. The method employed by Superfund (see Background Information) does not provide an accurate and reliable estimate for very small geographic areas. *(No corresponding exhibit)*

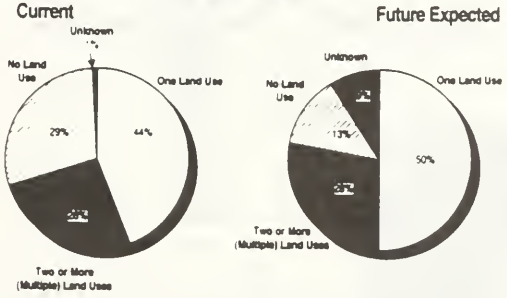
d. **assumption for future land use of the facility *per se* (e.g., industrial, residential, etc.).**

Fifty percent (50%) of the sites are expected to have a single use in the future; 28% are expected to have two or more uses and 13% are not expected to be in use based on the 889 sites reporting (out of all 1,249 sites). The future site use is 'Unknown' at 9% of sites.

Of the 446 sites reporting a single future land use on site, the most frequent uses are expected to be industrial, other (e.g., closed landfills, wetlands) and residential. Of the 245 sites reporting multiple future land uses on site, the most frequent uses are residential, commercial and industrial. *(See Exhibit 10-1 for a comparison of current and future expected single and multiple on-site land uses).*

Combining *all* (single and multiple) future on-site land uses reported, the most frequent uses are expected to be industrial, residential and commercial. *(See Exhibit 10-3 for a comparison of all future expected on-site and surrounding land uses).*

Exhibit 10-1
On-Site Land Uses at Sites



Current

	Single-Use Sites	Multiple-Use	Total Sites with Each Use
Industrial	170	214	384
Commercial	117	200	317
Other *	208	81	289
Residential	19	173	192
Recreational	23	115	138
Agricultural	13	56	69
Educational	1	54	55

Future Expected

	Single-Use Sites	Multiple-Use	Total Sites with Each Use
Industrial	159	145	304
Residential	69	162	231
Commercial	62	152	214
Other *	98	32	130
Recreational	42	87	129
Agricultural	15	47	62
Educational	1	28	29

* The 'Other' category includes closed landfills, military, undeveloped lands, wetlands and wildlife habitats.

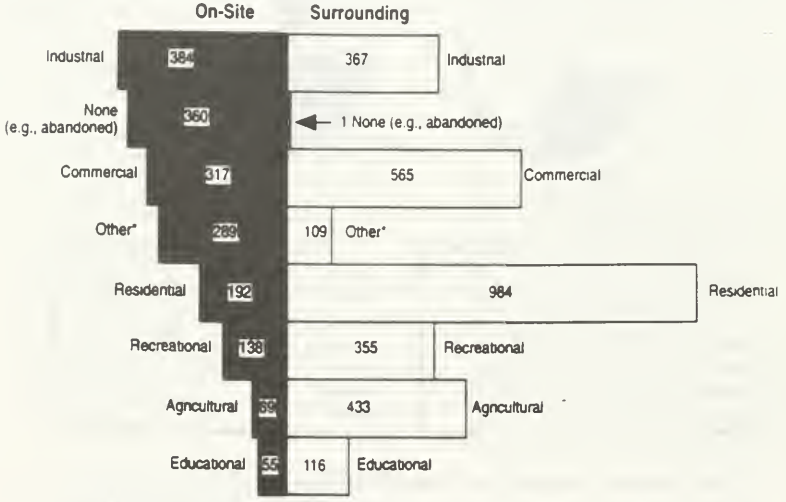
NOTE: Current on-site land uses represent data from 1,247 sites responding while future expected on-site land uses represent data from 889 sites responding. These land-use numbers add up to more than the total number of sites reporting because there may be more than one current or expected land use at a given site.

e. **assumption for future adjacent land use (industrial, residential, etc.).**

Seventy-three percent (73%) of sites are expected to have mixed uses surrounding the sites, while 24% will have a single land use surrounding the site based on the 881 sites reporting (out of all 1,249 sites). Only 1% expect to have no land use surrounding the site. Future surrounding land use was reported as 'Unknown' at 2% of the sites. *(No corresponding exhibit).*

The expected future land uses for areas *surrounding* the majority of sites are residential, industrial and commercial. *(See Exhibit 10-3 for a comparison of all future expected on-site and surrounding land uses.)*

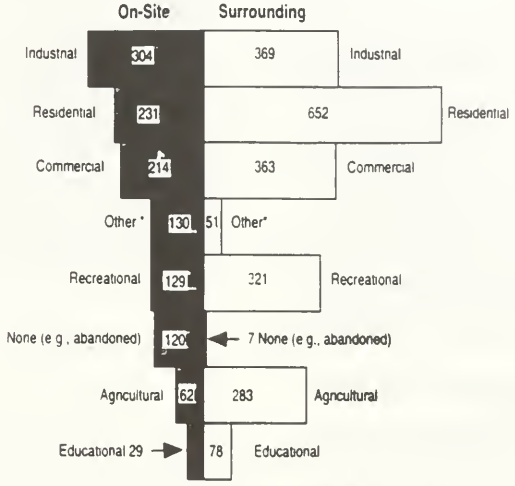
Exhibit 10-2
Current On-Site and Surrounding Land Uses of Sites



* The 'Other' category includes: closed landfills, military, undeveloped lands, wetlands and wildlife habitats.

NOTE: Of the 1,249 final and deleted NPL sites (123 Federal Facilities and 1,126 non-Federal Facility sites), on-site land uses reflect data from 1,247 sites reporting while surrounding land uses reflect data from 1,245 sites reporting. These current land-use numbers add up to more than the total number of sites reporting because there may be more than one land use at or surrounding a given site.

Exhibit 10-3
Future Land Use of Sites



* The 'Other' category includes: closed landfills, military, undeveloped lands, wetlands and wildlife habitats.

NOTE: Of the 1,249 final and deleted NPL sites (123 Federal Facilities and 1,126 non-Federal Facility sites), on-site future land uses reflect data from 889 sites reporting while surrounding future land uses reflect data from 881 sites reporting. These expected land-use numbers add up to more than the total number of sites reporting because there may be more than one expected land use at or surrounding a given site.

Supplemental Information

Currently, 35% of the sites are totally or partially abandoned. In the future, over one-quarter of these sites will continue to be abandoned, but an almost equal number will have residential (25%) or industrial (24%) site uses *(No corresponding exhibit)*.

Site managers reported the future land use at 252 of the sites where the current land use is industrial. The majority of these sites (72%) will continue to have an industrial land use in the future. Other frequently reported future land uses at these sites include commercial (73 sites) and residential (64 sites). *(No corresponding exhibit)*

Of the 231 sites that are expected to have a future residential land use, the most frequently reported current land uses are residential (135 sites), commercial (128 sites) and abandoned (115 sites). *(No corresponding exhibit)*.

Background Information

Assumptions used to provide population information.
The population information is based on a preliminary review of U.S. Census Bureau data. U.S. Census Bureau data is based on units (called "blocks") that vary in configuration and areal extent, especially from urban to rural areas. Census Bureau data identify the centroid of each "block" (around which there is a uniform population count). EPA has utilized the data from the central point at the NPL site and eliminated the potential for double counting where NPL sites are in close proximity to each other. Due to the number of assumptions and the difficulty of comparing Census "blocks" with NPL site boundaries, accurate and reliable population data within 1/4 mile are unavailable at this time.

What is the Graphic Exposure Modeling System (GEMS)?
GEMS is an automated population estimation system which relates area population to a single point. It was developed by EPA's Office of Toxic Substances to estimate potential population exposure. The system can account for "double counting" of populations within a given proximity to more than one site. (In this question, the system was used to estimate the population within 4 miles of facilities).

Data Source

1) *The source* August 1993 RPM Data Collection (questions E9a, E9b and E35), CERCLIS and GEMS database
2) *The full universe of sites addressed by the question* The 1,249 final and deleted sites on the NPL as of July 1993 (123 Federal Facilities and 1,126 non-Federal Facility sites)
3) *The subsets of the universe for which data are provided* 1,247 sites responded with current land uses, 1,245 sites responded with current land uses for surrounding areas, 889 sites responded with expected future land uses; 881 sites responded with expected future land uses for surrounding areas, and GEMS information correlated to the latitudes and longitudes at 1,193 sites

Question #11

ATSDR Recommendations and Follow-Up:

ATSDR has initiated follow-up studies for 15% of the sites for which the need for follow-up health studies has been identified.

Please identify whether ATSDR has indicated that a more in-depth study under Section 104(i) is needed after the health assessment is completed. Indicate for each such facility whether such a study is planned, underway, or completed and identify the type of study.

SARA Section 104(i) requires ATSDR to complete a Public Health Assessment within one year of the date that a site is proposed to the National Priorities List (NPL). ATSDR has completed at least one Public Health Assessment for over 1,249 NPL sites.

Background Information

What is the Purpose of an ATSDR Public Health Assessment?

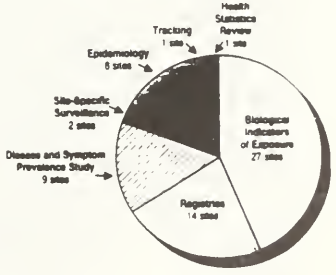
ATSDR Public Health Assessments assist in determining whether actions should be taken to reduce human exposure to hazardous substances from a site, whether additional information on human exposure is needed, and whether specific health follow-up studies should be undertaken for a site. Follow-up health studies may include epidemiological studies, establishing a registry of exposed individuals, establishing a health surveillance program or other public health related activities.

Data Source

1) ATSDR's HazDat database and Public Health Actions Tracking System.

Exhibit 11-1 shows the types of studies conducted (some sites have more than one study). *Exhibit 11-2* lists the 50 NPL sites (some sites are included in more than one study) at which ATSDR has initiated health studies. These studies include biological indicators of exposure studies, disease and symptom prevalence studies, registries (trichloroethylene, dioxin and benzene), epidemiological studies, and other studies. Twelve (12) studies are complete and 8 studies (at 5 sites) have completed the development of a protocol. In addition, since September 1990, ATSDR has reviewed over 500 NPL sites. These reviews have identified the need for approximately 200 health studies involving 140 sites.

Exhibit 11-1
Types of Health Studies Initiated



NOTE. The number of health studies is greater than the total number of sites because more than one study may be conducted at a site.

[redacted]

Exhibit 11-2
Health Studies Initiated by ATSDR

Site Name	CERCLIS No	Study Type	Study Title	Started	Completed
Aberdeen Pesticides Dump	NCD980843346	Epidemiology	Ety Expo and their Effects on the Immune System NC	9/16/93	
ACME Solvent Reclaiming Inc	ILD053219253	Registries	Trichloroethylene	8/1/88	
Allied Corp Kalamazoo Plt	MID006007506	Biological Indicators of Exposure	Allied Paper/Portage Creek/Kalamazoo River MI	9/30/93	
Anderson Development Co	MID002937228	Epidemiology	Analytic Epidemiologic Study of MBOCA MI	9/25/91	
Baird & McGuire	MAD001041987	Biological Indicators of Exposure	Baird & McGuire Superfund Site MA	*	
Beloit Corp	ILD021440375	Registries	Trichloroethylene	8/1/88	
Bofors Nobel Inc	MID006030373	Epidemiology	Analytic Epidemiologic Study of MBOCA MI	9/25/91	
Brio Refinery Co., Inc.	TXD980625453	Biological Indicators of Exposure	Brio Refining Co.,Dixie Oil Processors TX	2/1/91	
Bunker Hill Mining & Metallurgical Cmplx	IDD048340921	Epidemiology Study	Case Control Study Blood Lead Levels Silver Val ID	11/1/92	
Bunker Hill Mining & Metallurgical Cmplx	IDD048340921	Site Specific Surveillance	Lead Screen Study/Silver Valley Bunker Hill ID	9/30/89	
Byron Salvage Yard	ILD010236230	Registries	Trichloroethylene	8/1/88	
Carson River Mercury Site	NVD980813646	Biological Indicators of Exposure	Carson River Superfund Site NV	*	
Central City-Clear Creek	COD980717557	Biological Indicators of Exposure	Clear Crk/Central City Mine Waste Exp Study CO	9/30/89	
Cherokee County, Kansas	KSD980741862	Biological Indicators of Exposure	Kansas Multi-Site Lead Exposure Study Galena KS	7/1/90	
Commencement Bay-South, Takoma Channel	WAD980726301	Biological Indicators of Exposure	Commencement Bay Exposure Study Tacoma WA	9/1/84	3/31/87
Commencement Bay-South, Takoma Channel	WAD980726301	Biological Indicators of Exposure	Puyallup Tribe Data Assessment of Mortality WA	5/1/89	2/15/91
CONRAIL Railyard Elkhart	IND000715490	Registries	Trichloroethylene	8/1/88	
Cornhusker Army Ammunition Plant	NE2213820234	Disease and Symptom Prevalence	Cornhusker Army Ammunition Plant Hall County NB	8/5/93	
Crossley Farm/Hereford GW	PAD981740061	Registries	Trichloroethylene	8/1/88	
Crystal Chemical Co.	TXD990707010	Biological Indicators of Exposure	Crystal Chem/Pol Co Arsenic Expo Study TX	6/1/88	9/1/90
General Motors/Central Foundary Div	NYD091972554	Biological Indicators of Exposure	St. Regis PCB From Toxic Waste NY	9/30/89	
Griffiss Air Force Base	NY4571924451	Disease and Symptom Prevalence	Griffiss Air Force Base Rome NY	7/16/93	
Hanford - 100-Area (DOE)**	WA1890090075	Disease and Symptom Prevalence	Hanford, WA	*	
Hanford 1100-Area (DOE)**	WA4890090075	Disease and Symptom Prevalence	Hanford WA	*	
Hanford 200-Area (DOE)**	WA1890090078	Disease and Symptom Prevalence	Hanford, WA	*	
Hanford 300-Area (DOE)**	WA2890090077	Disease and Symptom Prevalence	Hanford, WA	*	
Industrial Excess Ldfl	OHD000377911	Biological Indicators of Exposure	Uniontown Voa Blood Testing Near Landfill OH	10/1/87	6/30/88
Interstate Lead Co (ILCO)	ALD041906173	Biological Indicators of Exposure	Leads Child Lead Exposure Study AL	9/15/88	9/1/91
LaSalle Electrical Utilities	ILD980794333	Biological Indicators of Exposure	LaSalle Electrical Utilities IL	9/30/93	
Lipari Landfill	NJD980505416	Tracking System	Voluntary Resident Tracking Database New Jersey	9/1/90	

* Study protocol has been approved; data collection has not started.
**Public Health Assessment under development.
Information based on records in ATSDR's HazDat database, November 1993.

Exhibit 11-2 (continued)
Health Studies Initiated by ATSDR

Site Name	CERCLIS No	Study Type	Study Title	Started	Completed
Maywood Chemical Co	NJD980529782	Health Statistics Review	Maywood Area Cancer Investigation, New Jersey	5/1993	
McClellan AFB	CA4570024337	Disease and Symptom Prevalence	McClellan Air Force Base Sacramento, CA	6/1993	
McGraw-Edison Company	MID005333676	Registries	Trichloroethylene	8/1988	
McKin CO	MED980524278	Biological Indicators of Exposure	McKin Dump Site Health Effects Study, Gray, ME	3/1987	
Minker/Stout/ Romaine Creek Site	MOD980741912	Registries	Dioxin	8/31/87	
New Bedford Site	MAD980731335	Epidemiology	Disease New Bedford, MA, PCB Health Effects Study	6/1984	6/1987
Newsom Brothers Old Reichold Site	MSD980640045	Biological Indicators of Exposure	Newsom Brothers NPL Site Columbia, MS	1988	5/1989
NL Industries/TARACORP Lead SMELT SITE	ILD098137468	Biological Indicators of Exposure	Illinois Multi-Site Lead Exposure Study IL	9/29/90	
Oronogo-Duenweg Mining Belt	MOD980686281	Biological Indicators of Exposure	Missouri Multi Site-Lead Exposure Study Jasper, MO	9/29/90	
OTIS Air National Guard/Camp Edwards	MA2570024487	Disease and Symptom Prevalence	OTIS Air Force Base Falmouth MA	4/1993	
Palmerton Zinc Pile	PAD002395887	Biological Indicators of Exposure	Palmerton Lead And Cadmium Study, Palmerton, PA	3/1991	
Quail Run Mobile Park	MOD980686634	Registries	Dioxin	8/31/87	
Quail Run Mobile Park	MOD980686634	Epidemiology	Missouri Dioxin Adipose Tissue Study	5/1985	8/1987
Rocky Mountain Arsenal	CO5210020769	Biological Indicators of Exposure	RMA Pilot Exp Study Part I, CO	3/1993	9/30/93
Rocky Mountain Arsenal	CO5210020769	Biological Indicators of Exposure	RMA Reproh/neurobehav Disorders in Communities, CO	9/30/91	
Rose-Finish Co.	MID005340068	Epidemiology	Analytic Epidemiologic Study of MBOCA, MI	9/25/91	
RSR Corp**	TXD079343387	Biological Indicators of Exposure	Childhood Blood Lead Yeasng, TX	4/1993	
SE Rockford Groundwater Cont	ILD981000417	Registries	Trichloroethylene	8/1988	
Shenandoah Stables	MOD980685838	Registries	Dioxin	8/31/87	
Silver Bow Creek	MTD980502***	Biological Indicators of Exposure	Silver Bow Creek Superfund Site Rocker, MT	8/1989	11/1992
Silver Bow Creek	MTD980502***	Biological Indicators of Exposure	Silver Bow Creek, Blood Lead Study, Walkerville, MT	8/25/87	3/1988
Smuggler Mountain	COD980680622***	Biological Indicators of Exposure	SMUGGLER Mountain Site Aspen, CO Or Creek Part 1	3/1987	9/1992
Solvents Recovery Service of New England	CTD009771604	Biological Indicators of Exposure	Solvents Recovery Services of New England, CT		
Times Beach	MOD980685226	Registries	Dioxin	8/31/87	
Triumph Mine Tailings Pile**	IDD984666224	Biological Indicators of Exposure	Triumph Porter Mine Dump Site IDAHO	9/1993	
Tucson Intl Airport Area	AZD980737530	Disease and Symptom Prevalence	Tucson International Airport Site AZ		
United Creosoting Co.	TXD980745574	Site-Specific Surveillance	United Creosoting Company NPL TX	9/30/92	
Verona Well Field	MID980753806	Epidemiology	Battle Creek Health Effects Study, MI	2/1985	
Verona Well Field	MID980753806	Registries	Trichloroethylene	8/1988	
VERTAC, Inc.	ARD000025440	Biological Indicators of Exposure	VERTAC Exposure Study Jacksonville, AR	5/1991	
Vestal Water Supply 1-1	NYD980763787	Registries	Benzene	6/2988	
Warner Electric Brake & Clutch Co	ILD008114151	Registries	Trichloroethylene	8/1988	

* Study protocol has been approved; data collection has not started.
**Public Health Assessment under development.
Information based on records in ATSDR's HazDat database, November 1993.

Question #12

Site Operations:

The majority (69%) of all non-Federal Facility sites report a single past use, while the remaining sites (31%) report multiple uses. Of the 750 single-use sites, the most common category of activities was waste management (362 sites), followed by industrial (230 sites) and miscellaneous (223 sites). Of the 333 multiple-use sites, past industrial activities were cited most often (at 242 sites), followed by miscellaneous (at 223 sites) and waste management activities (at 160 sites).

Of all 1,083 non-Federal Facility sites reporting, the most common waste management activity involved the operation of landfills (267 sites).

For non-federal sites only, please identify what kind of operation/activity was present at the facility, from the list of possible operations/activities provided. Only one category should apply to each facility.

Of the 1,083 non-Federal Facility sites providing information on past activities, 750 sites (69%) had a single past use and 333 sites (31%) had multiple uses. Of the 750 sites reporting a single past use, the most common category of activities was waste management (362 sites), followed by industrial (230 sites) and miscellaneous (158 sites).

Almost one-half of the sites in the single-use category reported past waste management activities. The primary waste management activity at National Priorities List (NPL) sites involved the operation of landfills. The most common past industrial activity associated with single-use sites involved the production of "Chemicals and Allied Products (Standard Industrial Classification (SIC) code 28)" (71 sites). *(See Exhibit 12-1 for other types of operations at single-use industrial sites).*

Of the 333 sites with multiple uses, some sites had multiple activities over time (e.g., the facility changed operations), while at other sites there were two or more concurrent uses. Thus the total number of uses exceeds the number of sites. The most common category of past activities was industrial (at 242 sites), followed by miscellaneous (at 223 sites) and waste management (at 160 sites). *(No corresponding exhibit)*

Background Information

About Site Activities

At many Superfund sites a variety of production and waste management activities caused contamination. For example, an industrial site might have had several past production processes, as well as several practices for managing the waste generated by these processes. As a result, most of the non-Federal Facility sites fall into the 'Other' category as defined by the Congressional inquiry. In order to more accurately categorize sites, EPA requested that site managers provide a listing of *all* Standard Industrial Classification (SIC) Codes that characterize the *range* of past site activities.

What Is a Standard Industrial Classification (SIC) Code?

The SIC was developed to classify establishments by the type of activity in which they are engaged. The SIC is intended to cover the entire field of economic activities. Major groups of economic activities are designated as two-digit codes and used here in the analysis of past operations at Superfund sites.

Exhibit 12-1
Types of Operations for Single-Use, Industrial, Non-Federal Facility Sites

■ INDUSTRIAL (230 sites)

SIC 28	Chemicals and Allied Products (71 Sites)
SIC 34	Fabricated Metal Products – except machinery and transportation equipment (45 Sites)
SIC 36	Electronic and Other Electrical Equipment and Components – except computer equipment (37 Sites)
SIC 33	Primary Metals Industries (28 Sites)
Other Industrial (49 Sites)	

Data Source

1) *The source:* August 1993 RPM Data Collection (questions E4b and E5), CERCLIS database and Woodtreat database.

2) *The full universe of sites addressed by the question:* Those 1,126 final and deleted non-Federal Facility sites listed on the NPL as of July 1993

3) *The subset of the universe for which data are provided.* The 1,083 out of 1,126 non-Federal Facility sites providing information on past site uses/types

Question #13

Number of Parties at National Priorities List (NPL) Sites:

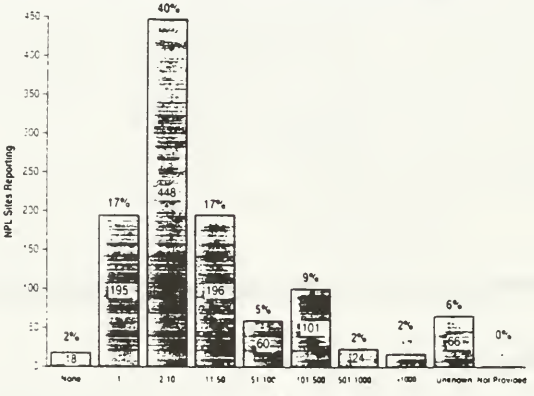
Three-quarters (75%) of the non-Federal Facility sites have between 1 and 50 parties associated with them. Fifty-nine percent (59%) of sites have 10 or less parties associated with them.

Please identify whether the best estimate of the total number of PRPs associated with the facility that could potentially be held liable under section 107 *(irrespective of whether EPA decides to pursue all of them)* is (1), (2-10), (11-50), (51-100), (101-300), (301-1,000), (1,000+).

Three-quarters (75%) of the non-Federal Facility sites (839 out of 1,126) have between 1 and 50 parties associated with them. The mode and median range of parties associated with these sites is between 2 to 10 parties. A breakout of sites by range of parties associated with each site is provided in Exhibit 13-1.

Exhibit 13-1

Number of Parties Associated with Non-Federal Facility Sites *



Three-quarters (75%) of the non-Federal Facility sites reporting (839 out of 1,126 sites) have between 1 and 50 parties associated with them. The mode and median range of parties associated with a site is between 2 to 10 parties.

NOTE: Responses in the 'None' and 'Unknown' categories may include sites where baseline PRP search activities have not been completed.

* This question only addresses 1,126 out of the 1,249 NPL sites because 123 sites are Federal Facilities.

Background Information

What is a "party associated with a site"?
A party associated with a site is one that EPA initially identifies as being potentially liable under CERCLA, and may include owners or operators of the site, generators of the waste, or transporters who disposed of material at the site.

What is a mode?
The mode is defined as the observation which occurs most frequently in a group of observations.

What is a median?
A median has a two-part definition: 1) the median is defined as the middle observation of an odd-numbered group of observations that are ordered from smallest to largest; or 2) the median is defined as the number halfway between the two middle observations of an even-numbered group of observations that are ordered from smallest to largest.

Data Source

1) *The source:* August 1993 RPM Data Collection (question E13)
2) *The full universe of sites addressed by the question:* The 1,126 final and deleted non-Federal Facility sites listed on the NPL as of July 1993
3) *The subset of the universe for which data are provided: Exhibit 13-1* The 1,125 out of 1,126 final and deleted non-Federal Facility sites listed on the NPL that reported parties associated with the site.

Question #14

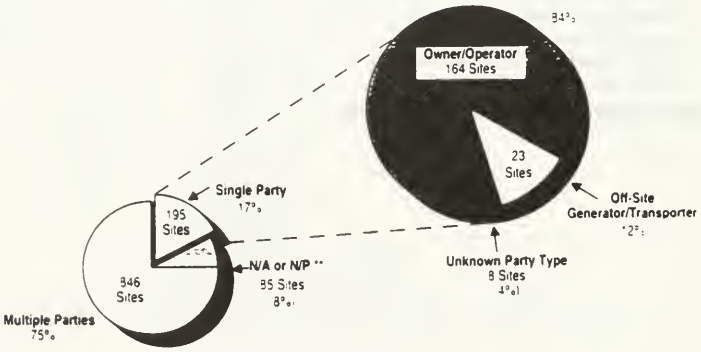
Types of Parties Associated with Sites:

About one-fifth (17%) of the non-Federal Facility sites have only a single party associated with the site. Of these 195 single party sites, 164 (84%) are owner operator sites.

For each facility where there is only one Potentially Responsible Party (PRP), please indicate whether that PRP is an owner/operator.

Of the 1,126 non-Federal Facility sites listed on the NPL, 17% (195 sites) are single-party sites. Of these 195 single-party sites, 164 (84%) are owner/operator sites. See *Exhibit 14-1*.

Exhibit 14-1
Single-Party Owner/Operator Sites*



Of the 1,126 non-Federal Facility sites on the NPL, 195 sites have only 1 (a single) identified party. Of these 195 single-party sites, 164 (84%) are owner/operators (i.e., no off-site generation of waste). In addition, some of the 846 multiple-party sites may also be owner/operator-*only* sites.

* This question only addresses 1,126 out of the 1,249 NPL sites because 123 sites are Federal Facilities.

** *NOTE: N/A or N/P represents sites where information was either not applicable or not provided.*

Background Information

What is an owner/operator - *only* site?
Sites with *only* owner/operator parties are defined as those sites where no hazardous substances were contributed by any off-site generator/transporters. The universe of single-party, owner/operator sites reported includes those parties who could potentially be held liable under CERCLA, irrespective of whether EPA decides to pursue them.

Data Source

1) *The source:* August 1993 RPM Data Collection (questions E13, E14, E26 and E28)
2) *The full universe of sites addressed by the question:* The 1,126 final and deleted non-Federal Facility sites listed on the NPL as of July 1993
3) *The subset of the universe for which data are provided:* The 1,041 non-Federal Facility sites that reported at least 1 PRP

Question #15

Owner/Operator Parties:

Forty-one percent (41%) of non-Federal Facility sites have only owner operators as PRPs

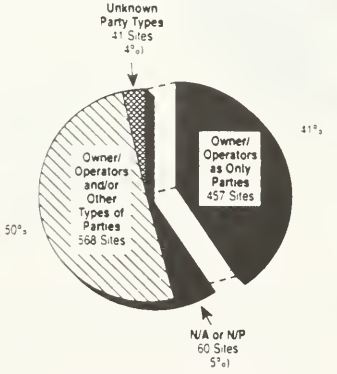
Please indicate where the only potentially responsible parties are owner/operators (i.e., no hazardous substances were contributed to the facility by off-site generator/transporters).

Of the 1,075 (out of 1,126) non-Federal Facility sites that indicated the types of parties associated with the sites, 41% (457 sites) have only owner/operators associated with them (i.e., no off-site wastes were contributed to the site). *(See Exhibit 15-1)*

Data Source

1) *The source* - August 1993 RPM Data C (question E14)
2) *The full universe of sites addressed by the question* - The 1,126 final and deleted non Fed. Facility sites as of July 1993
3) *The subset of the universe for which data is provided* - The 1,075 (out of 1,126) non-Fed. Facility sites reporting, which include those parties who could potentially be held liable CERCLA irrespective of whether EPA does pursue them

Exhibit 15-1
Breakout of Parties Associated with Non-Federal Facility Sites *



* This question only addresses 1,126 out of the 1,249 NPL sites because 123 sites are Federal Fac[illegible] es

** *NOTE: N/A and N/P represents sites where information was either not applicable or not provided*

Question #16

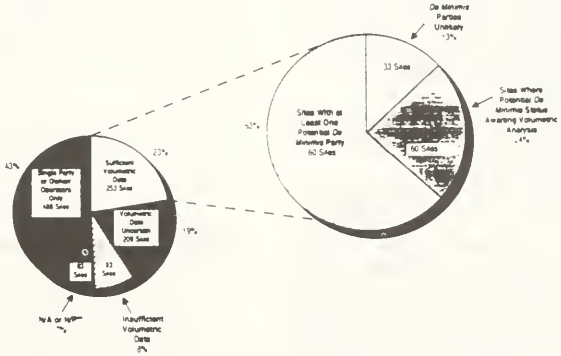
De Minimis Parties:

There are 220 sites where sufficient volumetric data exist to establish whether there are parties associated with the site who contributed "minimal" amounts of hazardous substances to facilities and *could be* considered *de minimis*. The new *de minimis* guidance, issued in July 1993, establishes that the Agency must simply find that the individual *de minimis* party's contribution is minimal in comparison to the total waste at the site. At the sites where sufficient data exist to determine volumetric contribution, almost two-thirds have been identified as having at least one potentially *de minimis* party, however *de minimis* settlements may have already been reached. In addition, at 33 sites where sufficient data is available, data indicate that no *de minimis* parties are likely to exist.

Please indicate whether sufficient volumetric data exist to establish whether there are PRPs who contributed small amounts of hazardous substances to facilities and could be considered *de minimis* parties.

There are 220 sites where sufficient volumetric data exist to establish whether there are PRPs who contributed "minimal" amounts of hazardous substances to facilities and *could be* considered *de minimis*. (*See Exhibit 16-1.*)

Exhibit 16-1
Distribution of Sites with Potential *De Minimis* Parties *



There are 220 sites where sufficient volumetric data exist to establish whether there are PRPs who contributed "minimal" amounts of hazardous substances to facilities and *could be* considered *de minimis*. EPA regional officials have indicated that there may be *de minimis* parties at 160 of these sites. Of the 60 remaining sites, once the volumetric data is analyzed, some may be found to have no *de minimis* parties.

* This question only addresses 1,126 out of the 1,249 NPL sites because 123 sites are Federal Facilities

** *NOTE: N/A and N/P represent sites where information was either not applicable or not provided*

Background Information

How does a party qualify as *de minimis*?
De minimis waste contributors are generators or transporters whose waste contribution is minimal – in both volume and toxicity – compared to the other hazardous substances at the site. Frequently these parties have contributed less than one percent of the waste at the site. However, whether individuals qualify for a *de minimis* settlement depends on a variety of site-specific factors. For example, the cut-off established for *de minimis* eligibility often varies from site to site.

What is a waste-in list?
A volumetric ranking, or "waste-in list," is an inventory of all the off-site waste generators involved at a site and the waste contribution of each. Organized in descending order of contribution volume, this ranking facilitates a *de minimis* determination. Although an extensive waste-in list frequently identifies some number of *de minimis* parties, some sites where a waste-in list has been (or could be) prepared may not involve any *de minimis* parties.

What does the "Streamlined Approach for Settlements with *De Minimis* Waste Contributors" say?
This new guidance, issued on July 30, 1993, establishes the minimum level of information required before EPA can make a *de minimis* finding. The guidance states that it is no longer necessary to prepare a waste-in list or volumetric ranking before considering a party's eligibility for a *de minimis* settlement. However, EPA still must demonstrate that the potential *de minimis* party's waste contribution is minor, in both volume and toxicity, and that the settlement is in the public interest and involves only a minor portion of the response costs at the site.

For each such facility, please indicate the number of potential *de minimis* parties.

Although EPA has sufficient information to assess whether *de minimis* parties *may* exist at each of these 220 sites, this analysis has not been conducted at all of these sites. At 160 sites, however, EPA regional officials have indicated that there may be *de minimis* parties. While the precise number of potentially *de minimis* parties at each of these 160 sites is not known, the *median* range of potential *de minimis* parties at each site is between 11 and 50 parties. *(No corresponding exhibit).*

Of the remaining 60 sites, once the volumetric information is analyzed, some may be found to have no *de minimis* parties. Thus, EPA cannot currently estimate "the number of potential *de minimis* parties" at each of the 220 sites. *(No corresponding exhibit).*

For each such facility, please identify where a waste-in list has been or could be prepared based on the data available to EPA.

Of the 220 sites where sufficient volumetric data exist to establish whether there are PRPs who contributed "minimal" amounts of hazardous waste, a waste-in list has been prepared, or could be prepared, at 145 sites. *(No corresponding exhibit).*

NOTE: According to the recently issued "Streamlined Approach with *De Minimis* Waste Contributors," the preparation of a waste-in list is not required prior to finding a party eligible for *de minimis* settlement.

Data Source

1) *The source:* August 1993 RPM Data Collection (questions E17, E18a, E19, E20a and E20b)
2) *The full universe of sites addressed by the question:* The 1,126 final and deleted non-Federal Facility sites listed on the NPL as of July 1993
3) *The subset of the universe for which data are provided:* Those 220 sites where PRPs could be considered *de minimis* parties.

Question #17

Financial Viability and Waste Contribution:

Over one-third of NPL sites (398) have at least one non-viable responsible party. Non-viable parties are more likely to be owner/operators (81% of sites), than generator/transporters (52% of sites). Non-viable generator/transporters, on average, contributed 42.5% of the waste volume at sites with sufficient waste volume information available.

Please indicate where there are orphan parties (i.e., parties that are not financially viable or cannot be located).

Of the 1,105 non-Federal Facility sites reporting, 398 (36%) have at least 1 non-viable responsible party.

NOTE: Twenty-one (21) of the 1,126 non-Federal Facility sites did not respond to this question. Two hundred and twenty-five (225) sites reported the parties as 'Unknown,' indicating that the financial viability of all PRPs at these sites has not been determined. At a majority of these sites, all PRP search activities have not been completed. Therefore, some or all of the 225 sites reporting 'Unknown' may have non-viable responsible parties.

For each of those same facilities, indicate whether all the owner/operators are orphan parties.

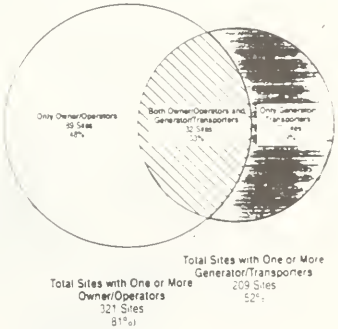
Of the 398 sites with non-viable responsible parties reporting, 321 (81%) have one or more (but not necessarily all) owner/operators as non-viable parties. One-hundred and thirty-two (132 or 41%) of the sites with non-viable owner/operators also had one or more (but not necessarily all) non-viable generator/transporters. *(See Exhibit 17-1)*

Where sufficient volumetric data exist, please provide the best estimate of the percentage, by volume, of waste contributed to the site by generator/transporter orphan parties.

Of the 211 sites reporting the presence of non-viable parties that are generator/transporters, 87 sites (41%) had sufficient volumetric data to report the average volume of waste contributed to sites by these non-viable generator/transporters. The average volume contributed to sites by these parties is 42.5%.

Exhibit 17-1
Sites with Non-Viable Responsible Parties

Total number of sites reporting where there is at least one non-viable responsible party = 398



NOTE: Twenty-one (21) of the 1,126 non-Federal Facility sites did not respond to this question. Two hundred and twenty-five (225) reported the financial viability of parties as 'Unknown' indicating that the financial viability of all PRPs at these sites has not been determined. At a majority of these sites, all PRP search activities have not been completed. Therefore, some or all of the 225 sites reporting 'Unknown' may have non-viable responsible parties.

NOTE: Questions 17, 18 and 19 must be read in tandem to obtain a more complete picture of the potential Fund exposure.

Background Information

What is a non-viable responsible party?
For the purpose of this analysis, a non-viable responsible party was defined as a party associated with a site who the Agency cannot locate or believes is not financially viable.

Data Source

1) *The source:* August 1993 RPM Data Collection (questions E21, E22, E23 and E24)
2) *The full universe of sites addressed by the question:* The 1,126 final and deleted non-Federal Facility sites on the NPL as of July 1993
3) *The subset of the universe for which data are provided:* Those 398 non-Federal Facility sites reporting non-viable responsible parties, excluding those 225 sites reporting financial viability as 'Unknown'.

Question #18

Sites with Non-Viable Parties:

There are currently 93 sites on the NPL with no enforcement potential. The government does not expect to obtain work or recover costs from PRPs at these sites.

Please indicate whether the government believes that there are no financially viable parties, or no parties that can be found, and that the Trust Fund will have to pick up 100% of site study and cleanup costs.

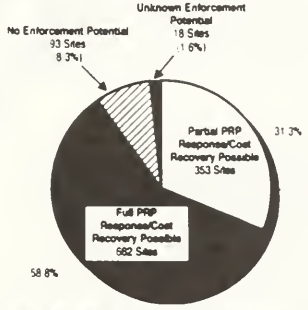
At less than 10% (93 sites) of the 1,126 non-Federal Facility sites, *all* parties are not financially viable or cannot be located. *(See Exhibit 18-1).*

NOTE: Unknown responses may include sites where baseline PRP search activities have not been completed.

NOTE: Questions 17, 18 and 19 must be read in tandem to obtain a more complete picture of the potential Fund exposure.

Exhibit 18-1
Enforcement at NPL Sites *

Total Sites Reporting
Excluding Federal Facilities = 1,126



At 93 sites (8.3%) of the 1,126 final and deleted non-Federal Facility sites, *all* parties are not financially viable or cannot be located and have no enforcement potential.

*This question only addresses 1,126 out of the 1,249 NPL sites because 123 sites are Federal Facilities.

NOTE: 'Unknown' responses may include sites where baseline PRP search activities have not been completed.

Data Source

1) *The source*: August 1993 RPM Data Collection (question E26).
2) *The full universe of sites addressed by the question*: The 1,126 final and deleted non-Federal Facility sites on the NPL as of July 1993.
3) *The subset of the universe for which data are provided*: The 1,126 non-Federal Facility sites listed final and deleted on the NPL.

Question #19

Fund-lead Sites:

About one-quarter of sites (317) are Fund-lead. Of these, 90% will continue to have Fund-lead events, while only 7% of the non-Federal Facility sites are expected to have Fund-financed work for the first time in the future.

Please indicate whether the facility is Fund-lead or expected to be Fund-lead.

Site activities are often led by one or several parties over the course of the entire site cleanup process. This analysis focuses on the lead for key cleanup activities at sites (i.e., RI/FS, RD and RA). *(See key to Exhibit 19-1)*

While some sites are currently Fund-lead and others may have future Fund-financed work, their status is subject to change as response actions progress. Therefore, any given site can have events financed both by PRPs and the Fund. Since EPA assigns leads only to individual events such as site studies, design and construction, a Fund-lead site simply means that all these site events have been, or are now being paid for, by the Fund.

Of the 1,126 non-Federal Facility sites, 317 sites (28%) are currently Fund-lead, 732 sites (65%) are PRP-lead and States have financed cleanups at 36 sites (3%). At the 41 remaining sites (4%) no response events have been started. *(See Exhibit 19-1).*

Site managers reported that of the 317 current Fund-lead sites, 308 *will continue* to be Fund-lead. The *PRPs* are expected to be doing all future work at 646 sites. 78 sites are *expected* to have Fund-financed work for the first time in the future and the future lead status is *undetermined* at 94 sites. *(See key to Exhibit 19-1).*

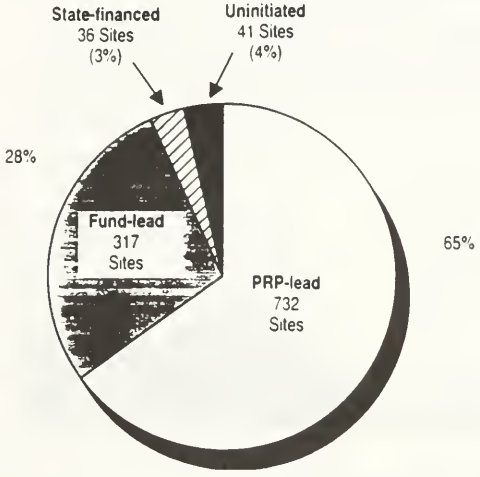
PRPs are increasingly taking responsibility for the RA (construction phase) of site cleanup, which is the costliest phase of cleanup. *(See Exhibit 19-2)* Data from CERCLIS (Superfund's official information system) suggest PRP involvement at 70% of remedial design starts and 77% of remedial action starts at NPL sites during FY 92 and FY 93.

Data Source

1) *The source:* August 1993 RPM Data Collection (question E27) and CERCLIS database
2) *The full universe of sites addressed by the question:* The 1,249 final and deleted NPL sites as of July 1993 (123 Federal Facilities and 1,126 non-Federal Facility sites).
3) *The subsets of the universe for which data are provided:* The 1,126 non-Federal Facility sites.

NOTE: Questions 17, 18 and 19 must be read in tandem to obtain a more complete picture of the potential Fund exposure.

Exhibit 19-1
Current Superfund Site Leads*

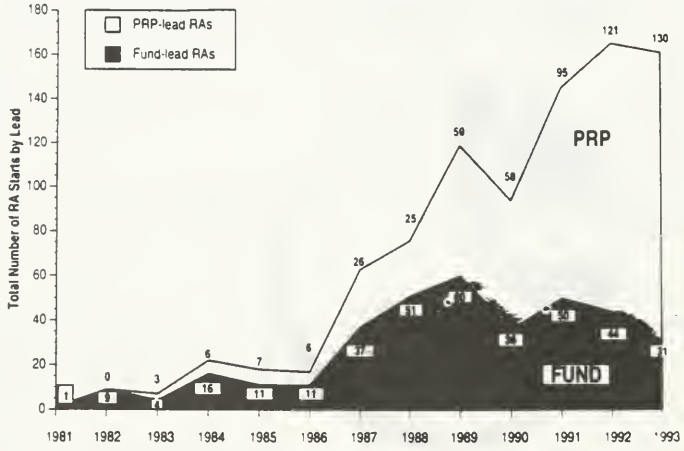


Lead	Definition
PRP	Some or all site study (RI/FS), design (RD) and construction (RA) events have been or are being paid for by PRPs. Some Fund or State dollars are spent to provide oversight for PRP cleanup activities.
Fund	RI/FS, RD and RA events at the site have been or are now being paid for by the Fund. Some State dollars also may have been spent.
State-financed	All RI/FS, RD and RA events have been or are being paid for by the State (no Fund dollars are involved).
Uninitiated	Either no response events have been planned or none will occur

Of the 1,126 non-Federal Facility sites, 317 sites (28%) are currently Fund-lead, 732 sites (65%) are PRP-lead and States have financed cleanups at 36 sites (3%). At the 41 remaining sites, no response events have been planned.

* This graphic only addresses 1,126 out of the1,249 sites because 123 sites are Federal Facilities.

Exhibit 19-2
Construction Start (RAs) Lead Trends
Fund vs. PRP



Data show that PRPs are increasingly taking responsibility for the RA (construction phase) of site cleanup, which is the costliest phase of cleanup.

Question #21

Projected National Priorities List (NPL) Additions:

Based on a poll of the Regions, EPA estimates that between 75 and 95 sites will be added to the NPL in FY 94, and an additional 340 to 370 sites will be added between October 1, 1994 and October 1, 1999. In 1994, EPA expects that the majority of new sites will be industrial facilities (61%) and waste management facilities (26%). Additions to the NPL between the beginning of FY 95 and the end of FY 99 are expected to be nearly 70% industrial and 15% waste management. Actual NPL listings will depend on resource commitments reauthorization mandates and policy decisions.

Please obtain from Regional officials in each Region their best informed judgement with respect to the number of facilities in their Region that will be added to the NPL in the period from October 1, 1993 to October 1, 1994 and in the five year period from October 1, 1994 and October 1, 1999. To the extent possible, please obtain information concerning the types of facilities that will be added to the NPL during the periods referenced above.

The projected additions to the NPL from October 1, 1993 through September 30, 1994 is between 75 and 95 sites. Of these sites, 68% are expected to be non-Federal Facility sites and 32% are expected to be Federal Facilities. The estimated breakdown of the non-Federal Facility sites by type is: 62% industrial, 26% waste management and 12% miscellaneous. The industrial category consists of metal fabrication, electrical manufacturing and equipment, lumber/wood treaters, dry cleaners and chemical manufacturing. *(See Exhibits 21-1 and 21-2).*

The projected additions to the NPL from October 1, 1994 through September 30, 1999 is between 340 and 370 sites. Of these sites, 80% are expected to be non-Federal Facility sites and 20% are expected to be Federal Facilities. The estimated breakdown of the non-Federal Facility sites by site type is: 68% industrial, 15% waste management and 17% miscellaneous *(See Exhibits 21-3 and 21-4).*

These projections are based on a range of factors related to site assessments

- Staffing and site-specific budget allocations.
- Impact of the implementation of the Superfund Accelerated Cleanup Model, reauthorization and other program improvement initiatives.
- States' role in site assessments;
- The number of sites currently in the pipeline for NPL proposal, a portion of which will not actually be proposed because they do not meet the technical specifications for listing; and
- In some Regions, the priority needs of addressing Federal Facilities in response to legal actions

Please obtain the opinion of Regional officials with respect to the number of facilities currently on CERCLIS, other than those for which a determination has been made not to list, which are ultimately likely to be added to the NPL.

All Regions found it difficult to estimate the number of facilities currently in CERCLIS that are likely to be added to the NPL. The Regions cited lack of active site discovery programs and a backlog of completed site inspections without listing decisions as factors that prohibit making an accurate estimation

Data Source

EPA polled all Regional officials involved in site assessment screening; however, accurate NPL listing forecasts were difficult to make because of the uncertainty of future resources. NPL listing is always a resource-constrained consideration.

Estimated Additions to the NPL by Site Type

Exhibit 21-1
FY 94
Total Universe = 75-95 Sites

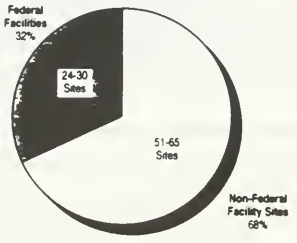


Exhibit 21-3
FY 95-FY 99
Total Universe = 340-370 Sites

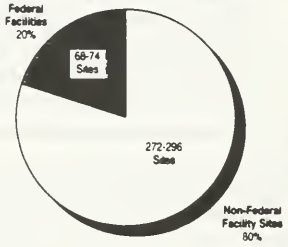


Exhibit 21-2
FY 94
Non-Federal Facility Sites = 51-65 Sites

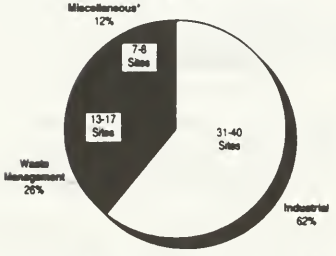
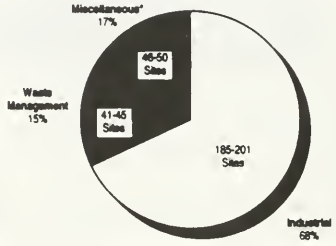


Exhibit 21-4
FY 95-FY 99
Non-Federal Facility Sites = 272-296 Sites



* The 'Miscellaneous' category includes those facilities that do not have either industrial or waste management operators on-site, and are often contaminated by off-site operations, activities or as a result of spills (e.g., residential areas, storage facilities, wells).

NOTE: Ranges in pie charts were calculated based on the percent of each site type Regional officials expect to be listed.

Question #20

Cost Recovery:

EPA can potentially recover almost $4 billion in past costs at more than 3,000 National Priorities List (NPL) and non-NPL sites. EPA has already taken some action to recover past costs of $2.17 billion at more than 2,000 of these sites (67%). Slightly more than $1 billion has been recovered, leaving an additional $1 billion currently being sought.

Please indicate where EPA has expended funds that are recoverable under Section 107 and the amount of those recoverable expenditures.

Omitting orphan sites (sites where EPA has not identified a financially viable PRP) and Federal Facilities, there are approximately 3,185 sites (NPL and non-NPL) at which EPA has incurred costs that are recoverable under CERCLA Section 107. Potentially recoverable past costs at these sites is just under $4.0 billion.

Indicate whether a cost recovery action has been filed to recover those funds, whether funds have been recovered and the amount that has been recovered.

EPA has taken cost recovery action to address $2.17 billion in past site costs at 2,140 sites (67% of the non-orphan, non-Federal Facility sites). Of this amount, $1.11 billion has been recovered through settlements with PRPs; the balance is still being sought.

Cost recovery actions to date include 639 cases which were referred to the Department of Justice for legal action. A total of $1.35 billion has been achieved or is still being sought through these cases.

Indicate whether or not the statute of limitations (SOL) is expected to be a bar to cost recovery of any amount.

There are 103 non-Federal Facility sites at which the initial SOL will expire in fiscal year 1994 (FY 94). EPA hopes to address all of the FY 94 SOL cases, either by initiating a cost recovery action or by documenting the reasons why cost recovery action will not be taken prior to the expiration of their SOLs. EPA has planned a total of 119 cost recovery actions in FY 94.

Data Source

1) *The source*. Financial data from SCORES including both direct and indirect costs for each site. CERCLIS data as of 10/22/93; U.S. Treasury Collections Data as of 9/30/93; and Cost Recovery Branch FY 94 Targeting Report.
2) *The full universe of sites addressed by the question*. The 1,126 final and deleted non-Federal Facility sites on the NPL and 2,161 non-Federal Facility sites *not* on the NPL for which cost data is readily available.
3) *Subset of the universe for which data are provided*. Revised universe of NPL sites is 1,024 after subtracting 93 orphan sites; data are provided for all 2,161 non-NPL sites.

SUPERFUND PROGRAM

Environmental Insurance Resolution Fund

THURSDAY, MARCH 17, 1994

HOUSE OF REPRESENTATIVES,
COMMITTEE ON ENERGY AND COMMERCE,
SUBCOMMITTEE ON TRANSPORTATION
AND HAZARDOUS MATERIALS,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:30 a.m., in room 2322, Rayburn House Office Building, Hon. Al Swift (chairman) presiding.

Mr. SWIFT. The subcommittee will come to order.

Today's hearing will focus on the insurance issues raised by title VIII of H.R. 3800, the administration's Superfund Reform Act of 1994. It will also consider other proposals on insurance that have been put forward, including the proposals recently announced by the Coalition on Superfund.

I don't know of anyone who thinks that litigation between PRP's and insurers over whether or not there is insurance coverage for Superfund costs is a productive use of this Nation's resources. Each year millions and millions of dollars which could be used for clean-up of Superfund sites are wasted as these disputes tortuously proceed through the courts. Regardless of the way these lawsuits will ultimately be resolved, searching for ways to curtail this litigation makes sense.

Title VIII would create a new environmental insurance settlement fund whose purpose would be to impose a resolution of these disputes. PRP's and insurers have continued to work on this issue through the Coalition on Superfund, and they have now announced agreement on a series of proposed amendments in title VIII.

While reserving the right to closely scrutinize this agreement and analyze its implications for public policy, I want to commend the participants in these efforts for coming to the table quickly and attempting in good faith to reach a meeting of the minds. While I understand these proposals are not universally supported, these parties have come forward with a serious attempt to solve the problem of Superfund insurance litigation costs created by Superfund, and their views as well as the views of many other parties interested in this debate will receive very careful consideration by this subcommittee.

We are pleased to have with us a distinguished group of witnesses today. I look forward to hearing all of the witnesses' testimony on these issues.

And I am happy to recognize the Ranking Republican of the subcommittee, the gentleman from Ohio, for an opening statement.

Mr. OXLEY. Thank you, Mr. Chairman.

Today's hearing is kind of unusual. Normally we have environment groups and industry groups and perhaps States and localities discussing and often arguing over liability or cleanup levels or settlements. This hearing is not about these issues. It is really not about the environment at all today. Our focus is how to best resolve disputes between insurance companies and their policyholders over claims that just happen to arise over Superfund. These disputes often wind up in court and are resolved today in legal principles that differ in every State.

The question is whether or not we can move these disputes out of the courtroom and into the boardroom. Can we litigate less and get on with the business at hand?

As we listen to today's witnesses describe the several different proposals on the table, we should not lose sight of this shared goal of reducing the amount of litigation and the related transaction costs.

Another thing we can't lose sight of is, quite frankly, the clock. Reauthorizing Superfund in this Congress will be a monumental task, and I have been very concerned about some recent statements through the environmental lobbying groups and the administration regarding Superfund reauthorization.

On February 3rd, Carol Browner assured the members of this subcommittee she was committed to an open, bipartisan process involving all points of view. But just this last week we see reports that Administrator Browner has decided to artificially limit the terms of the Superfund debate to only being between the administration's bill and the Keystone proposals, the proposals made without any Republican input.

This limit on debate certainly comes as news to me, and if these reports are correct, it seems totally inconsistent with Ms. Browner's commitment to this committee just 6 weeks ago to work in a bipartisan fashion. The members of this subcommittee—and after all, we are the ones who will actually have to vote on this bill—have some difficult decisions to make given the ambiguities of H.R. 3800. Therefore, I don't think this kind of line drawing of Ms. Browner is helpful in getting a bill this year.

I know she is not here today, but I do want to give Mr. Laws a full opportunity to clear the air on this issue, so I won't go any further on this point.

Mr. Laws, I hope in your statement or in the questions to follow, you can clarify the administration's position on just where we are going in this process.

With that, Mr. Chairman, I thank you for holding this hearing and yield back the balance of my time.

Mr. SWIFT. I thank the gentleman.

We are happy to welcome Elliott Laws, who has been before the committee many times. We are happy to have him back. And Alicia Munnell, Assistant Secretary for Economic Policy from the Department of the Treasury.

STATEMENTS OF ELLIOTT LAWS, ASSISTANT ADMINISTRATOR, OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, ENVIRONMENTAL PROTECTION AGENCY; AND ALICIA MUNNELL, ASSISTANT SECRETARY FOR ECONOMIC POLICY, DEPARTMENT OF THE TREASURY

Mr. LAWS. Thank you, Mr. Chairman. It is a pleasure for us to be here to discuss title VIII of the administration's proposal to establish an environmental insurance restoration fund. As you know, this resolution fund is an important element of our Superfund Reform Act of 1994.

Under the Superfund law, liability for the costs of cleaning up hazardous substances is strict, joint and several, and retroactive. While this scheme provides great benefits for the efficient operation of EPA's cleanup program, there is no question that it also spawns a tremendous amount of litigation. This litigation is so extensive and costly that the President has twice called for a solution to the problem, most recently in the 1994 State of the Union Address.

Under current law, a settlement by the EPA with a Potentially Responsible Party (PRP) at a site with multiple PRP's (either voluntarily or through litigation) results in those liable parties seeking to distribute the costs of cleanup by initiating contribution litigation against other PRP's. Since insurance companies generally have taken the position that their policies do not cover Superfund response costs, the PRP's frequently must sue their insurance carriers in order to try to recover those costs.

This litigation among PRP's, and among PRP's and their insurance companies, represents the bulk of Superfund-related transaction costs and is the impetus for much of the administration's proposal for Superfund reform.

One of the administration's major objectives in Superfund reform is to eliminate—or at least drastically reduce—all of these lawsuits, without eliminating the beneficial effect of joint and several liability, specifically the ability of EPA to order PRP's to begin cleanups.

The administration addressed lawsuits among PRP's by establishing early settlements for *de minimis* PRP's, eliminating liability in the case of virtually all *de micromis*—or truly tiny—PRP's, and by establishing a process for the early determination of all remaining PRP's allocable shares at a site in a single proceeding. To address lawsuits by policyholders against insurance companies, the administration has proposed establishing the Environmental Insurance Resolution Fund.

Before turning the administration's testimony over to Secretary Munnell, who will describe our proposal, how it was developed and what it represents, let me just briefly mention before doing so that a press conference was held yesterday to announce an agreement reached with a large segment of the insurance industry regarding a mechanism for achieving global settlements of Superfund liability insurance claims and which builds upon the administration's proposal.

As the Administrator said, we commend the parties that worked so hard to reach this agreement. That very spirit of compromise and understanding is what is necessary for this reform effort to continue and reaffirms our commitment to work with you, Mr.

Chairman, and you, Mr. Oxley, to move forward with the reauthorization and reform of Superfund.

I think, Mr. Oxley, that also will address your concerns.

What the Administrator was saying was that we intend on working with all parties. We intend on working with the Minority, but we are also going to work with the environmental community. I think there was probably some misunderstanding about the environmental community's support for the administration's proposal.

What they said was that the administration's proposal was a good beginning, and that the legislative process could move from this proposal to something that all the parties can work for. I think the Administrator was simply reaffirming our commitment to not only the Minority, but to the environmentalists, that we intend to work with all interested stakeholders.

We are totally committed to having this law reauthorized this year and we are going to have to have a very wide net to ensure that a bill engenders the type of support that is going to be necessary to make it through the Congress and ensure the President's signature.

I am not at all going to try and explain whether the reports, whatever reports you read were accurate, but the Administrator's statements were in no way intended to indicate any less resolve on our part to work with the Minority side of the aisle. But by the same token, we are not going to abandon our resolve to work with the environmental community as well.

On a personal note, I would like to thank the Treasury Department, and specifically Secretary Munnell, as well as the National Economic Council and Peter Yu, for their tireless efforts with regard to title VIII of the administration's bill, as well as for working with the groups that yesterday made their announcement.

And that concludes my part. I will turn the rest over to the Secretary.

Mr. SWIFT. Ms. Munnell.

STATEMENT OF ALICIA MUNNELL

Ms. MUNNELL. Thank you, Elliott.

Good morning, Mr. Chairman and Mr. Oxley. I appreciate the opportunity to describe the Environmental Insurance Resolution Fund. It is an unusual piece of the administration's Superfund proposal.

As Elliott indicated, private Superfund litigation falls into two categories: PRP's suing PRP's, and PRP's suing their insurance companies. The administration recognized early on that if we didn't solve both problems, we were not going to solve these enormously wasteful litigation issues.

The administration's allocation proposal is aimed at eliminating suits among PRP's. In the allocation process, each PRP will be assigned a share of remediation costs based on the volume and toxicity of its waste. The incentives to settle are substantial.

Settling companies will be protected from suits by other PRP's and will receive a contribution towards a so-called orphan share. Ensuring a fair distribution of cleanup costs should sharply reduce PRP-to-PRP suits.

The Environmental Insurance Resolution Fund, affectionately called the EIRF, addresses suits between PRP's and their insurers. The Fund will give each policyholder a one-time comprehensive offer to resolve all pending and future Superfund litigation. The proposal is interesting in that while it is an integral part of the administration's bill, it is in a very real sense an agreement between private parties.

Both the insurers and industry representatives deserve a great deal of credit for recognizing the problem and for their willingness to work together towards a solution. These two groups have been laboring in a variety of forums for a very long time.

The administration intervened only when the parties were unable to reach closure on their own. We, the administration, a group of insurers, and policyholders' representatives, worked to develop the mutually acceptable principles that underpin the administration's proposal.

The original proposal represented a delicate compromise among parties with distinctly competing interests. The fact that neither side was satisfied with the initial effort meant that the proposal indeed represented a genuine and workable framework for addressing this problem.

Can our original submission be refined? The answer is, of course. And since the administration presented the Superfund reform proposal in early February, representatives of insurers and policyholders have continued to work to refine the proposal.

As the chairman and Elliott indicated, only yesterday these parties announced their agreement on a wide array of thorny issues. These refinements, however, build on the basic structure of the administration's plan. You are probably well aware of the outline of the proposed system, but just let me summarize the key provisions.

First, a new fund, the EIRF, would be established to handle claims for pre-1986 waste at NPL sites, and certain other actions at other sites. Virtually all disputes between policyholders and their insurers arise under pre-1986 insurance.

Second, the sole funding for the EIRF would be fees and assessments on property and casualty insurers and reinsurers. Depending on the Fund's needs, insurers would provide between $2.5 billion and $3.1 billion during the first 5 years.

Third, policyholders would be required to file a claim for reimbursement with the EIRF before they could sue their insurers.

Fourth, to be eligible for reimbursement, policyholders would have to show that they were regular purchasers of insurance of the type that could give rise to a Superfund claim.

Fifth, the Fund would offer eligible policyholders a percentage of their claim. That percentage would vary by State, depending on the status of State law. Policyholders that have established litigation venue or have sites located in States where the courts tend to rule against the insurers would receive 60 cents on the dollar. Policyholders in States where the insurers tend to win would receive 20 cents on the dollar. And everybody else would fall into the 40-cents-on-the-dollar category.

Sixth, the Fund's offer would apply to all policyholder sites. The one-time selection is designed to avoid adverse selection whereby

policyholders would accept offers for sites only where their probability of litigation success was low.

Seventh, if a policyholder accepts an offer made by the Fund, it must agree not to sue the insurers for claims arising under Superfund. Payments for past costs would be spread over a period of 8 years. Payments for current costs would be made as incurred in the process of cleanup.

Finally, if a policyholder rejects an offer made by the Fund, it can then sue its insurers. If the policyholder loses, it cannot go back to the Fund and it would be liable for a portion of the insurer's litigation costs. If the policyholder wins, the Fund would reimburse the insurer for its liability up to the amount of the original offer to the policyholder.

We believe this kind of plan can work. Our cost estimates indicate payments from the insurance companies should be sufficient to cover the claims. The problem, of course, is that all estimates in this area are necessarily uncertain.

Also, you should know that the estimates incorporate a reduction from current levels due to improved remedy selection as well as EPA funding of orphan shares.

The crux of the problem in designing this kind of setup is to set the percentage reimbursements from the Fund at a level high enough so that most policyholders participate without providing huge windfalls to parties that would never have succeeded in litigation. Striking such a balance is the key to a successful Environmental Insurance Resolution Fund.

As I have indicated, the proposal in the administration's bill was viewed from the beginning as a framework for developing a plan that everyone can live with. It has to be realistic. It has to be fair to the PRP's and to the insurers. And it has to be affordable, or else it is not going to work.

Representatives of insurers and policyholders have continued to work on the proposal, and yesterday announced further agreement. These refinements are aimed at making the system more predictable and more affordable.

The administration has only begun to examine these modifications, and can only express pleasure that the insurers and policyholders have continued to work towards narrowing their differences.

As the process proceeds, the administration looks forward to working with you and other Members of Congress to help craft a final product that will eliminate most, if not all, of the wasteful Superfund litigation between insurers and their policyholders.

Thank you. Elliott and I would be delighted to answer any questions you might have.

Mr. SWIFT. Thank you very much. I thank both of you.

Mr. Oxley and I have conferred and we want to make it abundantly clear that we in no way want to be implicated in the creation of the acronym EIRF.

Mr. LAWS. The agency would like to reserve on that as well.

Ms. MUNNELL. Treasury may have to rethink.

Mr. SWIFT. Elliott, it has been the position of the administration from the beginning that any insurance settlement provisions must be voluntary as opposed to mandatory. As you know, a lot of people

in the insurance industry in particular have advocated as their first choice that a mandatory settlement process would be better, a process in which all PRP claims would have to be settled through a settlement fund.

Could you discuss the reasoning behind the administration's position for voluntary, and maybe address whether the administration has any constitutional concerns about the mandatory process?

Mr. LAWS. Certainly, Mr. Chairman. We are very concerned about making participation mandatory for the policyholders because of its implication in terms of the application of State laws. The contracts between insureds and their insurers are governed by State law. There were serious concerns raised within the administration by the Justice Department that by making participation by PRP's mandatory, claims against the United States would inevitably result, arguing that the resolution fund legislation is a "taking" of some sort, or otherwise violates some sort of due process or States' rights claims. Instead of policyholders suing their insurers, they would sue the Federal Government, and thereby we would only be shifting rather than eliminating litigation and transaction costs which this reform is designed to address.

That was our primary reason, and it was, as you stated, mainly due to very serious concerns we had.

Mr. SWIFT. For us policy people, when we get into a legal debate between lawyers, we have trouble sometimes knowing whether an objection being raised is being raised from the kind of "when in doubt, don't", ultraconservative kind of legalistic position, or whether there is very serious merit to the issue. And you are a lawyer, and so you can make a judgment.

Do you think this is an issue that is not just an ultraconservative interpretation but it is a real, practical concern we need to be aware of?

Mr. LAWS. Being an attorney, Mr. Chairman, it is hard to envision any type of potential legal issue that just becomes theoretical and doesn't carry a huge risk. I think it is real. Early on in the administration's decisions, we were talking about some of these issues, I thought that the issue of what we are doing to State contracts would be an extremely controversial issue and most definitely would lead to some sort of litigation.

So, I would not characterize this concern as ultraconservative, but as a very real concern that we have to be sensitive to.

Ms. MUNNELL. I know the Justice Department feels very strongly about this, and I am sure they would be happy to get back to you in writing for more details, if you would like.

Mr. SWIFT. We would be happy to do that. On the one hand, I think it is very understandable why everybody involved in these processes wants as much certainty as they can possibly get. On the other hand, writing a law that is going to get thrown out or will become snarled in terrible litigation is not what we want to do. It doesn't solve the problem.

So I am not particularly skeptical about it. I just want to be sure that if we cannot offer certainty in this instance that it is for really good legal reasons, and not just because somebody is playing it ultra-safe. And I think chatting a bit—it doesn't have to be for-

mal—chatting a bit with some people from Justice would be helpful to assure we are avoiding it for a very good reason.

Mr. SWIFT. The bill provides for annual audits, Ms. Munnell, of the insurance settlement fund, and civil and criminal penalties for submission of false claims by PRP's to the fund, but it doesn't include any procedures for the review of individual claims submitted to the fund.

Given the number of claims involved and the fact that we are going to have a very wide variety of expenses from which reimbursement is going to be sought, do you feel that the auditing provisions that you have proposed are adequate?

Ms. MUNNELL. As you know, in addition, the Fund will work closely with EPA, which will have a presence on the NPL sites to ensure that payment expenses are for work that has actually been performed. As you indicated, the EPA's Inspector General would have full authority to audit and investigate the fund's activities.

We are prepared to work with you and members of the subcommittee to develop any additional safeguards that you may view as necessary to ensure that the fund's expenditures are properly made.

Mr. SWIFT. What would you think of maybe a random audit process that would go deeper than the normal overall audits? Is that——

Ms. MUNNELL. I am not an expert in auditing. This has been an evolving process. We are happy to look at any proposals that you might have, and work with you to come up with something that you find satisfactory.

Mr. SWIFT. We will check with you. I don't want to overwrite this. In an effort to be sure that nobody can steal a penny, you can cost billions. And I don't want to do that. But some process that might just make people be very sure that they are doing this properly, and a random audit process might conceivably be a way to do that. It is worth thinking about. We will check with you further on it.

This bill raises between $2.5- and $3.1 billion for the settlement fund over 5 years. Given that settlement demands in individual cases, you know, one single case, can be over a billion, and given that there have been some studies that have indicated—these are studies by the insurance industry—they have stated potential losses of $30- to $50 billion, which are roughly 10 or more times the amount in the bill, what information are you relying on in determining the revenue payment requirements and the size of the fund?

Ms. MUNNELL. As you know, this is an area where it is very difficult to pin down costs. But the administration has made a Herculean effort at this. Treasury, EPA, and OMB have all worked simultaneously on trying to come up with the numbers. We then met with insurers and large PRP's to get a sense of their view of the numbers.

Whereas we can never be totally certain, we have developed some confidence that we all are sort of zeroing in on the same type of numbers. And basically they are built off the private sector costs, which are roughly $2 billion per year.

And if you just do rough calculations, if you paid 40 percent of the $2 billion, you get down to roughly $800 million per year. That is before you have any reduction in costs from improved remedy selection or from a federally funded orphan share.

We have to add in a bit for natural resource damages costs, and we have to pay off backlog claims, which range between $3- and $6 billion.

But basically what you get down to is a steady state number that is around $500 million, and if you add in backlog costs it gets it up to around $700 million. Basically in terms of the first 5 years, we envision not much money being paid out in the first year, and our best guess—and it is better than a guess—our best assessment is that the moneys should cover the costs over the initial period.

Mr. SWIFT. Thank you.

One last question. In the testimony that AIG has presented in written form, they assert with regard to retroactive liability that the only objection has been political, not substantive. That is a little bit, I think, like saying that the only objection the Pope has to abortion is religious principle.

This is an inherently political process, and the way you arrive at compromise, so you can get things done, is political. So I am not sure that if it were true that it were only political, it would necessarily say much. But I don't think that is true in any event. I think there are some substantive reasons.

Do you agree with that, Mr. Laws, and if so, what do you think are the substantive reasons for not having just simple and total elimination of retroactivity?

Mr. LAWS. I definitely agree with it, Mr. Chairman. I am reminded about your comment yesterday about resurrection and how this issue seems to be resurrected at almost every hearing we have. I thought we had made the administration's position quite clear during the liability hearing.

The abolition of retroactive liability would fundamentally transform the situation from one in which we have approximately 70 percent of response work being performed by private parties. It was actually 79 percent for fiscal year 1993.

I think society would lose the benefit of those market forces, and from a sheer dollar number, our estimates are that the abolition of retroactivity could result in a loss of approximately $870 million to $1.1 billion private cleanup dollars annually.

Second, we found that the abolition would significantly disrupt the liability scheme, and that of course would result in an entirely new round of litigation, and do nothing to eliminate or even reduce the transaction costs that we are trying to address in this legislation.

Third, we think there would be a serious question of fairness as to those parties which have complied with the liability scheme over the past 13 years. And it would definitely result in some sort of windfall for those parties that had not participated or been less than cooperative with the government as the program developed.

Finally, I think the last thing, it would very severely weaken the deterrent effect that this law has had on the way American industry handles its hazardous waste. The ability for us to unilaterally issue orders for handling processes has forced industry to take a

serious look, both in terms of handling and treatment of waste, but also in the areas of pollution prevention and waste minimization. I think all of that would be lost.

Again, as I said, at the liability hearing, the time that we have to address this law is very short. The administration spent a great deal of time debating this issue and came up with the admission that we should maintain the current liability structure.

I would hope that this committee and the rest of Congress would not waste any additional time trying to debate the issue of the removal of the retroactive portion of the liability structure.

Mr. SWIFT. Amen. I recognize the gentleman from Ohio.

Mr. OXLEY. Thank you, Mr. Chairman.

If we are going to pull this rabbit out of the hat and pass Superfund, we are going to give you, at your retirement party, an EIRF.

Mr. SWIFT. That is the one thing that might make me reconsider.

Mr. OXLEY. Ms. Munnell, has Treasury or Justice done any analysis of whether a mandatory system would be constitutional, and if not, why not?

Ms. MUNNELL. As Elliott indicated, the views of the Justice Department on this issue are quite strong. And their assessment is that it would result in substantial litigation against the Federal Government, and have advised us that a mandatory system was not feasible.

I am not a lawyer. I respect their judgment. And we have worked within that framework.

Mr. OXLEY. Do you have a written analysis that you could make available for the committee?

Ms. MUNNELL. I would actually ask the Justice Department for their analysis. I would be happy to make it available.

Mr. OXLEY. We would appreciate that.

What if a PRP does not participate in your proposed EIRF; would the other PRP's have costs, such as discovery costs? And can a PRP pick and choose a site?

Ms. MUNNELL. No costs would be imposed on participating PRP's. Under our proposal, and it seems to be under the revised proposal, the PRP would have to make a once and for all decision on whether he or she were going to opt to take the offer from the Fund or to sue its insurers. So the purpose of that is to avoid adverse selection. And that has been a tenet almost from the beginning and seems to stay there.

Mr. OXLEY. Let me ask you about the cost issue. How important are the remedy selection provisions of the administration's bill to the Environmental Insurance Resolution Fund? Is there a link between resolving this issue on insurance liability and remedy selection reforms that achieve an overall 25 percent cost reduction that as indicated by the administration, was their goal, and obviously we share that goal.

Ms. MUNNELL. Yes, there is a direct link. The estimates are based on the assumption that there will be a 20 percent reduction in cost beginning in the last 3 years. If that does not occur, then the cost estimates have to be reestimated, and more money would be needed.

Mr. OXLEY. You say 20 percent?

Ms. MUNNELL. Twenty percent per year. We didn't take the maximum that was in the proposal. We were trying to be conservative. But those are built into the cost estimates on which the assessment and fee revenue estimates are based.

Mr. OXLEY. The question is whether the fund would be sufficient.

Ms. MUNNELL. It would not be sufficient if we did not get remedy selection cost savings.

Mr. OXLEY. Exactly how would the Administrator's fund be financed? Who would pay the taxes and the fees? The insurance industry obviously, business. How much, and how would that be allocated?

Ms. MUNNELL. As you know, the funding proposals haven't been submitted at this point, but basically there will be fees and assessments on insurers and reinsurers. Only the insurance industry would pay. Watertightness was a basic tenet from the beginning, and the insurer and reinsurer funds would go to the EIRF and the payments would then be made from there.

Mr. OXLEY. What period of time are we talking about for these fees? Would they sunset or would they go on forever? What is the proposal?

Ms. MUNNELL. In the administration's original proposal, the idea was to have the Fund set up over a 5-year period, and the assumption was that the fees would be reviewed at the time of reauthorization.

Mr. OXLEY. Would they be retroactive pre-1986? How would that work?

Ms. MUNNELL. There are actually two components. One is a retrospective fee and the other is a prospective assessment. Basically they are based on premiums in certain lines of insurance over the period 1970 to 1985, for the retrospective component, and based on gross premiums going forward.

Mr. OXLEY. You are aware that the British insurance industry wrote a substantial portion of the property casualty insurance covering American companies that would be affected by the proposed bill. Is it your understanding that the tax treaties between the United States and the United Kingdom bar taxation in the United States for premiums paid to British insurers?

Ms. MUNNELL. I am not in a position to answer all the specifics on the fees, but I know the intent was to get at the reinsurers and Treasury's tax policy people believe that the proposal will do that.

Mr. OXLEY. Do they have anything that we can look at that would help us in that regard?

Ms. MUNNELL. Yes. I would be happy to send that to you.

Mr. OXLEY. Great. So from your perspective you don't think that is a problem, I guess?

Ms. MUNNELL. It is always a problem but we think we have worked around it.

Mr. OXLEY. It may be a political problem but it is not a tax problem?

Ms. MUNNELL. Our sense is it is not.

Mr. OXLEY. Thank you.

Thank you, Mr. Chairman.

Mr. SWIFT. I should congratulate both of my colleagues for the work they did on the telecommunications bills that passed unani-

mously in full committee yesterday, especially the gentleman from Louisiana who is probably second only to the two chairmen in terms of the work put in on our side of the aisle. Congratulations. And I recognize the gentleman from Louisiana.

Mr. TAUZIN. You are very kind. You are waxing religious now. It is probably St. Patrick's Day.

My biggest fear about the new acronym is that somebody doesn't argue that we err on the side of EIRF.

Let me discuss a bit with you today the concept of the tax and the redistribution of those funds as I read the proposal. As I understand it, you have proposed to raised $2.5 billion over a 5-year period, perhaps $3.1 billion over that 5-year period, and that you propose to raise 70 percent of that from fees collected on premiums that were—net premiums written during the period 1971 through 1985, and the 30 percent on current premiums. Is that right?

Mr. LAWS. That is correct.

Ms. MUNNELL. Yes.

Mr. TAUZIN. Obviously when you say only insurance companies are going to pay it, you of course are not mentioning but assuming the fact that somebody is going to pay premiums, which are likely to go up because we have just taxed them. Is that right?

Ms. MUNNELL. I think you have to look at the two parts of the fee separately. The part that is retrospective is much more difficult to shift forward to policyholders than the part that is prospective. I just want to make sure we got this right. In our proposal 70 percent is retrospective and 30 percent is prospective.

Mr. TAUZIN. So that we are looking at something in the neighborhood of either three quarters of a billion dollars or maybe even as much as nearly a billion dollars over the 5-year period to be collected from current policyholders to put into this fund. Is that correct?

Ms. MUNNELL. I am an economist by training. So yes, my economics training would lead me to think that the prospective part could be shifted forward. When you actually talk to the insurers, they seem more dubious about whether—how easy that would be.

Mr. TAUZIN. Because of the competitive marketplace in insurance. I have found in the marketplace it is harder to get insurance, I think probably, than it is easier to get it in a lot of these areas. I suspect maybe we are talking about increasing premiums, but the fact of the matter is that we are taxing current premiums to settle these old accounts to the tune of about 30 percent of the fund. Is that correct?

Ms. MUNNELL. You can ask why we didn't do it all retrospectively.

Mr. TAUZIN. Which is the next question I am going to ask.

Ms. MUNNELL. I didn't mean to rush ahead on your list.

Mr. TAUZIN. Why did you choose to tax current policyholders for this retroactive liability?

Ms. MUNNELL. One could argue what you are doing is eliminating a liability that these companies are currently facing, and therefore you would like them to pay an equivalent amount. The problem is that there are not good data to attribute liability to each company.

First of all, the only good premium data are available from 1970 to 1985, and of course policyholder disposal had been going on long before 1970.

Also, there is not a one-to-one relationship between premium payments and liability. And then some companies have also gone out of business. And so given that you can't exactly pin down the liability, it did not seem like the fairest thing to make it all retrospective.

Mr. TAUZIN. By going this route, aren't you asking new insureds to contribute to settle these old accounts? You do have that problem, don't you?

Ms. MUNNELL. It is not a perfect system. You have to weigh the two objectives. Treasury came out with this particular ratio, and——

Mr. TAUZIN. Let me question then how the money shifts over. You propose in your discussion of it to set up a different percentage schedule for the different States. Obviously you are going to rate those States on the way those States have interpreted the contracts. Which States have been generous to policyholders in denying exclusions, I take it, and which States have been generous to insureds in enforcing exclusions.

And there is a whole list of different exclusions. I am not quite sure what formula you are going to use to say which State falls into what category. The end result is you are going to allow the fund to pay more to PRP's in States which have been generous to the policyholders, and less to the PRP's in States which have been—where the courts, I suppose, have been more conservative about enforcing the exclusions in favor of the insurers. Is that correct?

Ms. MUNNELL. That is the proposal, yes.

Mr. TAUZIN. Is that going to mean a shift of dollars and revenues in this country in terms—you are collecting premiums from the current policyholders in effect by taxing the policies, and paying in some States much more than you are going to be paying in these other States with the initial offers, which may be accepted, because that particular State has been generous to policyholders as opposed to a State that has ruled otherwise.

Is that going to cause some shifting of resources in this country in settling these claims, and is that—how do you judge that from—we are going to have to judge it from a political standpoint. How do you judge it from an equity standpoint?

Ms. MUNNELL. I don't think it would involve a major shift. On the revenue side, this $1 billion prospective fee is relatively small in the scheme of things. The intent was to mirror the concept of insurance, which shifts costs and risks. To the extent we are successful at that, there shouldn't be any shift or not as significant a shift from what would have happened if litigation had gone forward.

Mr. TAUZIN. You admit in your statement that the percentages are relatively subjective; is that right?

Ms. MUNNELL. These numbers came out of a negotiation process between the insurers and the PRP's, and you hope that type of process produces something that is reasonably sensible.

Mr. TAUZIN. Is there a paper or something we can look at that tells us how those percentages were arrived at on the basis of court interpretations in States?

There is a fairly large difference that may affect dramatically the ability of PRP's to accept or reject these offers.

Ms. MUNNELL. There are academic studies that have provided some information on this. And I am sure the insurers and the PRP's would be happy to provide you with additional information.

Mr. TAUZIN. I mean, we end up sharing formulas up here all the time, and very often they become political.

Ms. MUNNELL. Right.

Mr. TAUZIN. And once you put out a formula, people start calculating how much you are going to lose if a formula is changed before it is adopted. The concern is that the formula is being presented to us, and even though it is the product of a lot of negotiations, nevertheless it becomes a fait accompli and becomes the standard by which changes are judged.

I wonder if we have some analysis of the criteria by which this formula was adopted to see whether or not it is a fair formula.

Ms. MUNNELL. We can provide you with as much information you would like.

Mr. LAWS. I would like to add that the proposal we have here is not intended to change the playing field. We are trying to provide a settlement mechanism for a huge amount of litigation that had been occurring. These numbers are simply intended to reflect what is actually occurring in those States today.

Mr. TAUZIN. But you understand my question. Do they really reflect it and how do we know that?

I realize this is a product of some negotiations and some give and take, and sometimes people will yield, you know, different numbers as a matter of compromise. But I am wondering if we have some background upon which to judge how accurately this does in fact reflect the current state of the laws in the various States.

Ms. MUNNELL. Mr. Tauzin, in our original submission we didn't allocate the States by percentage. In the follow-up that was done, that was announced yesterday, they did allocate the States by percentage. So——

Mr. TAUZIN. I am aware of that. I am not putting this on you. I am asking if there is at your disposal, and whoever has it we can get it, the background upon which this analysis was made, because if it is a true reflection, that is one thing. If it isn't, and this is a political compromise, I would be interested in knowing why, because it will affect, dramatically, the status of PRP's across America in terms of their ability to take these offers and settle them out or to have to refuse them because they may not be equitable to their particular position in the case.

And if it is true, it is reflective, then indeed you may have presented us with something worthy of our consideration.

I am very interested in that analysis and the analysis by which you have reached this formula of 70/30, and how that came about. I know that, again, we are talking numbers that came out of negotiations, and a great deal of discussion.

I am also interested in Mr. Oxley's question. I think you stated you thought you had the legal issues settled as to whether or not

we can tax policies. My understanding, it is not just reinsurers, it is direct insurers also?

Ms. MUNNELL. Direct insurers and reinsurers.

Mr. TAUZIN. So there is at least a question that needs to be settled about whether we can legally tax a direct insurer, Lloyds of London or whoever it may be, from Great Britain. You think it is settled but——

Ms. MUNNELL. Treasury thinks it has worked it out.

Mr. TAUZIN. Thank you very much, Mr. Chairman.

Mr. SWIFT. Just to help me clarify one point, because I think the gentleman's line of questioning was very interesting. His concern about whether or not you have a cost shift, what you are saying is that under the present system, where various States have, through largely the courts, taken differing positions, that you have got a certain way money flows, and that you think doing this would not significantly change the way that money flows; is that the argument?

Ms. MUNNELL. The whole intent of this proposal was to reflect the way money is currently flowing. As everything in the negotiated settlement, it may not be perfect, but the intent is to mirror the current outcomes.

Mr. SWIFT. I think that is helpful. It is also going to—you know, there has been a 10-30-10 kind of a concept. Again, bringing in this awful thought of politics into the legislative process, what that relates to me is 80 percent are going to love this proposal—I mean, 20 percent. Eighty percent will hate it because they won't be on the most generous end, even though it is the law as interpreted in their States that set them up in that position in the first place.

It is just going to be a difficult problem that we are going to have to try to address in some kind of a rational fashion. Am I kind of understanding what is going on?

Ms. MUNNELL. I think it won't be quite that bad because I think there are some States where PRP's generally don't get anything. So 20 percent might look quite good. And the percentages are not based on where a policyholder resides, but rather where litigation venue is established, or where sites are geographically located.

Mr. SWIFT. If we can get them to concentrate on the glass being half full.

Mr. TAUZIN. Would the Chair yield?

The concern, of course—there are two relevant concerns. In some States where PRP's have gotten nothing because their insurance contracts have been interpreted that way, now are going to get something. It obviously means that others who have been getting something may have to take less. There is always a quid pro quo here.

Mr. LAWS. The fact of what we are doing is a huge amount of litigation that adds to the costs. We are hoping we have achieved the proper balance to address these things.

Mr. SWIFT. You are saying they regain the litigation costs.

Mr. TAUZIN. Would the chairman yield one more time?

Is that one of the reasons you made it voluntary, so someone in a given locality, PRP, feels like he can do better in court, he can still go to court?

Ms. MUNNELL. Yes. That is precisely the issue, that if we didn't do it voluntarily, we would be taking away that right, and then we, the Federal Government, would be sued.

Mr. TAUZIN. Again.

Ms. MUNNELL. For taking. Once more.

Mr. SWIFT. Thank you both very much. I think you both indicated there may be some materials you would provide the committee, particularly Ms. Munnell from the Justice Department.

Oh, excuse me. The gentleman from Idaho. I beg your pardon.

Mr. CRAPO. I sneaked in here.

Mr. SWIFT. You are recognized for questions.

Mr. CRAPO. Thank you. I will be brief. My question relates specifically, and I don't know if you got into this already, but I would like to have a little better understanding of where the money goes and how it proceeds, and specifically does it go to the Superfund trust fund, or to the PRP's, or how will the PRP's obtain reimbursement? What is the exact process that will occur when someone elects to proceed down the course that is provided in this option?

Ms. MUNNELL. The money is going to go from the insurance companies to the Fund. The Fund will have the board of trustees, and some staff.

When the PRP's or policyholders come out of the allocation process, they will walk over to the window at the resolution fund, submit their claims, and will be told, based on wherever they have established venue or where their sites are located, what percentage payoff they are entitled to.

They will then make a decision for all their sites, whether they want to accept or reject this offer. If they accept it, they will receive money as they incur their costs in the process of cleanup. If they reject it, they can then go and sue their insurers as they can under current law.

Mr. LAWS. They are separate funds, though. The resolution fund and the Superfund are entirely separate and there is no exchange of moneys between either.

Mr. CRAPO. Are there penalties that come into play here? Is it truly a free election process, or does the PRP end up facing some kind of penalties in the event that they don't accept?

Ms. MUNNELL. If this is going to work, a lot of PRP's have to accept, or it is not worth doing. So throughout the negotiations, there were considerations of how to provide carrots and sticks to make it an agreeable thing to do. And basically it came down to this notion, if a PRP really thinks that he or she can do better in court, that party should be able to go ahead and sue.

And the debate was focused on whether a policyholder could do better in litigation. Because you didn't really want someone to go through all the litigation expense if they are only going to come out just marginally ahead.

For this reason, there is some fee-shifting built into our original proposal and even more fee-shifting built into the proposal that was agreed upon yesterday.

Mr. CRAPO. When you say fee shifting, you mean if the PRP chooses to go ahead and litigate and does not do better, then they are penalized?

Ms. MUNNELL. If they lose, then they have to, under our proposal, pay some percentage of insurer's litigation costs.

Mr. LAWS. It is 20 percent of the insurer's cost, if by going through the litigation route they ultimately receive an amount that is less than what they had been offered as a settlement by the fund.

Mr. CRAPO. It seems to me that is not entirely voluntary in the sense that you are saying, sure, you can make this choice, but if you don't win, you will be punished. Am I understanding that wrong?

Ms. MUNNELL. That particular point is right. But when you think about this whole deal, it is basically mandatory on the part of the insurers, and totally voluntary on the part of the PRP's. And the idea in the negotiation was to make it more acceptable to—and fair to both parties.

And I think this is a good solution that came out of a hard-fought negotiation. So it is really something that is an agreeable concept to both sides.

Mr. CRAPO. Is the approach of either eliminating joint and several liability or finding some other source or some other solution that is more system-wide simply unacceptable?

Ms. MUNNELL. We had a discussion about retroactive liability before, and Elliott answered that question. I think—I mean, this is the context in which this debate arose. Anybody who reads *Inside EPA* knows that Treasury started out in a different place. But it has been totally convinced that would not be a productive effort to enhance the likelihood of Superfund reform.

This is an issue that has been debated endlessly within the administration. At this point the administration has a united front that this is the absolute best way to go.

Mr. CRAPO. Let me ask, I am concerned that we don't simply substitute one big transaction, cost-related system for another one, when we have an opportunity to truly fix it. Has OMB or any other entity or organization done any study on this proposal to illustrate what transaction costs are going to be reduced and how much of a benefit this is going to bring?

What I am getting at here is if we are going to be encouraged to go this direction, I think we ought to have some baseline as to what it is we are trying to accomplish, so that we can measure against that in the future to see if we have actually benefited.

Ms. MUNNELL. I think throughout the negotiations there was broad agreement that if you didn't have a very high level of participation in this fund, it wouldn't be successful. And the whole thrust of the negotiations was to try to set up a system that would get most of the PRP's to settle, and this involved trying to get the right percentages that would seem most appealing to PRP's, discouraging them from litigation. Our sense is that we have done a pretty good job.

We welcome—and I am sure the principals welcome—any suggestions that you might have. But that has definitely been the goal.

Mr. CRAPO. I guess the question, though, I have is, is there any study OMB or any other group has done that actually puts the sense of it into a more objectifiably determinable parameter we can use as a yardstick to measure this?

Ms. MUNNELL. We have certainly developed cost estimates. How we arrived at the basic contribution levels of $500, $500, $700, $700, $700 million, which we would be happy to share with you. So we do have base numbers.

We have always talked in terms of very high percentages of settlements, in the 80s or we even start at 90 percent. So people have been aiming very high in their target of eliminating litigation and litigation costs.

Mr. CRAPO. I would appreciate it if you could provide any of that information that you have identified there, and I also would encourage you to see if you can't get some kind of a very firm standard of what it is we are hoping to accomplish by this, what amount of transaction costs we are going to reduce, in what way, and how and where, because frankly I have a high level of concern as to whether this is going to be any better than what we have got. And I would like to be able to measure that somehow.

Ms. MUNNELL. Fair enough.

Mr. SWIFT. I want to compliment the gentleman on being able to pronounce "objectifiably determinable", let alone know what it means.

Does the gentleman from Colorado have questions?

Mr. SCHAEFER. No, thank you, Mr. Chairman.

Mr. SWIFT. We thank you both very much and we will continue to work with you on this.

The staffer who ran a staff briefing on the insurance provision yesterday said that at the end of it he thought there was one person left in the room who was still awake. And therefore we are making this the shortest of the hearings we have had on Superfund. We have just one more panel in hopes that the committee can stay awake as well.

We now welcome to the table Oakley Johnson, Benjamin Cooper, Mike McGavick, Edward Pollak, Stephen Merrett, and Kenneth R. Dickerson.

Mr. TAUZIN. While the panel is being seated, Mr. Chairman, I have seen a disturbing memo, which talks about a strategy by an environmental group which wants to kill the bill. I would hope the memo does not represent the environmental groups who are interested in seeing some of these reforms go forward.

Mr. SWIFT. I did notice in a report in the Daily Journal where at least one environmentalist said they thought the strategy was probably—I am trying to use their word—said it wouldn't work, that it was kind of naive. So I don't think that this is necessarily a unified position.

Mr. TAUZIN. I would hate to think we were all wasting our time here. We have been making great progress on trying to arrive at some compromise and conciliation and consensus on this important reform. I would hate to think that anybody out there is just going to take a position that they are going to kill it.

Mr. SWIFT. I think that is true, what that particular environmentalist said. He didn't think that the strategy for killing bills was realistic. And I would tend to agree with him.

I would say this. I think that we are at a point on this particular legislation, we are poised right now where anybody who thinks they are going to be better off by not doing anything this year is

probably wrong, whether they are coming from the environmental movement or whether they are coming from industry or the insurance business or anything else, because the situation is so damn bad that no one is benefiting from it.

I have sensed there are some people in the business community who kind of think that they want to, you know, play roulette and see if they can get a better deal in the next Congress. I think they also are making precisely the same mistake. The country is going to be better off if we do it this year.

Mr. TAUZIN. We will never have a better chairman to shepherd it through, Mr. Chairman.

Mr. SWIFT. You are very kind.

We welcome all of you very much for being here. We appreciate your assisting the committee, and we will begin by recognizing Stephen Merrett, chairman of the Merrett Group. Welcome.

STATEMENTS OF STEPHEN R. MERRETT, ON BEHALF OF LLOYD'S OF LONDON; L. OAKLEY JOHNSON, VICE PRESIDENT, AMERICAN INTERNATIONAL GROUP; EDWARD POLLAK, ON BEHALF OF THE COALITION ON SUPERFUND; KENNETH R. DICKERSON, SENIOR VICE PRESIDENT, ARCO; BENJAMIN Y. COOPER, SENIOR VICE PRESIDENT, GOVERNMENT AFFAIRS, PRINTING INDUSTRIES OF AMERICA, INC.; AND MICHAEL S. McGAVICK, ON BEHALF OF THE SUPERFUND IMPROVEMENT PROJECT

Mr. MERRETT. Thank you, Mr. Chairman.

Lloyds is proud of the interest we have taken in this very difficult subject over the last couple of years and the constructive way in which we have sought to assist in the resolution of it. For example, by participation in the National Commission on the Superfund.

Lloyds would like to express its wholehearted support of the proposals made yesterday in the context of the administration's proposals. In no sense does that mean that our wish list is being met by the proposals that are coming forward.

We are profoundly influenced by the general belief of the unfairness of the original Superfund legislation, and I would like to draw the committee's attention to the particular unfairness that it has for insurers, because the major justifications for the unfairness lie in the punitive effects and the deterrent effects. Neither of those really have anything whatever to do with insurers.

And indeed insurance, being against fortuity, by and large, since the arguments rest on the punitive punishment arising out of the expected consequence of deliberate acts, that is not a subject which would ordinarily be covered by insurance in any event.

So, as I say, insurers feel they are particularly hard hit by the unfairness of the basic legislation which we are seeking to change. Lloyd's syndicates have attempted to establish reserves against a reasonable expectation of the outcome of the claims being made against our insureds and establishment of those reserves has created very, very substantial losses and distress for individuals who are members of Lloyd's.

In the proposals that are coming forward, we don't intend nor do we suggest that there is absolute fairness. We believe that we are seeing some properly rounded views being taken, but that there is

substantially less unfairness for all parties concerned than in any other system, and indeed substantially less unfairness than would be provided by wholesale resort to the courts.

On the issue of a fee or indeed of a tax, if one is permitted to express it in that way for the time being, Lloyd's position is in general terms that we are effectively deemed as a domestic insurer for this purpose. Lloyd's arrangements on tax have been established with the Treasury Department for many years by agreement, and we are comfortable or uncomfortable, depending on how you look at it, that the arrangements quite squarely as drafted by the Treasury fall on us, and in no sense are we seeking to escape what you might call the taxation consequences of this reform as proposed.

The only other comment I would like to make at this stage is that we believe that the formula, the assessment of where the quantum will lie is going to work out satisfactorily because by definition, unless that formula is acceptable to the great majority of the PRP's, then the fund won't go forward. So we think it has its own adequate built-in protective device.

I shall be very happy to answer any questions that you have.

[Testimony resumes on p. 950.]

[The prepared statement and attachments of Mr. Merrett follow:]

U.S. HOUSE OF REPRESENTATIVES

Committee on Energy and Commerce

Subcommittee on Transportation and Hazardous Materials

Testimony

of

Stephen R. Merrett

on behalf of

Lloyd's of London

March 17, 1994

Mr. Chairman, and members of the Subcommittee, we appreciate the opportunity to testify before this Subcommittee as it considers the very important issue of how the Superfund liability system has adversely affected property/casualty insurers, as well as many other industries, and the American economy as a whole. Indeed, that a British insurer is invited to testify illustrates the fact that the huge costs and undesirable effects of the litigation spawned by Superfund are not confined even to American shores.

As you may know, Lloyd's of London is not a single company but an insurance market. Although Lloyd's is based in London, its business is predominantly international as it responds to commercial insurance needs from all over the world.

Lloyd's is over three hundred years old, and since at least well before the end of the 19th century has written many American accounts. Indeed, the United States is the largest source of business for Lloyd's worldwide, and Lloyd's for its part has provided important and longstanding capacity and innovative underwriting for many U.S. industries and difficult-to-insure risks.

I chair the Lloyd's market's internal working party on Superfund. Also, since December 1992, I have had the privilege of serving on the National Commission on Superfund as one of the two insurance representatives on that 25-member Commission. The Commission experience has been invaluable and eye-opening indeed. Over the past fifteen months, we on the Commission have gained a deep appreciation of how many interests and communities are affected by Superfund and how difficult is the task of reconciling the many varied grievances under the current programme. The security behind the policies against which these claims are being made consists of the unlimited liability of some 30,000 individuals. Amongst them are in excess of 3,000 U.S. nationals, who are at least as forthright as any on the subject of the unfairness of the current law.

By now the difficulties that Superfund presents for insurers has been well documented before Congress. Most recently, the American Insurance Association's testimony before this Subcommittee on February 10 explained how insurers become involved in litigation on old insurance policies and in financing the PRP's own defense.

Like our colleagues in the American insurance industry, the London insurance market has been ensnared by this seemingly endless but -- as Superfund now stands -- unavoidable litigation. President Clinton said it best in his first State of the Union address:

> We all know it doesn't work. The Superfund program has been a disaster. All the money goes to lawyers and none of the money goes to clean up the problems it was designed to clean up.

Too much of that money is now spent by insurers and their policyholders litigating against each other over coverage issues and consuming valuable resources, which from a societal viewpoint, could better be devoted to cleaning up waste sites. No one will benefit if the status quo is maintained -- not insurers, not policyholders, and certainly not American communities which suffer as cleanups are delayed.

The special unfairness to which insurers can be subjected as a result of this already unfair law was perhaps best illustrated with refreshing candor last year, when a member of the Florida Supreme Court reversed his position in a CERCLA coverage case in which he had earlier sided against the insurer. He acknowledged that his original position had been based on a desire to protect the PRP from seemingly unfair CERCLA liability rather than on a rational interpretation of the policy language:

> I originally concurred with the position of the dissenters in this case. I have now become convinced that I relied too much on what was said to be the drafting history of the

> pollution exclusion clause and perhaps subconsciously upon the social premise that I would rather have insurance companies cover these losses rather than parties such as Dimmitt who did not actually cause the pollution damage. In so doing, I departed from the basic rule of interpretation that language should be given its plain and ordinary meaning. Try as I will, I cannot wrench the words "sudden and accidental" to mean "gradual and accidental," which must be done in order to provide coverage in this case. Dimmitt Chevrolet Inc. v. Southeastern Fidelity Insurance Corporation, 1993 WL 241520 (Fla.) July 1, 1993.

When Lloyd's began two years ago to focus on possible improvements to the Superfund law which would reduce or eliminate the problems it causes for the insurance industry, we would not have devised a mechanism like the Environmental Insurance Resolution Fund (EIRF) proposed in Title VIII of H.R. 3800. There are far more direct and certain ways to deal with the Superfund problems of both potentially responsible parties and their insurers. The proposal suggested by the Treasury Department last September is a good example. We are not inclined, however, to dwell now on alternatives that, for whatever reasons, have not been pursued by the Administration in its recommendations to Congress. While Title VIII is far from ideal, it indicates a reasonably efficient and rational way to eliminate the waste caused by Superfund-related insurance disputes. We are committed to do all that we can to help you and the Administration make this proposal work so that it can in fact achieve the stated goal: eliminating 95% of all such insurance litigation on a basis that is affordable to insurers and fair to all concerned.

Our concerns with the EIRF scheme as introduced can be reduced to two basic issues:

-- Will a non-mandatory system attract a sufficient rate of EIRF settlements (resolutions, in the parlance of Title VIII), and dispose of enough litigation, to justify taxes (or "fees") which commercial insurers will not have the choice of avoiding? Or will only PRPs with the weakest cases against their insurers sign on?

-- Will the windfalls, which are inherent in a system which attempts to induce broad settlement through voluntarism rather than compulsion, make the EIRF Fund and its tax burden on insurers unaffordable when measured against the costs for which insurers could have otherwise eventually disposed of the litigation?

The Administration has indicated in public meetings since introduction of the bill that it viewed Title VIII as a rough start and that it recognized the asymmetry of a system that would require insurers to pay fees while not compelling PRPs to accept EIRF settlement offers. We agree with the Administration's view that more balance is needed in the scheme and we have accepted the challenge of working with your Subcommittee, the Administration and other major stakeholders to get it right.

In recent weeks much progress has indeed been made in informal discussions among stakeholders to develop consensus recommendations on how Title VIII can be amended to strike this balance. We have contributed to, among other efforts, the discussions conducted under the auspices of the Coalition on Superfund. We are encouraged by the progress made in that forum. We are in substantial agreement with the terms of change that will be described today by the Coalition representatives, although some technical issues (fewer than before) remain to be resolved.

Mr. Chairman, the importance of one overriding principle --the single most important key to the success of this proposal -- cannot be overstated. Unless a substantial majority of PRPs accept EIRF resolution offers and thereby waive litigation against their insurers, the programme will have failed to achieve its objective. Insurers cannot fairly be asked to pay large fees to finance the EIRF if, in the end, they continue to shoulder the burdens of litigation and liability from which they have paid to be relieved. More importantly, the transaction costs of excessive litigation would continue and the goal of Title VIII would not be achieved. For this reason, our first preference, of course, would be for a mandatory system in which all insurance disputes are resolved through the EIRF scheme. We appreciate, even if we are not convinced by, the political difficulties that have so far prevented adoption of such a mandatory system.

Under a non-mandatory system, we need assurance that there will be acceptance by a large proportion of PRPs. PRPs must be convinced that the offer they

receive is as good or better than the likely result of litigation or, more accurately, private settlement. In doing so, however, they will presumably recognize three valuable benefits which EIRF offers in addition to the straight percentage recovery: (1) elimination of litigation costs; (2) certainty of result (including coverage of future claims and natural resource damages); and (3) immediate improvement in cashflow. We believe many PRPs who have participated in the recent Coalition discussions, as a result of that focussed analysis, must now recognize the merits of this programme for them. Other PRPs, we trust, should ultimately reach that same conclusion after a careful review of the proposal in its entirety.

If the perception of these benefits proves insufficient (we have no doubt the benefits in fact are very real), the proposal also includes one other incentive not to reject the EIRF offer. PRPs who reject resolution offers, litigate against insurers, and get a less favourable judgment than the Fund offer would be required to shoulder a portion of the insurer's defense costs. The Administration proposed 20%; in our recent discussions, reflective PRPs have agreed that a 50% fee-shifting is acceptable (subject to an overall cap). Rather than a "penalty" for suing, this is more appropriately viewed as an incentive to accept resolution offers. PRPs will remain free to pursue litigation against their insurers when they genuinely believe that course is in their best interests -- and if they are subsequently proved right, there will be no adverse consequence. There is every reason, however, to employ a scheme that will cause a serious review at the highest management level before a PRP rejects an EIRF resolution offer. The legislation, after

all, is premised on the belief that this litigation is a socially undesirable by-product of Superfund.

Another critical condition for Title VIII is that it must not allow PRPs to pick and choose which cases or sites they litigate against insurers, while accepting EIRF settlements in weaker cases. The all-or-nothing nature of the one-time, irrevocable election PRPs are required to make under Title VIII does much to reduce the danger of such adverse selection. However, the additional incentives and safeguards which have been negotiated under the Coalition's auspices in recent weeks are also crucially important and therefore a condition of insurer support.

Mr. Chairman, the insurance industry, including foreign insurers, will be required to pay a very substantial, but still uncertain price for the establishment of this programme. The Administration's proposal is to raise $500 million to $700 million (in years 3-5) annually from insurers, foreign and domestic, to fund this programme. It is in all of our interests to see that the programme remains solvent if in fact it is shown to be achieving its goal of eliminating litigation on an affordable and certain basis. Recognizing the difficulties of projecting accurately the future revenues and obligations of the Fund, we have accepted the suggestion that the Secretary of the Treasury be given the authority to increase insurer fees by a limited, statutorily defined amount in the second five-years of the programme. You will undoubtedly understand that insurers would accept such uncertain future fee increases with considerable concern and

reluctance. We believe that it is only fair that two concomitant tools also be adopted in the legislation: (1) that the Fund be allowed to stretch out certain of its obligations to PRPs if necessary to match obligations with funding over the long run, and (2) that some provision be made to reduce or eliminate the programme fees if resolution offers are not, in fact, generally accepted by PRPs.

We understand that the details of the EIRF funding mechanism may not be this Subcommittee's work. Some general comment, however, may be in order. Other things being equal, we favour the use of a prospective fee to fund this programme. Retrospective fees are inherently problematic because the parties bearing them were not able to plan for the burden. Certainly, any use of retrospective fees should be clearly and firmly circumscribed so as not to invite further increases in future years.

Finally, the viability of Title VIII, even with the improvements recently developed under Coalition auspices, depends on other Superfund reforms. Under any studies made, the EIRF will be affordable only if reform of remedy selection lowers the ultimate cost of cleaning up NPL sites. We urge that every effort be made to rationalize the cleanup process -- and that this be accomplished in 1994. Even the delay of another year in making real progress towards cleanup may have adverse consequences to the health of those who live near some of these sites.

Conclusion

Mr. Chairman, an ideal solution has not been offered. However, we are encouraged that Title VIII, together with the recommendations for amendments which are emerging from stakeholders' negotiations, conducted under Coalition auspices, may represent a viable package. It is, however, a tenuous compromise in which insurers are risking much. We are encouraged to support Title VIII, with these amendments, because its adoption holds out the prospect for us of putting behind much of the acrimonious litigation that has festered between insurers and their major commercial policyholders. Most appealing to us is the prospect that reducing litigation will help us to renew the good faith and trust which have been the hallmark of Lloyd's relationships with American policyholders for so many years.

Adoption of an effective, affordable Title VIII should be an important element of Superfund reauthorization this year. We want to make it work, and we are committed to helping you see that it does.

Thank you again, Mr. Chairman, for the opportunity to offer Lloyd's views on this important legislation. I would be pleased to respond to any questions you and members of the Subcommittee may have.

[redacted]

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April 5, 1994

The Honorable Michael G. Oxley
Ranking Minority Member
Subcommittee on Transportation
and Hazardous Materials
Room 564, Ford House Office Building
Washington, D.C. 20515-6120

Re: Superfund -- Lloyd's of London

Dear Mr. Oxley:

At the Subcommittee's recent hearing on H.R. 3800, our client Stephen Merrett undertook to provide you with more information regarding Lloyd's comparative exposure to Superfund or other U.S. environmental claims.

Precise information on this issue is extremely difficult to produce either within the Lloyd's market or on an industry-wide basis. However, we enclose two reports by U.K. financial analysts, Hoare Govett (May 1992) and UBS Global Research (May 1993), respectively, which compare Lloyd's relative strength of reserves, and therefore financial position, with that of major U.K. and U.S. insurance companies. In particular, the studies consider the historical mix of short- and long-tail (e.g., liability policies giving rise to pollution claims) business in assessing reserve strength, and reach favorable conclusions about Lloyd's reserve trends and solvency margins.

We would be pleased, of course, to discuss these reports or other questions which you or your staff may have.

Yours sincerely,

L. Charles Landgraf

L. Charles Landgraf

Enclosures
cc(w/enclosures): The Honorable Al Swift

LLOYD'S

LLOYD'S
LLOYD'S OF LONDON

SUMMARY OF CONCLUSIONS FROM HOARE GOVETT STUDY MAY 1992

INTRODUCTION

- The conclusions summarised below are drawn from the report 'Lloyd's of London: Profits, Reserves and Solvency; a comparison with the insurance industry'. The study, commissioned by Lloyd's and conducted by Chris Hitchings of Hoare Govett Investment Research Ltd, was published in May 1992. Copies of the full report are available on request from John McCroskie, Lloyd's marketing department, telephone 071-327 6061.

STRONGER SOLVENCY MARGINS

- Lloyd's was found to have stronger solvency margins than either US or UK companies.

SUPERIOR LEVELS OF RESERVES

- Lloyd's was found to have maintained technical reserves that are:

  (i) much higher than those of UK companies, and

  (ii) generally higher than those of US companies.

- No evidence was found which would require Lloyd's to maintain higher reserves than those of US companies.

- Hoare Govett concluded that Lloyd's is probably more strongly reserved than the US insurance industry.

HIGHER PROFITABILITY

- On a like for like basis, Lloyd's syndicates have generally produced higher profit margins than insurance companies.

- It is more meaningful to compare Lloyd's results with those of insurance companies on a 'reported time' basis; ie Lloyd's 1988 year with insurers' 1990 results.

- Press reports of Lloyd's 1989 losses will represent a very poor result, unprecedented in the post-war period. UK insurance company results are also very poor and similarly unprecedented

- Lloyd's results for 1989 are likely to be much worse than those of the insurance companies. A similar situation occurred in 1965. This was also a year in which generally poor margins throughout the industry were exacerbated by severe natural catastrophes (Hurricane Betsy).

- Lloyd's syndicates are likely to have made higher provisions for past and future liabilities than insurance companies

CONCLUSION

- Today, Lloyd's maintains a level of solvency and security behind its policies well in excess of its main US and UK competitors, according to this report. These conclusions suggest that Lloyd's is in a position to take full advantage of increasing rates in the world insurance market and return to profitability in the near future.

LLOYD'S
LLOYD'S OF LONDON

LLOYD'S OF LONDON: A COMPARATIVE ANALYSIS

■ **Special Survey**

This is a summary of a May 1993 survey commissioned by the Corporation of Lloyd's and carried out by *UBS Global Research*. It is a comparison of the financial position of Lloyd's of London with that of UK and US insurance companies. The report was carried out by leading insurance analyst Chris Hitchings, and updates that published by *Hoare Govett* in May 1992.

Conclusions include:

■ **Better Reserved**

Lloyd's has maintained technical reserves much higher than those of UK companies and generally higher than those of US companies.

The difference between the technical reserves of Lloyd's, UK and US companies appears to have widened significantly since1987. In this period of declining global premium rates and gloomy liability problems, most insurers' reserve ratios have increased. However, while the UK and US company ratios have risen by 24% and 25% respectively, Lloyd's has risen by 45%.

The report notes that one explanation of the divergent reserve trends could be that Lloyd's underwriters are recognising liabilities which, as yet, the US insurers are not.

■ **Similar Business Mix**

Over one-third of Lloyd's premium income comes from treaty reinsurance (while a further 10-15% is facultative reinsurance). Reinsurance normally has a longer tail than direct business in the same class. However, UBS find no evidence in Lloyd's business mix which would require Lloyd's to maintain reserves which are higher than those of US companies. Lloyd's reserves also appear consistent with those of US and two major Continental European reinsurers.

■ **Solvency**

The report finds evidence that while Lloyd's solvency margins have weakened since 1987/88 they remain stronger than the average of either the US insurance industry or the larger UK composite insurers.

■ **Profitability**

Lloyd's has generally produced higher profit margins than either US or UK insurers.

It is more meaningful to compare Lloyd's results with those of the insurance companies on a 'reported time' basis (ie Lloyd's 1989 loss of £2 billion with the UK insurers' estimated 1991 loss of £1.9 billion).

■ For a copy of the full *UBS Global Research* report please contact Lloyd's marketing department, room 546, 1986 building, telephone 071-327 6061; fax 071-327 5229.

Mr. SWIFT. Thank you very much.

We will hear testimony from everybody and ask questions of the panel as a whole.

I turn now to L. Oakley Johnson, vice president for corporate affairs for the American International Group.

STATEMENT OF L. OAKLEY JOHNSON

Mr. JOHNSON. Mr. Chairman, thank you very much. I am vice president of AIG for Corporate Affairs. I am appearing today on behalf of our company. I want to thank the subcommittee for the opportunity to share our concerns about the Environmental Insurance Resolution Fund.

I would like to say at the outset that I have been asked to inform the subcommittee that two major national organizations representing important segments of the insurance industry support our position. The National Association of Mutual Insurance Companies, whose members include 1,250 small and regional property and casualty insurance companies, and the Council of Insurance Agents and Brokers, representing 300 of the Nation's largest insurance brokers and agencies writing $80 billion in commercial insurance premiums at over 1,000 locations across the country.

As many of you know, since 1989, AIG has been a vocal advocate for fundamental Superfund reform that will best serve society's interests in generating prompt, efficient, long-term hazardous waste cleanups.

Regrettably, after careful study we do not believe the administration's proposal goes far enough. While well-intentioned and clearly reflecting an understanding that Superfund has failed, we believe the administration's proposals overall suffer from a core problem. They build indeed on the flawed foundation of Superfund's 13-year-old retroactive site-specific liabilities system, leaving almost all of it intact.

We sense that the Superfund reauthorization process is being driven by a perception that the Superfund's liabilities system is so sacrosanct that only limited, piecemeal relief can be offered to a few parties at the expense of all of the remaining stakeholders.

AIG strongly endorses the reform approach advocated by the Alliance for Superfund Action Partnership, ASAP, chaired by Dr. Ben Chavis, which has presented to this subcommittee its views at an earlier hearing.

ASAP offers the only comprehensive reform package that will work for all Superfund stakeholders, in our judgment. We believe the momentum for this type of programmatic reform is growing daily, especially outside the Beltway.

In the time remaining I would like to focus on title VIII of H.R. 3800, developed by the administration with consultation with some major PRP's and some major insurers. Since we have not been part of the recently concluded negotiations of the Coalition on Superfund which produced the compromise amendments, my remarks necessarily will reflect our general understanding of the compromise terms, which we only recently received.

We applaud the administration's good effort, good faith effort to address the debilitating litigation spawned by the Superfund program. However, we have always opposed an insurer-only solution.

The EIRF's focus, settling disputes between some PRP's and insurers, in our view, is just too limited. At best, the EIRF appears to simply reshuffle spending on Superfund to reduce large PRP-insurer transaction costs.

What is clear is it will not increase total cleanup spending or spending on other related priorities, nor will it speed cleanup. We do not believe that the EIRF will save either PRP's or insurers all that much, frankly, in transaction costs.

As a RAND study reported, only 30 to 40 percent of insurer transaction costs are incurred at NPL sites. Presumably this reflects PRP experience as well, as there is no legal reason which would differentiate NPL from State sites for the purposes of insurance claims.

Typically the larger claims against insurers include both NPL and State sites. In fact, not only will the EIRF unfortunately not reduce transaction costs, but we fear that it may provide a perverse incentive to increase overall costs in the program. By creating an essentially unlimited source of new funds to pay on average 40 percent of cleanup costs, the EIRF may undermine incentives for EPA to choose the most cost-effective remedies and place additional upward pressure on overall Superfund costs.

The EIRF will also give rise to an enormous and complicated new Federal bureaucracy to deal with the allocation disputes and to review each insurance policy to determine a series of complex and esoteric coverage issues. The government will be forced to replicate the army of insurance archaeologists that large PRP's and insurers now use to determine their positions on litigation, and apply their expertise on a case-by-case basis to thousands of PRP's.

It is difficult, Mr. Chairman, to imagine how complex an insurance coverage case can be. To dramatize just a bit, if you will bear with me, I would like to just show you one example of one PRP insurance coverage chart for a period of 35 years which stretches roughly 8 feet in length, which gives you an idea of the complexity of the issues that the insurance industry faces and the PRP will face in complying with the terms necessary to make the EIRF work.

We would be happy to provide with you a sample of this kind of coverage document for your reference in determining the validity of our statement.

Overall, we do not believe the EIRF is fair or workable. Using estimates based on two RAND studies, insurers pay 1 percent today of the cleanup costs and about 10 percent of overall private sector costs, exclusive of taxes imposed by Superfund.

But under the terms of the EIRF, insurers would pay on average 40 percent of all Superfund costs incurred to date and in the future.

In the administration's bill, insurers would pay an estimated $2.5- to $3.1 billion in the first 5 years. Seventy percent of the assessment, as mentioned, would be payable against amounts of premiums collected by insurers who issued only such types of commercial insurance policies that could have been subject to environmental insurance claims from 1971 to 1985.

The pre-1986 retroactive feature was chosen, we understand, by the administration to achieve indeed fairness and equity as well as

cost efficiency. These are the same insurance policies and years currently being contested in the expensive coverage litigation for which the EIRF attempts to provide relief.

Today, insurance policies contain very explicit, absolute exclusions from Superfund exposures. To levy a fee or assessment on insurers based on prospective commercial insurance policies, as proposed in the compromise, we understand, totally divorces the assessment or fee from relief of any potential retroactive liability for insurers. It becomes a general assessment that might as well be levied against the sale of popcorn for all its relevancy to the insurance industry.

We believe that if this assessment, which we oppose, is to be levied against the insurance industry, it should be broad based and cover all commercial lines of insurance, and it should be designed as a separate, identifiable item so that insurance regulators have no question as to whether it should be included as part of ratings for policies to which it applies.

As you consider changes, Mr. Chairman, to the legislation before you, we urge you to consider the ASAP approach.

You might also want to explore the Business Roundtable work on some creative ideas to develop what has come to be called the Rapid Site Settlement Election Proposal. It is worthy of your consideration, if we may suggest so. While short of our original proposal, the Business Roundtable draft does provide substantial relief from retroactive liability, while maintaining the principle, which includes a doubling of the environmental income tax on all businesses as supported by the organization.

In closing, Mr. Chairman, we do want to express our willingness to work with the Congress, with the administration, and other stakeholders to consider alternative approaches that address the fundamental problems with Superfund.

I thank you for the opportunity to appear.

[Testimony resumes on p. 966.]

[The prepared statement of Mr. Johnson follows:]

L. OAKLEY JOHNSON,

VICE PRESIDENT

AMERICAN INTERNATIONAL GROUP, INC.

My name is Oakley Johnson, Vice President, Corporate Affairs, at American International Group (AIG), on whose behalf I appear today. AIG appreciates the opportunity to provide our thoughts on Superfund reauthorization to the Subcommittee on Transportation and Hazardous Materials of the House Energy and Commerce Committee.

In 1989, AIG helped launch a nationwide campaign to increase public awareness of the need to overhaul a program that has led to endless clean-up delays while resulting in billions of dollars in unnecessary legal costs. We originally proposed replacing Superfund's liability fundraising mechanism with a broad-based fund derived by placing a separate and identifiable 2% surcharge on insurance premiums paid by all businesses that would be placed in a trust fund to pay for the clean up of hazardous waste sites.

Few knowledgeable observers today, including even Superfund's most passionate defenders, believe that the current liability system has achieved its original purpose. Virtually everyone agrees it must be changed. Indeed, most proposals to reform Superfund have numerous provisions to change how cleanup funds are raised and liability established.

While we applaud the Administration for recognizing that the Superfund law has failed, we believe the liability proposals in the Superfund package sent to Congress by President Clinton mask the real issues and fall far short of the more fundamental reform that is so urgently needed.

The existing Superfund liability regime has spawned waves of costly litigation -- and potentially massive exposure -- for insurers which we believe is without merit. It is also quite obvious that entirely apart from our own interests, the Superfund law is not serving society's interest in generating prompt, efficient, long-term hazardous waste cleanups. We continue to believe that the result of the Superfund reauthorization process must be to attain these goals.

Regrettably, we do not believe the Administration's proposal will do the job. Even though it is well-intentioned, it suffers from a core problem: it builds on the flawed foundation of Superfund's 13 year-old, failed, retroactive, site-specific liability system leaving almost all of it intact. In so doing, it puts in place a number of contorted allocation schemes that are doomed to repeat the failures of the past and add further complexity to the process.

Rather than tackling the inefficiencies and inequities of Superfund's liability system directly, the Administration plan assures continued litigation and high transaction costs by retaining the requirement to identify thousands of parties, develop detailed information about past waste disposal, make complex allocation decisions and process tens of thousands of insurance claims.

The bill does little to ameliorate the effects of retroactive liability on either the Superfund program or on the vast majority of the 32,000 PRPs who have been identified, their insurers, or on the citizens and communities located on or near Superfund sites. Although the bill does provide piecemeal relief from retroactive liability for some parties, for example generators and transporters of municipal solid waste, lenders, trustees, and fiduciaries, it does so at the expense of the remaining PRPs.

Last month, the American Bar Association (ABA) added its voice to those urging the Administration and Congress to eliminate retroactive liability. The ABA resolution states that retroactive liability is unfair, contrary to the common law, and presents an additional major risk to business decisions because present activities which are legal may have uncertain future legal consequences. The ABA resolution states that this added risk will tend to discourage new investments in the future.

Superfund's failures go beyond its abysmal record in cleaning up large numbers of sites or its unmatched record for triggering legal warfare and unacceptable transaction costs among federal and state government, local governments, business of all sizes, and insurers. Superfund is also highly damaging to our economy, directly and indirectly.

For example, major cities see hundreds of abandoned, but potentially tax-producing, industrial sites sitting idle because the threat of Superfund liability drives investors and businesses away from re-using them. Citizens and communities near these sites wait endlessly for relief.

An ever-expanding number of small businesses -- acknowledged engines of job creation -- are driven into bankruptcy, denied credit, or simply distracted from what they do best as they face Superfund liability, often in compliance governmental requirements.

These costs are just as unacceptable and damaging as the costs placed on insurers and Fortune 100 PRPs. And we are deeply troubled that the Superfund reauthorization process is being driven not by what will solve these problems, but by those who have become prisoners of the conventional wisdom in Washington and who want to preserve the status quo. There seems to be a lot of looking at the trees: What do we need to do to win small business support? What do we need to do to win some environmental group support? What do we need to do to win some big business support? What do we need to do to win some state and local government support? But after this process is done, someone needs to look at the forest that has been created.

Our strong sense is that this constituency-by-constituency approach to reform may get a bill passed, but it will not, in the

end, result in a better program. May I respectfully suggest that this subcommittee should do all it can to avoid repeating the mistakes of 1986. If you tinker with the law, you may be coming back here five years from now talking about the same issues and lessons we have already learned since Superfund was enacted.

AIG strongly supports the reform approach advocated by the Alliance for a Superfund Action Partnership (ASAP). I know ASAP's Chairman, Dr. Benjamin Chavis, appeared before this Subcommittee a few weeks ago. I will not repeat all the details of the ASAP Eight Point Plan. Let me simply suggest that in our judgment, the ASAP plan is the only comprehensive reform package that will work for all Superfund stakeholders. The only arguments made against it have little to do with substance and everything to do with politics. The main argument is that retroactive, site-specific liability is sacrosanct and that an increase in business taxes to pay for its elimination would be politically unpopular.

But many parties reject the view that site-specific liability is sacrosanct. As the strong base of ASAP's support suggests, good substance can also be good politics. Political support for the right kind of Superfund reform is pervasive and growing, particularly outside of Washington.

Let me now turn to Title VIII of H.R. 3800 and the Environmental Insurance Resolution Fund (EIRF) proposal developed

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by the Administration in consultation with some major PRPs and some major insurers. At the outset, I should also note that it is difficult to comment with much specificity because we have not been part of the recently concluded private negotiations of the Coalition on Superfund which produced compromise amendments to the Administration's initial proposal. As you know, the details of the latest compromise have only just become available.

AIG applauds the Administration for its good faith effort to address the debilitating litigation spawned by the Superfund program. But from the start we have rejected an insurer only solution as unworkable, and as mentioned, we reject the premise that dealing with individual constituent problems in isolation can yield comprehensive, effective reform.

We have serious reservations with the premise as well as the purpose of the proposed EIRF.

Regarding the premise, no one has ever suggested that the insurance industry was a polluter contributing hazardous waste to Superfund sites. The only reason we are involved at all is the claim -- hotly contested by the insurance industry and challenged by a significant number of recent court decisions -- that some old comprehensive general liability policies provide coverage to policyholders for their Superfund clean up costs.

The most critical problem with the EIRF is its limited focus - settling disputes between some PRPs and insurers. The proposed EIRF does not attempt to change the basic Superfund financing or prioritization system. The EIRF attempts, at best, to reshuffle current spending on Superfund to solve a derivative issue -- how to cut large PRP/insurer transaction costs. It will not increase total cleanup spending nor spending on other related priorities, nor will it accelerate cleanups.

PRP/insurer disputes are a relatively small source of Superfund transaction costs. EPA and we estimate public and private NPL transaction costs in the neighborhood of $1 billion per year. The larger problem with the current liability system is PRPs fighting EPA and each other over overall costs and cost allocation, which produces major cleanup delays. The EIRF does not address that fundamental issue at all. Thus, it cannot have any direct positive impact on the program. We support raising money from business in a more efficient way to pay for cleanup, but why should Congress vote to tax insurers hundreds of millions of dollars for a fund which has nothing to do with faster or more cleanup?

Furthermore, EIRF payments to PRPs have no relationship to PRPs' actions at NPL sites. As we understand the proposal, a PRP could settle with the EIRF but continue to fight EPA and other PRPs over its responsibility at any or all of its Superfund sites. But the EIRF would still pay the PRP an average 40% of all its future

and past costs, including its past and future legal fees as it fights EPA.

The EIRF may indeed exacerbate the current legal domination of the program if the effect is to subsidize PRP legal fees. This is particularly true due to the Administration's decision to maintain the current site-by-site fundraising system with only a few minor changes, assuring continued liability disputes.

The proposal seems to provide, in short, a tax on insurers to subsidize PRP lawyers to fight with the government. None of the money in new fees imposed on insurers will expand spending on cleanup.

We do not believe that the EIRF will save either PRPs or insurers much in transaction costs. As RAND has reported, 30-40% of insurer toxic waste expenditures are caused by NPL sites. Presumably this reflects PRP experience as well, as there are no legal reasons which would differentiate NPL from state sites for purposes of insurance claims. And typically, the larger claims brought against us include both NPL and state sites.

Thus, in a hypothetical suit reflecting these averages, the effect of the EIRF would be to settle an average of 40% of the liability for a 30-40% NPL share of the total amount at issue in a suit -- or 12-16% of the total claim. The suit will obviously

continue, as well as its attendant legal fees. Legal fees do not get proportionally reduced when the amount at stake is reduced. To really reduce transaction costs, lawsuits must be settled. This can only be done by much higher settlement percentages than the 40% average contemplated by the EIRF proposal.

In addition to not reducing transaction costs, we think the EIRF may provide an incentive to increase overall costs. Many Superfund critics charge that there are currently not enough incentives for Government to control costs, or pick cost effective remedies. They say EPA has a strong incentive to pick more expensive remedies than are required to protect human health because PRPs will supposedly pay all the costs, including EPA's oversight. With an essentially unlimited source of new funds to pay an average 40% of all PRP costs, the EIRF proposal could exacerbate this incentive, placing additional upward pressure on overall Superfund costs.

The Administration's original EIRF proposal was criticized for creating major incentives for adverse selection which simply put insurers in double jeopardy by paying new taxes, while still exposed to suits over NPL liability.

The private negotiators solved much of that problem with their "trigger" proposal to terminate the whole program if 85% of the large PRPs chose not to use the EIRF. Is there not created by this

proposal a whole new level of uncertainty? We have been told that some major PRPs may opt out. Thus, Congress can go through this exercise, raise hundreds of millions in new taxes, halt this litigation for over a year, and end up with nothing, based on the litigation calculations of a few large PRPs.

It should also be noted that the Administration's bill puts the Government squarely in the middle of horrendously complicated allocation disputes, made almost impossible to resolve properly by the absence at most sites of credible contribution and negligence information on disposal practices. A sizeable, new bureaucracy will be needed by the EIRF to review each insurance policy of each PRP to determine "limits of liability", "deductibles", "self-insurance retentions", "per occurrence limits", and similar esoteric and complex issues. Big PRPs and insurers now employ armies of "insurance archaeologists" to determine their positions on these issues for litigation. The Government will have to duplicate that expertise and apply it on a case by case basis to thousands of PRPs.

It is hard to imagine, unless you have been engaged in this work, to appreciate what it will take for the staff of the EIRF to make these determinations. Companies often have had scores of policies written by scores of different insurers with language, limitations and coverage amounts changing over time. If you have never seen an insurance coverage chart, I hope you will look at one

before you approve this plan. We would be happy to provide a sample should the Subcommittee require it.

Overall we do not believe the EIRF is fair or workable. Using estimates based on two RAND studies, insurers pay about one percent of the cleanup costs and about 10% of overall private sector costs (exclusive of tax) imposed by Superfund. But under the terms of the EIRF, insurers would pay an average of 40 percent of all PRP Superfund costs incurred to date and in the future. The EIRF would impose an enormous tax on our industry - a minimum of between $2.5 and $3.1 billion over the first five years, growing to as high as $5 billion in the second five years under the compromise plan. If one accepts these cost estimates (which are subject to serious question), this would amount to an average of some $800 million per year.

Especially disturbing is that no other industry is asked to contribute to this fund. Funding is limited to the insurance industry which, at best, should only be a partial contributor among other stakeholders. This sole-source funding notion runs entirely counter to the "fair share" approach embraced in the liability provisions of the Administration's proposal.

While the EIRF funding mechanism may be viewed as a secondary issue, it is primary to the insurers who will be taxed. The taxing mechanism in the Administration's proposal would assess an

estimated $2.5 - 3.1 billion on the insurance industry in the first five years. Consistent with this approach, seventy percent of the assessment is properly payable against amounts of premiums collected by insurers who issued only such types of commercial insurance policies that could have been subject to environmental insurance claims from 1971-1985. The pre-1986 retroactive feature is chosen by the Administration to achieve fairness and equity as well as cost efficiency. These are the same insurance policies and years currently being contested in extremely costly court cases by the PRP's and insurers for which the EIRF attempts to establish some mechanism to provide relief and to avoid litigation costs.

Today, commercial insurance policies contain very explicit absolute exclusions from Superfund exposures. To levy a fee or assessment on the insurers based on prospective commercial insurance policies issued flies in the face of even a remote nexus to the polluter pays concept. It also totally divorces the assessment or fee from relief of any potential retroactive liability of insurers. A tax based on premium received on prospective policies issued becomes a general revenue assessment that might as well be levied on the sales of popcorn for all its relevancy to the insurance industry. If this tax is to be levied on the insurance industry, it should be broad based and cover all commercial lines of insurance. It should also be specifically designed as a separate, identifiable item so that state insurance

regulation departments have no question as to whether it should be included as part of ratings for the policies to which it applies.

AIG has always advocated the broadest possible reform, beginning with our initial proposal in 1989 that would have raised $40 billion over ten years, for a larger, more efficient Superfund. We still believe this general approach has merit.

We have always been willing to consider alternative approaches -- if they solve the fundamental problems of Superfund. In this regard, the Business Roundtable recently voted to support up to a doubling of the Environmental Income Tax, along with additional taxes on insurers and other stakeholders to help resolve the problems of the current retroactive liability system. Consistent with the "Elements for Liability and Financing Reform" approved in February, the Business Roundtable's Superfund Working Group unanimously voted two weeks ago to approve the outline of a creative plan called the "Rapid Site Settlement Election (RSSE)." While short of what we originally proposed, the plan would use the additional taxes that the Business Roundtable is willing to support and end the delays and warfare at most NPL sites. The Business Roundtable draft is a good example of an approach that funds substantial relief for retroactive liability for old, legal disposal that would be directly tied to rapid settlement at sites.

We continue to believe that when the Superfund reauthorization process is completed, the final product can and should resemble the kind of broad-based, comprehensive solution we have advocated for over five years. We look forward to continuing to work with this Subcommittee, other Congressional panels, and the Administration as the process unfolds.

Mr. SWIFT. Thank you very much.

I now recognize Mr. Edward Pollak, corporate senior vice president of the Olin Corporation.

STATEMENT OF EDWARD POLLAK

Mr. POLLAK. Thank you, Mr. Chairman.

I am Ed Pollak of the Olin Corporation but today I am testifying for the Coalition on Superfund. I have submitted written testimony on behalf of the coalition.

I would like to focus——

Mr. SWIFT. I think I should do a procedural thing. I am asking unanimous consent that the prepared text of all of our witnesses today be included in the record. Without objection, so ordered. Thank you.

Mr. POLLAK. I would like to focus my oral testimony on two issues. One, why I believe the PRP community supports the concept of an insurance resolution fund. And two, why I believe the vast majority of PRP's will opt into the system as proposed by the administration with the modifications proposed by the coalition.

In dealing with the first subject, I would like to offer a perspective based on two other roles I played in the Superfund debate, one as chairman of the Business Roundtable's superfund working group, and two, as member of the staff committee of the National Commission on Superfund in support of John Johnstone, who was Olin's chairman and CEO, who was a member of the commission.

Superfund liability reform has been a controversial issue within the business community. We can all agree that the present liability system is flawed. But we have had difficulty in reaching a consensus on a solution. Some have advocated the elimination of retroactive liability, with costs associated with pre-1986 actions paid for by an expanded trust fund. Others have advocated a fair share allocation system to deal with the joint and several aspect of the present system.

In recognition of this, the Business Roundtable has adopted a position which supports a mandatory fair share allocation system, as well as a continuing effort to seek out ways not to eliminate but to ameliorate the effects of retroactive liability.

In this regard, the BRT supports the creation of an insurance resolution fund which is fair to all, affordable to the insurance industry, and which will provide for the settlement of the vast majority of insurer-PRP disputes.

While the National Commission on Superfund did not directly address the issue of an insurance resolution fund, its report did state, and I quote, "The commission recognizes, however, that the fair share allocation system proposed will not solve problems between insureds and insurers that arise because of Superfund liability. These disputes lead to the expenditure of resources for transaction costs, which preferably should be directed toward cleanup. Therefore, members of the commission urge continuing discussions to determine whether there is a way to resolve insurance disputes in order to redirect these transaction costs.

"The commission agrees that any resolution of that issue should fairly reflect the rights and interests of both insureds and insurers.

It also should not reduce the financial resources available for clean-up."

Based on this, I feel confident that there is broad support for a fair, affordable insurance fund. With regard to my second subject, I truly believe that a broad cross-section of PRP's will opt into the insurance resolution fund, and not just those with poor insurance cases, as has been alleged.

I say this for the following reasons. One, the proposed handling of the very contentious issues of policy limits and deductibles is simple and generous.

Two, the provision for settlements for owned property is also very generous compared to the actual difficulties experienced by policyholders in most coverage litigation.

Three, PRP's will be able to book their expected payments from the fund immediately rather than having to wait for the conclusion of litigation, as is now the case under SEC rules.

Four, settlements for current and future expenses will be paid on a pay-as-you-go basis, again, without having to wait for the conclusion of litigation.

Five, opting into the fund eliminates the need to go through the expensive, time-consuming and extremely uncertain fact-finding phase of insurance litigation.

Six, opting into the fund provides future certainty with no need to worry about future litigation where the situation may or may not be less favorable for the PRP than in its current litigation.

Seven, authorizing the fund for 10 years as proposed by the coalition and increasing the insurance industry contribution in years 6 through 10 substantially reduces the possibility that the fund will shut down, which has been a major concern for some PRP's.

Now, there are individual PRP's whose situations are such that they can truly achieve better results through continuing their insurance litigation. These companies can and should opt out of the system. However, I believe that most PRP's will perceive the proposed system as fair and that the public policy objective of eliminating the vast percentage of coverage disputes at NPL sites will be achieved.

In conclusion, I want to emphasize that essential to the success of the insurance resolution fund, and indeed to the success of Superfund reform is a substantial reduction in overall costs through reforming the remedy selection process, minimizing transaction costs, and assuring that natural resource damage claims are contained within well defined and readily established limits.

The Coalition on Superfund encourages this subcommittee to incorporate provisions into H.R. 3800 to accomplish this to the maximum extent possible consistent with Superfund's goals of protecting human health and the environment.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Pollak follows:]

TESTIMONY

BY THE

COALITION ON SUPERFUND

BEFORE

THE

SUBCOMMITTEE ON TRANSPORTATION AND HAZARDOUS MATERIALS

COMMITTEE ON ENERGY AND COMMERCE

MARCH 17, 1994

This testimony is presented on behalf of the members of the Coalition on Superfund. The Coalition on Superfund is comprised of members from both the property/casualty insurance industry and the manufacturing/chemical processing industry. It was formed in 1987 with a portion of its goal to improve the interaction between these industry segments regarding reauthorization of the Superfund law.

During the latter portion of 1993, the Coalition began developing options that would provide for resolution of insurance litigation regarding coverage disputes at Superfund sites. When the Clinton Administration released its legislative proposal (H.R. 3800), it included Title VIII for the purpose of creating an Environmental Insurance Resolution Fund to resolve coverage disputes. The broad public policy goal of this title was to end 80 to 95 percent of the coverage litigation over National Priorities List (NPL) sites. This action by the Clinton Administration was a major step forward toward developing a resolution of the extensive litigation between insurers and insureds. It put into consideration an innovative and positive approach to dealing with this private sector problem. And, it showed a willingness to make resolving this issue a part of the overall Superfund reform agenda.

Moreover, the clear indications from Congress that it wanted efforts made to find consensus or compromise on this issue in the private sector put these diverse industries on notice that they need to try to find a resolution of their differences if they wanted provisions in the Superfund reform legislation.

Consequently, because of its membership and size, the Coalition on Superfund members decided to try to develop modifications to the Administration proposal that would meet a series of criteria. These were:

The proposal would continue to target elimination of a high percentage of coverage litigation at NPL sites.

The proposal would result in support from a substantial majority of the members of the Coalition as a starting point for developing broader support across the business community, the policy makers and other stakeholders associated with Superfund.

The proposal would be affordable and fair to the insurance industry.

The proposal would be fair to industries which are potentially responsible parties at NPL sites.

After several intense weeks of private and sensitive negotiation, a substantial majority of the members of the Coalition on Superfund are now prepared to support a proposal building on Title VIII of the Administration bill. The changes which will be described momentarily are designed to address a number of key concerns of both sides associated with coverage litigation. Among these concerns are:

1. The insurance industry is deeply concerned that — if it is going to pay a substantial tax for the foreseeable future — it must be protected against the problem of adverse selection. In the context of Title VIII, the problem of adverse selection arises if too many PRPs fail to accept the offer from the Environmental Insurance Resolution Fund (EIRF). If this occurs, the insurance industry must pay the tax without the policy objective of terminating coverage litigation being successful.

2. Many PRPs are unwilling to accept a mandatory requirement to participate in the EIRF. Rather, they would seek incentives to participate in addition to those in the provisions in Title VIII.

3. Both insurers and PRPs believe that there is a greater need for certainty regarding the states that will be included in the three categories for determining the percentage a PRP will receive from the EIRF as well as the eligibility criteria.

4. Insurers are concerned, and PRPs in the Coalition generally agree, that the current Title VIII creates the potential for windfalls — a substantial amount of the EIRF could be drained for claims that would not likely be litigated under current law. Because of the low thresholds the current Title VIII creates for claims against it, parties who would not otherwise pursue claims on insurance policies would come to the EIRF.

The Coalition members have attempted to address all of these concerns. While detailed descriptions of the changes the Coalition members support is submitted with this testimony, following are a number of the key items:

1. After the EIRF develops offer numbers for each PRP, there will be a time certain for

all PRPs to accept or reject these offers. If more than 15 percent of a measure designed to reflect the magnitude of coverage litigation at NPL sites rejects the offers, the EIRF would terminate its functions, taxes collected from the insurance industry would be refunded, and coverage litigation would resume. This approach was developed to assure that the adverse selection problem would not overcome the public policy objective of substantially ending coverage litigation.

2. In calculating the offer number, the Title VIII of H.R. 3800 uses venue as the sole basis whenever venue has been established and the location of NPL sites where no venue has been established. This proposal would use the Administration's venue proposal for half the value of the offer number when venue has been established. It would then base the other half of the value on the location of sites with those sites in the state of venue counting twice. The purpose of this change is to reduce the potential for adverse selection by those PRPs who are poorly treated by a venue only offer while mitigating any windfall for those who have selected favorable venues.

3. Whether the EIRF will be adequate to pay all of the claims against it depends in part on whether the claims brought before it are truly valid and are being actively pursued. In order to reduce potential windfalls this proposal tightens the Administration's eligibility criteria to assure that the claims brought to the EIRF are based on active efforts to recover from insurance policies. Similarly, it more carefully specifies how liability limits and deductibles are calculated in the determination of available coverage for eligible persons under Title VIII.

4. Because the selection of which states fall in both the 60 percent category and the 20 percent category are critical to both sides in determining the benefits of the EIRF, both sides extensively looked at criteria for selection. It was difficult if not impossible to agree upon a set of criteria which could clearly place 10 states in each of the categories under the current Title VIII. One suggestion that was evaluated was basing the selection solely on the treatment of the "pollution exclusion" clause as it has been interpreted by the highest courts in states. Twelve states have made such determinations. But, other criteria are important in other states. On balance, using the pollution exclusion as a principal criterion, but not the only one, the members of the Coalition on Superfund concluded that sixteen states could reasonably be classified in either the 60 or 20 percent categories. This proposal would, therefore, alter H.R. 3800 by reducing these categories to eight states each and naming them.

5. The Coalition proposal also alters H.R. 3800 regarding the structure of disincentives for those who reject an offer, continue their litigation, and achieve a result below their EIRF offer. The proposal would eliminate the current bill's costs and fees shifting requirements which would impose a disincentive of 20 percent of insurers costs and fees after the rejection of an offer on litigation on NPL sites if the PRP fails to do better than the offer. This proposal would provide the following structure: A PRP that rejects its EIRF offer and subsequently fails to win a higher recovery at NPL site

coverage litigation would be subject to paying 50 percent of the subsequent costs and fees of the insurance companies involved in the litigation up to 200 percent of the PRPs direct litigation costs and fees incurred after the rejection of the EIRF offer. This disincentive can be costly, but it can be controlled. It is structered such that neither side is encouraged to escalate its litigation costs in the belief that someone else will pay. And, under this proposal the judge who tried the case would make the final determination on the reasonableness of the costs and fees incurred.

6. Both the PRPs and insurers are concerned about the treatment of past Superfund costs. The treatment needs to be fair, adequate and managable. This proposal revises H.R. 3800 in several ways. First, it extends the amortization period for past costs from 8 to 10 years. Second, recognizing the uncertainty that a 5 year authorization creates in the context of a 10 year amortization program, this proposal authorizes the EIRF for 10 years. Third, it authorizes the tax for ten years with increases above the H.R. 3800 levels in the second five year period. Revenues could increase by as much as $100 million per year to the EIRF if required up to a cap of $1.2 billion in the tenth year. Fourth, recognizing that the extension of the amortization period reduces the effective resolution rate for past costs, the proposal begins paying interest on these costs starting five years after enactment based on one-year Treasury bills. Fifth, the proposal allows for a stretchout of payments in the event that the EIRF is inadequate in the final years of the initial 10 year authorization.

This package of changes forms the basis of a revised approach to the EIRF that its supporters believe will meet the objectives we set forth in undertaking these negotiations. This is not to say that we have today a full legislative proposal to put before you. There remain a number of detailed technical issues that we are addressing. More importantly, we would rather work with you to draft the details of any legislation in this effort. If you believe you can support this effort, we believe that the best product would result with your involvement.

3/14/94

PROPOSED CHANGES TO H.R. 3800 REGARDING
THE ENVIRONMENTAL INSURANCE RESOLUTION FUND

1. Insurance Fees - The insurance industry will propose a fee which is basically prospective in its effect and which will apply to domestic and foreign insurers and reinsurers.

2. Eligibility and Determination of the Offer -

a. Eligibility and Screening of Claims - The trustees of the EIRF will appoint a Screening Panel consisting of between 3 and 5 persons from the insurance industry, who shall serve until offers by the EIRF are made. The Screening Panel will be empowered to deny an offer to an otherwise eligible person at a specific site if the eligible person has been convicted of felonious criminal activity which has a material effect on the response costs or natural resource damages incurred at the site. The Screening Panel will also be empowered to make recommendations to the Board that the Fund not make an offer to an eligible person unless the eligible person has filed a claim against or has engaged in settlement discussions with an insurer before January 1, 1994 and has been actively pursuing a claim or settlement. For the purposes of this section, an eligible person will be deemed to have filed a claim if the eligible person has notified one or more of its insurers of the existence of a claim or has filed a lawsuit seeking coverage for eligible costs as defined by the bill. Failure to have filed a claim or to have engaged in settlement discussions before January 1, 1994 will not preclude an eligible person from receiving an offer from the Fund if the eligible person had not received any notice letter from a governmental authority or one or more PRPs asserting its potential liability under CERCLA at any eligible site until after January 1, 1993.

b. Proof of Coverage - The requirement of proving 7 years of coverage will be eliminated. Instead, an eligible person will be required to bring in all of its proof of insurance for policy years prior to 1986 at the time a request for an offer is made and its deductibles and limits on eligible costs will be governed by the terms of the policies or proof which has been proffered.

c. Exclusion of Certain Contracts - A contract will be deemed not to constitute a "valid contract of insurance" when it covers a time period that precedes an eligible person's earliest date of disposal at any of its eligible sites.

d. Deductibles and Limits of Liability - The Fund will determine the "available coverage" for each eligible person by adding the limits of liability for all primary and excess policies proffered and then by subtracting therefrom all of the

deductibles or self insured retentions applicable to those policies. For insurance policies whose limits or deductibles are expressed on a "per occurrence" basis and do not include an aggregate limit, the limit or deductible deemed attributable to that policy will be the limit or deductible in the policy times the number of eligible sites; however, these "per occurrence" limits or deductibles may increase in future years to the extent there is an increase in the eligible sites attributable to an eligible party. The Fund will make its offer at the percentage determined under the rules established in the bill, and, if the offer is accepted, the Fund will pay this percentage of: (a) the eligible costs actually incurred by an eligible person or (b) the available coverage, whichever is less. In addition, the Fund will determine the average of all of the deductibles or SIRs from all of the proffered policies of insurance and will deduct this average once from the amounts payable by the Fund to an eligible person. In calculating the available coverage and the average deductible, the Fund will exclude any deductible or SIR contained in a policy which has already been paid by the eligible person.

e. Calculation of the Size of the Offer - The bill will list the following States in the 60% category: California, Colorado, Georgia, Illinois, New Jersey, Washington, West Virginia, and Wisconsin. The bill will list the following States in the 20% category: Florida, Maine, Maryland, Massachusetts, Michigan, New York, North Carolina, and Ohio. All other States will be listed in the 40% category.

Where venue has been established, the offer made to an eligible person will be calculated by assigning 50% of the score based on venue and by assigning the other 50% of the score based on the weighted average of an eligible person's site locations. In calculating the weighted average for site locations, the Fund will count a site twice if the site is located in a State where venue has been established, if the site is included in the eligible person's coverage litigation in that venue, and if the total response costs incurred plus those estimated for the site exceeds $50 million, as established by governmental cost summaries or demands, records of decision, or satisfactory evidence of costs actually incurred. In performing this weighted average calculation, the Fund will assure that a site which has been double counted in the numerator will also be double counted in the denominator. Where venue has not been established, the offer will be calculated as the weighted average of an eligible person's site locations as currently determined in the bill.

f. Adjustment for Owned Property Sites - For the purposes of this bill, a site will be considered an "owned property site" if: (1)(a) an eligible person owned the site at the time of "initial disposal" or (1)(b) a predecessor company owned the site at the time of "initial disposal" and the

predecessor company was merged into an eligible person or became the wholly owned subsidiary of an eligible person; and (2) an eligible person or predecessor company generated the hazardous substances which were disposed of during its period of site ownership; and (3) these hazardous substances constitute the basis for the risks posed by the site. Under this section, a site will not be considered "owned property" of an eligible person when the eligible person acquired the parcel of property from, or acquired the assets of, a company which engaged in "initial disposal" at the site and the eligible person did not engage in "initial disposal" of hazardous substances at the site during its period of ownership. "Initial disposal" means the spilling, pumping, pouring, emitting, emptying, discharging, injecting, dumping, disposing, placing, or leaking of hazardous substances into the environment caused by the site owner but does not include: (1) any continuing or further leaking, escaping, or leaching of hazardous substances into the environment during subsequent periods of ownership which was not caused by the acts of the subsequent owner or (2) any activities undertaken by an owner related to a remediation for the site. Under this provision, therefore, an "owned property site" will include a manufacturing facility at which the owner disposed of its own process or other wastes but will neither include a landfill at which the wastes generated by others were disposed nor a site acquired by otherwise responsible parties to facilitate the performance of removal or remedial action. Whenever an eligible person seeks payment of eligible costs for an "owned property site," the Fund will reduce by 30% the percentage which has been offered to that eligible person for all of its other eligible sites.

3. Treatment of a Party Accepting or Rejecting Offer -

a. Waiver of Claims - Parties accepting the Fund's offer will be required to waive and stay or dismiss all claims against insurers for eligible costs, including bad faith claims.

b. Minimum Participation Level by Eligible Persons Receiving Offers - Within 45 days after acceptances are due, the Fund will determine the number of eligible persons which have rejected the offers made by the Fund. In the event that there is more than a 15% rejection rate by those eligible persons receiving offers, the provisions of Title VIII and the insurance fee provisions of Title IX will expire and any fees paid by insurance companies which have not been utilized for administration of the Fund will be refunded to those companies.

c. PRP's Additional Disincentive for Rejection - In the event that an eligible person rejects an offer and the eligible person does not obtain a judgment or settlement in its coverage litigation which exceeds the offer made by the EIRF for

a resolution of its NPL sites, the eligible person shall be liable for 50% of the reasonable attorneys fees, other litigation costs, and direct costs incurred thereafter by the insurance companies which are attributable to eligible sites, but this amount shall not exceed 200% of all of the attorneys fees, other litigation costs, and direct costs of company inhouse personnel reasonably incurred thereafter by an eligible person in the pursuit of its coverage litigation which are attributable to eligible sites. Upon application by a party to the coverage litigation, the court may make all determinations necessary to decide whether an award of fees is required hereunder, including the value of the offer made by the EIRF and whether the attorneys fees and litigation costs of any party were unreasonable or not justified by the ends of justice. If the court determines that certain fees and costs were unreasonable, the court will exclude such fees and costs from the calculation described above.

4. Uncertainties About the Size and Duration of the EIRF -

a. 10 Year Life for the EIRF - The sunset provision of the current bill will be eliminated and the EIRF and the insurance fees will be authorized for 10 years. In the second five years of the program, Congress will authorize the insurance fee to increase by $100 million per year, and this additional fee will be collected unless the Secretary of the Treasury reports to Congress before June 30 of the prior year that the additional tax revenue will not be needed to cover the expected payments of the Fund during the subsequent fiscal year. In no event shall the fee exceed $1.2 billion in the 10th year of the EIRF.

b. Stretchout of Funding for Shortfalls - In the event that the EIRF does not have sufficient funds to pay all eligible costs submitted during any given year, the Fund may borrow from the private sector against future revenues up to the amount authorized by Congress to be raised over the 10 year authorization of this Title. In the event that the EIRF does not have sufficient funds available from either the fees raised or the amounts borrowed to pay all eligible costs submitted to the Fund, the EIRF shall determine the size of the shortfall and shall allocate the shortfall to the eligible persons in proportion to the size of their pending claims for reimbursement from the EIRF. This shortfall shall be paid to the eligible person and shall be amortized over the next five years, and the amortized amount shall be paid with interest (as specified in 4.c.). A shortfall which is being amortized hereunder shall not be considered a default by the EIRF, triggering the revival of claims.

c. Amortization Period for Past Costs - The amortization period for the past costs will be extended to 10 years, and interest will be earned starting 5 years after the

date of enactment. The interest rate shall be that specified in a one year Treasury bill, as determined on each anniversary date after enactment.

d. Report on Potential for Escalation of EIRF Liability - Not later than the end of the fifth year after enactment of this bill, the President shall make a report to Congress assessing the potential liability of the EIRF for payment of response cost and natural resource damage claims over the next five year period, and the President shall make recommendations for amendments to CERCLA which would deal with any shortfalls between the projected potential liability of the EIRF and the amounts authorized to be raised over this five year period.

e. Report on Non-NPL Sites - In order for Congress to be able to evaluate whether to extend the EIRF to non-NPL sites, the Treasury Department shall conduct a study on the number of non-NPL sites and the average cleanup cost per non-NPL site and shall report its findings not later than three years after the date of enactment.

5. Other Issues -

a. No Subrogation by Orphan Share of Claim Against the EIRF - Neither parties included within the orphan share nor the Superfund will be eligible to make a claim against the EIRF.

b. No Precedential Effect - Nothing contained in Title VIII shall affect or be used as precedent with regard to any other site or liability not subject to Title VIII.

Mr. SWIFT. Thank you.

I recognize now Kenneth R. Dickerson, the senior vice president of ARCO.

Mr. Dickerson.

STATEMENT OF KENNETH R. DICKERSON

Mr. DICKERSON. Thank you, Mr. Chairman.

Speaking on behalf of ARCO, we have been involved in Superfund deliberations and discussions with the Congress since its inception when CERCLA was first enacted. Since that time ARCO has expended $280 million in remediation costs and by the end of this year will probably be in the range of $300 million in cleaning up waste sites, most of which we have inherited from companies we have purchased over the past several years.

The costs of remediation under the new SEC standards have changed somewhat. We have recently filed a 10(k) with the SEC saying in addition to the estimated cost we had, that our costs may well exceed an additional $1 billion for remediation of the sites that we are now aware of.

ARCO is also involved in a lawsuit in California with approximately 100 of its insurance carriers in an effort to determine how much will be reimbursed, how much will be paid to ARCO, and the policies which we have purchased over the past several decades. All of these lawsuits are consolidated into one proceeding in California.

This is a very, very burdensome piece of litigation, as you might imagine. By the time we go to trial, which we estimate will be no sooner than a year from now, we will have expended some 6,000 person days in depositions, and that is a conservative estimation of the amount of time of preparation.

It is for that reason, the reason of the costs we incurred, the costs we see in the future, the policies we have, and the time that was required to process all the litigation that we joined with the administration and in committee early on in an effort to determine how we might structure some type of insurance arrangement, insurance settlement which would be attractive not only to ourselves but to all the other participants.

As Treasury mentioned earlier today, remedy selection is the key to holding down cost. But once cost has been determined, there must be an allocation of responsibility between the PRP's and those with whom they signed contracts decades ago.

Initially the administration proposal, we thought, reached a fair and reasonable and just compromise. It did involve some reduction in claims that the PRP's might hope to receive if they proceeded in litigation.

There were a number of trade-offs involved in the administration's initial proposal. There was a reduction down to 60 percent which would have been something of a penalty for those that had filed their lawsuits in States that were deemed to be rather generous, as Mr. Tauzin had suggested, and there was some reward for those who lived in States that had not been so generous in allowing insurers to recover from their insureds because it would have been a minimum of 20 percent once you had a qualifying policy.

With some exceptions, we believe that the initial proposal by the administration was a reasonable, fair, and just proposal. However,

that has changed rather substantially in the last several weeks so that now there is a proposal on the table which has further modified the potential reductions that might be achieved by PRP's whether they are in a State like California, as ARCO is, or in some other State.

The numbers have now been reduced, the percentages have now been reduced, the owned property provision is now something of a penalty where you have a further 30 percent reduction, and there are additional penalties which exist if you choose to opt out of the system.

Nonetheless we supported the administration proposal initially. Unfortunately, we cannot support the proposal that is currently before the committee, styled a compromise. We do not believe it is a compromise. We believe it is a further encroachment upon the rights of companies who purchase these policies, policies that were offered to us and purchased in good faith, good faith on the part of the insurers and the insureds, and we think that the changes that have been made will detract from those rights and will lead to very serious litigation between the insurers, the government, and the insurers.

The administration bill has one problem that we thought was rather significant but which could be solved before this committee, and it was the automatic stay that is built into the current legislation, or the proposal before this committee. This stay would cease all litigation, put it on hold until some administrative process, that which has been proposed for this committee to consider, had been completed.

Until that time, the insured that could not opt out of the system would be held hostage by the system perhaps as long as a year. We estimate, frankly, it would be as much as 1½ to 2 years that your lawsuit would be held in abeyance while you were determining whether or not you should accept the offer that was to be made under the proposal before the committee.

Time is money, and the time value of dollars that would be tied up in this arrangement, this stay, would be very substantial. There have been some estimates that there is as much as $50 billion involved in this dispute. If that be true, and if you delay for a year or a year and a half any effort on the part of the opting out PRP to attempt to recover through the judicial process, then that adds an extra year to a year and a half, up to 2 years, perhaps, for the period of time he or she will be unable to recover from the insurance carrier from whom that individual purchased a policy. That becomes a very expensive process for which there is no reimbursement.

In fact, under the proposal before the committee, there is no interest paid under the old arrangement for the new arrangement. The old arrangement had an amortization period for previously existing or previously paid cleanup cost, and the amortization period was stretched out to the point where it reached 8 years.

Under the new arrangement, not only is there a further amortization period contemplated, there is a further amortization on top of that if the fund doesn't have the money to pay the claims. And there is some uncertainty as to the effective date as to what is an old or a previously incurred cost and what is a future cost.

Nonetheless, there is no reimbursement during this period of time while you are either trying to raise the fund level, increase the amount of funds available, or for the amortization period that exists as in the past. This we consider to be a further encroachment on the rights of the policyholders who purchased their policies in good faith.

Now, the resolution of these issues, we would propose that the committee adopt the initial administration proposal that a PRP be permitted to opt out of the system without penalties. There are penalties, as was raised earlier. There are penalties for opting out of the system, because if you do not recover an amount in excess of the what you are offered, then you have to pay for part of the counsel fees for the insurance companies.

Stated that way, it is a very simple proposal and one could not disagree with it. However, as in the case of ARCO, and there are many others who have numerous policies at a given site, and there are dozens, sometimes hundreds of PRP's, we are involved in one site where there are over 300 PRP's. You can imagine how many insurance policies those 300 PRP's have on that same site.

Trying to determine who has received an amount in excess of what they would have recovered from the program, from the system that is proposed before this committee, would be a most difficult process and would lead to additional litigation to determine whether or not you received more or less than was originally offered to you by the proposal, the insurance resolution proposal.

We see that as fostering additional litigation as well as the litigation that would almost certainly arise to determine whether or not there has been a taking, when the penalties are reduced first to the 60 percent level, then perhaps below that, to the compromise that is before the committee.

We would like to continue to work with the committee, with the administration, to develop a program which would be acceptable to a larger group of PRP's.

Contrary to what the prior witnesses said, we believe there would be a very significant number of PRP's who will find this an unacceptable provision and will opt out of the system and will want to proceed with their litigation. When they find they are unable to opt out rather promptly, it almost certainly will lead to litigation over the limitation on their ability to prosecute their claims.

Nonetheless we think the system is on the verge of failure, that is, the 85 percent provision that is there, simply because we think that other PRP's will find this to be a very difficult program to swallow.

I would be happy to answer any questions the committee might have. Thank you for inviting ARCO to be here today.

[Testimony resumes on p. 995.]

[The prepared statement of Mr. Dickerson follows:]

Testimony of

Kenneth R. Dickerson

Senior Vice President

ARCO

Thank you for giving me the opportunity to address, on behalf of ARCO, Title VIII of the Superfund Reform Act of 1994, known as the Environmental Insurance Resolution Fund ("EIRF" or "Title VIII").

ARCO has much at stake in the Superfund program and in recovering a fair share of its remediation costs from its comprehensive general liability insurers. By the end of 1994, ARCO will have spent nearly $300 million on remediation expenses at Superfund sites. ARCO may spend as much as an additional $400 million on remediation for these sites. These expenditures exceed what the entire insurance industry proposes to contribute to the proposed Resolution Fund in a year. ARCO believes that it is entitled to reimbursement of these costs from the more than 100 insurers that wrote comprehensive general liability policies for ARCO and its predecessors. ARCO's suit against its insurers has been pending for about three years.

Perhaps no more glaring example of litigation-created waste exists in the United States today than that fostered by the flawed Superfund program. Congress really must bring an end to the shell game that has been played since 1985. Thus, though confident that it will prevail in its coverage lawsuit, ARCO expressed its support when the Administration announced its intention to develop a voluntary system for resolution of the insurance litigation at Superfund sites that would be evenhanded for both insurance companies and insureds like ARCO. We applaud the courage with which the Administration has tackled this difficult problem.

Like the administration, ARCO believes that litigation with insurance companies over defense and cleanup costs at Superfund sites unproductively consumes time and money that could be devoted to cleaning up the sites, retrofitting refineries for cleaner fuels, or otherwise providing useful economic stimulus to the economy. Indeed, all parties--including the insurance companies--believe this litigation is wasteful. This litigation is

exceedingly protracted and costly. For example, we estimate that if our insurers continue to depose our employees at their present rate, they will have deposed nearly 3,000 people over the course of 6,000 days of deposition before our suit goes to trial. Our experience is not unusual. The 1992 Rand Study on Superfund and Transaction Costs calculated that 88% of insurer outlays for Superfund were devoted to transaction costs, with 42% devoted to opposing coverage lawsuits with policyholders. "Cleanup" has taken on new meaning to the lawyers engaged in Superfund litigation and this meaning has little to do with waste-site remediation.

ARCO enthusiastically participated in the original discussions from which the President's bill was proposed. ARCO believes that the President's bill as submitted holds great promise for ending much of the litigation through an essentially voluntary system offering fair settlements to realistic PRPs willing to accept less than what they could get in court in return for a prompt result. With reservations regarding two provisions in the bill that unfairly advantage the insurance companies, ARCO supported and continues to support the President's original bill.

ARCO cannot support the amendments now being renegotiated by certain PRPs and insurers.

ARCO cannot, however, support the wholesale revisions now being renegotiated by some of the insurers and some PRPs with the Administration's blessing. The proposed amendments would reduce the settlements to such an extent that ARCO and other similarly situated PRPs would opt out of the program. As a result, the program would fail.

Only a voluntary system can work.

In approaching this problem, the Clinton Administration has correctly perceived that any legislative solution to end Superfund insurance litigation must be truly voluntary from the perspective of the PRPs. Some in the insurance industry have argued for legislation that would simply extinguish insureds' Superfund claims. Others have argued for a mandatory system that would force insured parties to accept unreasonably low settlements. However, such a "forced compromise" would be an unconstitutional taking of insured's contract rights, exposing the Federal Government to claims by those insureds who did not receive adequate compensation from the Resolution Fund. The law firm of Covington & Burling recently did an extensive analysis of this problem, which is attached to this testimony as Exhibit A.

These same constitutional limitations apply to legislation that, while not expressly extinguishing insureds' claims, penalizes any insured party who decides to opt out of the Resolution Fund, and otherwise hampers the continuing assertion of insureds' rights in court. Adoption of a system of penalties that makes assertion of the policyholders' rights impractical or impossible causes the same constitutional problems as a mandatory system. To avoid constitutional problems, the system must not just be voluntary in name, but voluntary in fact.

To work, a voluntary system must be fair to PRPs as well as insureds.

A voluntary system like that set forth in the Administration bill will work only if it offers fair results to both sides of the dispute. The system must offer a fair recovery to those Potentially Responsible Parties who hold insurance policies for their environmental liabilities while at the same time extinguishing the liability of those insurers for that site. If the recoveries are not fair, the PRP quite properly will want to continue to litigate and the program will fail. The bill should not be a device for increasing burdens on litigation by the

PRPs to the point that they will be forced to accept less than a fair settlement. Such increased burdens would raise the constitutional problems discussed above.

Fairness to PRP's requires recognition that policyholder suits have merit. How much the insurance industry really owes to its policyholders, or fears that is owes, is hard to determine. Historical data on payouts is unreliable because, as the Rand study found, most of the claims are still open. There is no doubt, however, that the insurance industry faces very substantial exposures. In testimony last month, the American Insurance Industry quoted Robert E. Litan, now of the Clinton Administration, to the effect that losses of $30 to 50 billion could fall on certain insurance companies. At present, Title VIII contemplates that insurers will contribute to the Resolution Fund a much smaller amount at the rate of about $500 million per year.

There can be no real doubt that the insurers are liable for a substantial portion of the cleanup at Superfund sites. The contractual obligations from which the insurers seek release are ones that insurers accepted willingly, in transactions for which they had ample sophistication and bargaining power. In fact, insurers vigorously competed for the right to sell these policies. The insurers liability arises from a product the insurers sold as "comprehensive general liability" insurance. Businesses purchased comprehensive general liability policies to cover a broad range of liabilities that were not specifically named in the policies. In 1941, an executive of the Travelers said about these policies:

> The burden of determining what to insure and what not to insure is removed from the shoulders of the insured and placed squarely on the shoulders of the carrier. How much better it is to say--
>
> 'We cover everything except this and this and this'-instead of 'We cover <u>only</u> this and this and this.

Egloff, Comprehensive Liability Insurance, Best's Fire and Casualty News, May 1941, at 12-22. Had the insurance industry wanted to exclude certain forms of risk, it could easily have done so. Most of us are familiar with such defined risk policies because we have purchased them for our homes. The insurance industry suggestion that policyholders are looking for "free" defenses to environmental claims, ignores their own promises to defend and indemnify against general liabilities in return for the payment of premiums. Policyholders are simply looking for the insurance coverage for which they paid over many decades.

At present, Title VIII offers fair settlement percentages.

The Administration's original bill proposes a relatively simple method of calculating a single settlement percentage that should be large enough to induce a large number of PRPs to settle all remediation and defense cost claims at all their NPL sites, past and future. The bill accomplishes this end without the need to resolve complex questions of limits of insurance or to re-examine factual issues on a site-by-site basis.

In most cases, the percentage offers contemplated by the administration's bill represent a substantial compromise of policyholder rights. In jurisdictions, such as California, which are assigned 60% because their courts favorably consider insured claims, PRPs give up a large proportion of their claim. In states assigned only 40% because their law is unsettled, insureds may give up an even larger portion of their claim, because the law in their state may eventually turn out to be just as favorable as in states such as California. The PRPs will receive at most only 20-60% of costs of defense of environmental lawsuits, generally less than they will receive in most courts, which usually hold that carriers must pay most of these costs. See, e.g., the recent California case of Montrose Chemical Corp. v. Superior Court, 6 Cal. 4th 287, 861 P.2d 1153 (1993).

In addition, PRPs give up claims for interest, costs and attorneys' fees to which they would be entitled in insurance litigation.

In short, the settlements proposed by the administration version of Title VIII were about as low as they could be and still induce a substantial number of PRPs to enter the system and waive insurance recoveries at all Superfund sites, past and future.

The proposed changes to the Administration's bill would reduce payments to PRPs below the level where most PRPs would accept them.

The insurers now propose to reduce these percentage recoveries even further through a series of arbitrary reductions. Chief among these arbitrary reductions is the across-the-board reduction of 30% for all recoveries at sites owned by the insured person, regardless of whether that person's claim would be reduced by a court. This reduction is arbitrary because it is not supported by the law in all states. For example, ARCO's case is filed in California, a state with favorable rulings on the issues that arise in insurance litigation. The recent proposals do reflect that California should be in the 60% tier of states. But these new proposals would further reduce the recovery 30% when the site is an owned property.

Such further reduction is based on a single issue in the insurance litigation, the application of the owned property exclusion that is present in many policies. Yet, under California law, the owned property exclusion often does not bar recovery for CERCLA response costs. For example, in Intel Corp. v. Hartford Acc. & Indemnity Co., 952 F.2d 1551, 1565 (9th Cir. 1991), the Ninth Circuit, applying California law, held that the owned property exclusion does not bar coverage of the costs of preventing future harm to groundwater or adjacent property from existing contamination, even if the contamination had occurred on the insured's own property. Finally, singling out one category of damages for special lower

treatment does not recognize other categories, such as duty-to-defend costs, which could result in higher awards in some states. The single percentage reduction was intended as a compromise of all of these issues.

The amortization provisions of the statute further reduce the real recovery to PRPs. This is a problem in the Administration bill, but is made worse by the alternatives now being suggested. Title VIII divides eligible costs into two categories: Pre-Resolution Costs and Post-Resolution Costs. Post-Resolution Costs are to be paid on a more or less current basis, while the Pre-Resolution Costs are to be paid out over 8 years, without interest. Because there is no interest recovered either before or during the period of amortization, the amortization provision reduces real recoveries far below the percentages stated in the bill. The proposed revisions could lengthen this waiting period to ten years, further reducing real recoveries.

This uncompensated amortization penalizes those companies like ARCO that have already cleaned up a substantial number of sites and rewards those who have avoided paying anything at all. The amortization provisions also could cause environmental concerns. The enormous advantage to insurers of having a cost classified as a Post-Resolution cost creates an obvious incentive to delay any remediation that can be delayed. This magnifies the delays that have been part of the Superfund Program since 1985.

The amendments now being offered by insurers and others extend this problem by amortizing even Post-Resolution costs in the event that the Fund runs out of money, which is highly likely given the low level of funding contemplated at present. Because a PRP cannot tell if it will ever be paid, no PRP can accurately assess the value of the Fund's settlement offer, and thus will reject an offer out of caution.

To fix the problems with the Administration bill, we propose that all costs incurred after January 1, 1994, be considered as Post-Resolution Costs. See Attachment B. In addition, if the amortization is to remain a part of Title VIII, PRPs should be paid a fair rate of interest on their claims.

We are also concerned that the Resolution Fund, as presently conceived, will not have enough money. If the PRPs are to forgo their litigation claims in return for payments from the Resolution Fund, then the insurers should contribute enough money to pay the percentage offers and to pay them on time. Otherwise, the resolution offers become illusory excuses to delay claims. In addition, there must be a mechanism for increasing the assessment on insurers if the present level of assessment does not prove to be enough. To date, the insurers have suggested arbitrary limits on their additional contributions that are far too low to allow the Fund to meet its obligations.

Not all of the money raised goes to PRPs. It is little noticed that the insurers themselves are major payees of the Resolution Fund. Under the Administration bill, insurers are reimbursed for settlements with PRPs who opt out of the Fund, thereby taking money away from settlements with the PRPs who opt into the Fund. When these payouts are combined with payouts for legal fees of the carriers, some insurers could even receive more from the fund than they put in. We propose changes to the administration bill to keep an insurer from ever taking out more than it contributes. See attachment C.

Certain provisions of Title VIII and the Coalition of Superfund Amendments will complicate and delay all environmental insurance litigation.

One might ask why ARCO cares that proposed settlements to the PRPs not be reduced to a level that many PRPs, including ARCO, could not accept them. Because the system is voluntary, the argument goes, ARCO could simply reject the offer, and go on with its suit.

First, ARCO wants the Fund to make fair settlement offers for the same reason that everyone in the country should want that result. The insurance companies are presently holding a large amount of money that they are contractually obligated to contribute to remediation at waste sites. They can spend that money on lawyers, as they have been doing up until now, or a rational system can channel those dollars on an accelerated basis into cleaning up the environment. To the extent that PRPs environmental liabilities can be funded, at least in part, by insurance, PRPs will be more willing to settle and get the job done. For example, insurance companies often deny coverage unless the insured is obligated by court order to undertake the cleanup, thus forcing the PRP to seek a costly order from EPA to trigger insurance coverage. If a large number of PRPs can be induced to accept resolution offers, accelerated voluntary remediation should follow.

Second, ARCO has an interest in the Fund as a company that purchases insurance. Regardless of whether a PRP opts into the Resolution Fund, it will be paying for the system through higher insurance premiums. Title VIII contemplates that insurers will be released from historical liabilities for which they have collected premiums in the past, in return for an assessment they argue should be paid currently. The Administration proposes that at least a portion of the assessment be calculated as a percentage of gross premiums collected from purchasers of commercial insurance. If the assessment is structured in this way, the insurers will pass on as much of it as the competitive market will bear. Under this scheme, ARCO does not collect on policies of the past. If it recovers anything, it is from a fund created by payment of increased premiums in the future. With a benevolent Congress, the carriers do not need financial reserves. They can always rely on future income to pay past debts.

Third, as presently drafted, and even more so under amendments suggested by insurers, Title VIII has provisions that give insurers additional advantages and bargaining power in

all environmental insurance disputes, regardless of whether the policyholder accepts a Resolution Fund offer or not. The pro-insurer provisions of Title VIII may force policyholders to accept resolution offers even though they are unfairly low. Even if a policyholder does not succumb to these "disincentives" and elects to continue with its litigation, the insurers are given Congressional advantages that will cause them to resist settlements and prolong litigation.

The stay of all Superfund insurance litigation will unjustly impact policyholders.

Chief among these pro-insurer provisions is the broad stay imposed upon all environmental insurance cases concerning Superfund sites as of the enactment of the Title, continuing up until the time that an insured party accepts or rejects a settlement offer. Conservative estimates of the time during which this stay will operate are about one year and four months, but it could be even longer. The stay simply adds a year or more to the already overly long time that insureds must wait to recover their claims, regardless of whether or not those claims will ever be administered by the Resolution Fund. What does that delay do for the insurance industry? If we estimate that the affected liabilities approximate $50 billion dollars, the stay allows insurers to hold on to that $50 billion for at least a year longer than the present law would allow, regardless of whether a PRP will ever accept the contemplated Resolution Fund offer. Even at today's low interest rates the return earned on that money over the extra year exceeds the total amount that the insurers now propose to contribute to the Resolution Fund. The insurance companies will decline to settle any of these cases during this time period because they are immune from these liabilities for that period of time. The present worth value of delay becomes very substantial. This delay alone could dry up a significant source of funding for remediation efforts for this period of time.

The stay will be especially destructive of policyholder rights in the event that the new amendments proposed by the insurance industry are adopted. For example, one of these proposals contemplates that the entire system will collapse if 85% of claimants do not accept offers. This could delay all claims a year or more without compensation to the insureds. In many cases, justice delayed will be justice denied, as policyholders go bankrupt because they cannot pay for the remediation ordered by EPA or other governmental agencies. There is no justification for granting a stay. It denies insureds due process of law and constitutes a governmental taking of their contract rights.

It would be best simply to eliminate the stay, but if Congress mistakenly adopts this provision, there must be a vehicle to lift the stay where it would cause gross injustice in an individual case. We attach a draft of a provision that could prevent injustice in such cases. Attachment D.

The Federal cause of action for insurers should be eliminated.

Another provision that unfairly favors insurers at the expense of policyholders is the grant of a federal cause of action to insurers to recover attorneys' fees as a penalty against insureds who proceed with their case, but do not recover in excess of the amount offered by the Resolution Fund. If the system and its offers are fair, no one will need to be forced to accept them. If the offers are unfair, then it is all the more important to protect the right of policyholders to reject them. Moreover, this provision could turn every one of the already complicated insurance cases into scores of cases that would relitigate the one underlying case.

In evaluating the harm that could be caused in all environmental insurance litigation by this new federal cause of action, one must remember that the PRPs who turn down a resolution offer will recover money only after successfully proving in court that they are entitled to the

insurance that carriers have been denying to them. Under this new statute, however, any policyholder who reaches the end of that trail will immediately be hit by a series of federal lawsuits by insurance companies who will force the insured to prove that the result obtained is better than what would have been offered by the Resolution Fund. If you consider that the remediation costs at even a single site may be the responsibility of dozens of insurers (often allocation is the subject of separate trials already), you can begin to imagine how complicated these new lawsuits will be.

Giving insurers a new federal cause of action also will reduce whatever remaining incentive exists for insurers to settle cases that do not enter the resolution system contemplated by Title VIII. Insurance companies are not just given this mechanism to recover their fees, but, under another provision, the Fund will actually pay their litigation costs where a PRP fails to attain the level of compensation that the Fund offered. Financed in this way, insurance companies will have less motivation to settle. Together, these provisions provide insurers with the power to force unjust settlements through the specter of devastating awards of attorneys' fees.

We believe that most PRPs do not expect or demand windfalls out of this system nor out of the court system. PRPs are realistic businesses run for profit, and in return for speed and certainty will accept fair offers to end the insurance litigation. Under the percentage formulas set forth in the Administration's current bill, insurers should save enormous amounts over what they owe. Unfortunately, insurers are now advocating a system that will force the acceptance of unfairly low offers, and fail to achieve its goals. It will result in litigation for the next decade and beyond.

ARCO urges you to resist the efforts to lower the percentage offers to the insureds. The policyholders contracted for coverage. Congress should not combine with carriers to take away from the insureds the benefit of their bargains. We also urge you to take steps to enact a Fund that is adequately financed by the insurance industry, so that its benefits do not turn out to be cruel deceptions to those companies that have already had to wait so long and to fight so hard to obtain the benefits of their insurance coverage.

Attachment B.

Reduction in Hardship Caused by Excessive Amortization of Past Costs.

Proposed Change:

Sec. 802(g)(5)(B)(iii)(I).

Change the first sentence of this paragraph to read:

"The Resolution Fund shall make equal annual payments over a period of five years for eligible costs incurred by an eligible person on or before the date of enactment of this statute and interest shall not accrue with respect to such eligible costs.

Sec. 802(g)(5)(B)(iii)(II).

Change the first sentence of this paragraph to read:

"The Resolution Fund shall make payments for eligible costs incurred by an eligible person after the date of enactment of this section to the eligible person. . . . .

Reasons for change.

This change move costs incurred between the enactment of the statute and the acceptance of an offer into the category of "Post Resolution Costs." Without this change, responsible parties may seek to delay incurring any cost that might otherwise be incurred between the date of enactment and the acceptance of a settlement offer. This will have the unwanted effect of slowing ongoing cleanup operations.

Likewise, this change alters the period for amortization of Pre-Resolution costs from eight to five years. Amortizing these costs over a period beyond the life of the fund makes their recovery so speculative that a type of "adverse selection" will occur whereby the parties with the very type of legitimate claims that the fund is meant to settle will decline to accept resolution offers.

Attachment C

Limits on Insurer Overdraws on the Resolution Fund.

Proposed Change:

Add the following language to the end of §§ 802(g)(B)((iii)(IV) and 802(g)(5)(C)(iii):

"In no event, however, shall the Resolution Fund make payments to an insurer pursuant to this act that exceed the contributions of that insurer to the Resolution Fund pursuant to § 903 of this Act."

Reasons for Change:

We advocate removing both of these sections of the bill because they allow insurers to be the beneficiaries of a fund that should have as its primary purpose payment **by** insurers **to** those insured parties that waive their claims. Allowing the insurers to draw on the fund lessens the chances that funds will be available to settle the disputes it is meant to eliminate. In the event these sections are not eliminated they should be amended to make clear that insurers cannot be the net beneficiaries of a fund that also releases them from billions of liability. Insured parties make a large contribution to the fund's goals of reducing litigation costs by donating their contract rights. Likewise, consumers of insurance are contributors to the fund to the extent that the fees assessed against insurers are passed on to consumers. The taxpayers also contribute to the fund by means of the deductibility of the fees paid by insurers. Insurers should not be net beneficiaries of the resolution fund at the expense of these other contributors when they are already receiving a release of their liabilities. Thus, we suggest this language to make it clear that distributions to particular insurers will not exceed the contributions of that particular insurer.

Attachment D

Reduction in Hardship Caused by Stay of Actions Against Insurers.

Proposed Change:

Sec. 804(a)(1)

Change the beginning of this title to read as follows:

"Except as provided in this section, issuance of the regulations pursuant to sec 802(g)(B), supra operates as a stay, applicable to all persons. . . .

Reasons for change.

This change would reduce the period for which actions for eligible costs would be stayed pending organization and setup of the Resolution Fund. Staying actions by an insured during an extended period of time when they are powerless to accept or reject an offer does not serve the stated purpose of encouraging acceptance of resolution offers. It simply immunizes insurers for that period, and takes away any incentive for insurers to settle or resolve claims during that period, even though they will apparently be reimbursed by the Resolution Fund for such settlements.

Proposed Change.

Add section 804(b)(3) to read as follows:

"Upon application of an eligible person, the court in which an action for eligible costs is pending or is filed after imposition of the stay established by subsection (a) may lift the stay in whole or in part, upon a showing of good cause by the eligible person. Good cause may include a showing that continued imposition of the stay will cause substantial harm to the eligible person's right of recovery against insurers as a result of spoiled of evidence, death or unavailability of witnesses, actual or threatened insolvency of insurers, age of the insured, financial or other hardship to the insured, or other circumstances that in the court's judgment are sufficient to show good cause."

Reasons for change.

In no event should the imposition of the stay by itself be allowed to damage or destroy the rights of the insured. Without this qualification, the stay alone may result in an unconstitutional taking of property.

Mr. SWIFT. Thank you very much.

We now recognize Benjamin Y. Cooper, senior vice president, government affairs, Printing Industries of America.

STATEMENT OF BENJAMIN Y. COOPER

Mr. COOPER. Thank you.

My name is Benjamin Y. Cooper. I am vice president of the Printing Industries of America. I also serve as chairman of the Environment Committee of the Small Business Legislative Council, a permanent coalition of 100 small business associations. On behalf of these organizations, I want to thank you for the opportunity to testify on the administration's proposals related to the insurance provision of the Federal Superfund law.

As a general statement, the small business community would favor any proposal which would enable small firms to have access to a system of simplified Superfund insurance claims settlements. While our experience in this area tends to be anecdotal, there are consistent themes.

From what we can determine, from the late 1960's to the late 1970's it was common for small firms to have liability insurance which included environmental liability coverage. Beginning in the late 1970's and early 1980's, environmental liability coverage was dropped from general business liability policies.

Such environmental insurance, if available, became quite expensive. Unfortunately, companies which had such insurance have been unable to produce copies or other evidence of coverage. Even if they are able to produce evidence, the evidence is often challenged by the carrier. As a result, small companies face a difficult fight to settle such a claim. Unless the amount is significant, they often choose to forego the claim.

To date I am not aware of a small company in our industry which has received money based on an insurance liability claim under Superfund.

Our experience would suggest the following small business problems with Superfund insurance claims. Small firms do not have adequate records of insurance policies for the periods covered by retroactive liability under Superfund.

For example, it is common for small firms to face exposure for waste disposal which occurred in the 1960's; however, it is not common for these firms to have retained copies of insurance policies from this period.

As I indicated, small firms either had environmental liability excluded from their policies or had inadequate coverage. Generally, until the early 1980's, there was little awareness of the need for environmental liability insurance coverage.

Unless the small firms faced a significant liability exposure, the cost of filing a claim for uncertain payment was often greater than the amount which could be recovered.

The administration has proposed the creation of a fund from which a portion of insurance claims could be paid. Certainly, compared to current law, the fund is an improvement. It is our general impression that any money recovered through such a fund would be more than would have been recovered without such a fund.

However, there are some problems with the fund concept for small business.

First, we are concerned that the fund will be inadequate to cover the claims of all the companies involved. If inadequate, the fund would have to be increased by additional fees on the insurance industry. Inevitably, these costs will have to be passed on to companies through higher premiums.

Second, despite the flexibility in the proposal which would allow a small company to demonstrate that it had some type of liability coverage during the period of years in question, records will still be inadequate. Lack of records is hard to defend, but it is a fact of life in small business.

Finally, while it is ideal if a law is constructed that would allow a small company to file a claim for environmental liability when that company may never have paid for environmental liability insurance, it would be something of a windfall. Given the overall inequities of Superfund, small business could probably accept a windfall with a clear conscience.

The insurance pool concept would be beneficial to small business but similar to other provisions in the law, it is not as important to us as the liability provisions. Nevertheless, the general approach outlined by the administration would give small business the potential to recover some of their Superfund losses without resorting to protracted legal action.

Based on our initial review of the approach taken in the agreement announced yesterday, the Printing Industries of America and the Small Business Legislative Council will support the insurance fund proposal.

Thank you, Mr. Chairman.

Mr. SWIFT. Thank you. Our last witness is Michael S. McGavick on behalf of the Superfund Improvement Project of the American Insurance Association.

STATEMENT OF MIKE McGAVICK

Mr. MCGAVICK. Thank you, Mr. Chairman.

My name is Michael S. McGavick, and I am speaking on behalf of the Superfund Improvement Project of the American Insurance Association. We also represent the Coalition on Superfund which yesterday announced a series of improvements to Title VIII.

This hearing represents a vital recognition of the depth of the problem for PRP's, insurers and our society of environmental coverage litigation. It wastes hundreds of millions of dollars a year and fuels the delay of cleanup.

We are deeply appreciative that the administration and the Congress have paid attention to this vital matter. I want to make it very clear from the start, not one insurance company of which I am aware or of which anyone else is aware supported title VIII in its current configuration. Not one. Title VIII was written on the basis of a voluntary system. We have never supported a voluntary system until yesterday.

We reluctantly participated in the negotiations. We reluctantly held our fire of criticisms as to the content of title VIII under duress from the administration and others who requested that we

continue to work in good faith to see if we could make a voluntary system work.

Yesterday, it was announced that one could. Title VIII can be viewed only as a good first step, a step we appreciate, but a snapshot of a negotiations in process.

The work continued at the Coalition on Superfund. It should be pointed out that the coalition included more companies on both sides than did the administration's earlier efforts.

A couple of general observations before moving on to the specific improvements made by the coalition. First, all of the costs for bearing the system come from the insurance industry. No other sector of the economy's moneys are used and no additional Federal tax dollars are used. It stands alone.

Second, in deference to the environmentalists in particular, no other part of Superfund's proposed reforms or its current of operations is affected. We have not tied it to orphan shares or other reforms in the bill. Again, it stands alone.

Finally, we believe that by removing much of the litigation from the system, cleanup will speed up. That is one of the main benefits to society of providing some rules so that this private dispute can be resolved on a voluntary basis.

With title VIII, there are four major areas of concern. First, some assurance to the insurance industry that it would work. Under its current formulation, the only thing mandatory was the tax. There was no certainty that the insurance industry would receive any benefit through the resolution of claims.

Second, an end of the windfalls. Too many companies were going to receive far too much, vastly more than they could have received under any imaginable litigation process, and as was mentioned earlier, some companies without any insurance or at least minimum insurance would receive vast sums of money. This made the process unaffordable for insurers and risked that legitimate claims could not be resolved by the fund. We had to end the windfalls.

Finally, we needed greater certainty for both sides. There were concerns for the PRP's that there were too little moneys in the proposal. There were concerns from both sides that if it stopped in 5 years, not enough resolution would have taken place and litigation would have resumed apace. We have proposed it be extended to 10 years.

Finally, we wanted a fairer system of taxation on the insurance industry which bears so much of this cost. Trying to look backwards to assess how these costs ought to be borne replicates the unfairness of the entire retroactive system of Superfund, but puts that burden only on one other industry. No other industry is asked to somehow reach back to dead people and make them pay. Only this industry would have been asked to pay its portion of Superfund in the past.

No company sitting at this table is banned from passing on its costs as the market will bear, nor should the insurance industry be so banned.

How did we come forward to resolve these four issues? First of all, the assurance needed by the insurance industry, what it paid for, would get something. The proposal made by the Coalition on Superfund is that this process, this EIRF, would not start making

offers until 85 percent of the PRP's had opted to be in. So we would know that most of them were in and that we were getting value for the tax dollars we had put in place. If it did not succeed in getting that, again, we bear the cost.

We pay for the administration, we pay for it to be torn down. Our taxes are being collected in the meantime. They are returned minus these administrative costs if it fails to work. And we bear a much worse cost than that. Once it is out of the way, we spend the next 4 years, or however long you reauthorize this law for, without any particular addressing of the needs of insurers in Superfund. We bear all that risk.

We decided to end windfalls by a series of very creative proposals. First of all, there was an essentially disagreeable proposal from the administration that venue be the sole determinant whether there would be 20 or 30 or 60 percent off made. It is do so without any reflection of how those courts might actually have determined the case.

It may have been determined instead by applying the choice of law of the State of the site or where the policy had been written or some other venue, as was recently decided in several Delaware cases. This does not reflect how insurance coverage disputes are resolved by the courts, and therefore there will be a windfall effect.

We wanted it to reflect where the sites were, that you get paid according to the State of the site. A balance has been reached. I don't think it was accidental. Half of the weight will be given to where the court action is filed and half to where the site is.

Again, unlike what was said earlier, it is a very simple system. You no longer have to go through the various difficult issues. States will be assigned a number. Once that is assigned, PRP's know their number and they can go forward and make a decision.

The second way in which we tried to reduce windfalls was by creating an insurance panel that could reject claims under two very narrow types, one a claim that lay dormant for more than a year. If a PRP was not willing to make a claim, we shouldn't create a Federal system that could encourage them to do so later.

Second, where illegal acts significantly contributed to the waste created, they should not benefit by the system. Those two cases, that would be the opportunity—not the certainty, but the opportunity—for the insurance industry to say, You are opted out, you can see us in court if you choose.

Finally, we reduced the overly generous payments to owned property. That is one of the strongest defenses. This system had no reflection of difference on that subject. We now propose that on owned property, claims alone be reduced by 30 percent in dollars when they receive their claim from the fund.

With respect to the need for greater certainty on both parts, the coalition has recommended that this go in effect for 10 years rather than 5. In the last 5 years, we have agreed that the insurance taxes could be increased by $100 million per year if the Secretary of the Treasury deems it necessary to make the fund able to meet its obligations. Both sides gain greater certainty that their claims will be paid by the fund.

We have also added one provision at the very end. In the last 5 years, if in addition to the moneys that are added, you still had the

fund in fear of financial failure, you could stretch out some payments to the PRP's rather than pay them on demand, over a period of 5 years, but only to get it through that financial hurdle.

We, Mr. Chairman, in the industry have run actuarial models on this program. We have done it on the basis of there being 4,000 sites, a horrifying process. We find the moneys put forward in this bill would adequately meet the claims even in that worst-case scenario.

Finally, as to the tax, we would like it to be a prospective tax. The PRP's and the Coalition on Superfund have agreed to support it as long as it is not just a surcharge and we have agreed to that stipulation.

We hope you are witnessing through this agreement, Mr. Chairman, the end of the holy war. For 13 years insurers and their customers have been engaged in extremely expensive and wasteful litigation, litigation which is fueling delays in cleanup of Superfund, and wasted hundreds of millions which could be put to more productive use. We have all the usual suspects. The warriors, in this case, are the litigation and claims departments of the various companies and their paid troops in the legal profession who object to any effort to resolve the conflict and its issues.

In my view, the choice for the committee is stark and direct. Reward the vast majority of each side who seek to be peacemakers and resolve this and put it behind us and put money into cleanup, or reward the extremists who would buck this proposal or any other that does not satisfy precisely their personal view, even if that means preventing the much-needed reform of Superfund.

Thank you, Mr. Chairman.

[Testimony resumes on p. 1022.]

[The prepared statement of Mr. McGavick follows:]

U.S. House of Representatives

Committee on Energy and Commerce

Subcommittee on Transportation and Hazardous Materials

Testimony

of

Michael S. McGavick

on behalf of the

Superfund Improvement Project

of the

American Insurance Association

March 17, 1994

The American Insurance Association ("AIA") is a trade association comprised of 254 insurance companies which write a large percentage of the commercial property and liability insurance sold in the United States. AIA is vitally concerned about the efficiency and effectiveness of the current Superfund law, as well as its financial implications for property/casualty insurers, other affected industries, and the American economy as a whole. We appreciate the opportunity to present our views today as the Subcommittee considers Title VIII of H.R. 3800, the insurance-related provisions of the Administration's proposed Superfund reform bill.

On February 10, AIA testified before this Subcommittee on the liability reform provisions contained in H.R. 3800. In that testimony we set forth a brief history of Superfund and described in detail the unintended, but very expensive, wasteful, and counterproductive effects of Superfund's retroactive liability system. We stated unequivocally at that time that the simplest and most direct way to address the most serious flaws in the current Superfund liability system would be to eliminate retroactive liability for waste legally disposed of prior to the enactment of Superfund. We also stated our industry's unequivocal willingness to contribute substantial monies toward financing that solution.

As the February hearing drew to a close, Chairman Swift admonished us, along with other Superfund stakeholders, to be flexible in seeking a solution to the Superfund liability problem. The Chairman observed that so long as one group insists on a particular reform that another group simply cannot accept we will have "a sheet too short for the bed" -- and the entire Superfund problem will remain unsolved.

We have paid attention. The insurance industry's preferred solution remains the elimination of retroactive liability. However, we have worked hard with non-insurers, including members of the business community and representatives of the Administration, in trying to develop a workable solution that will eliminate the vast majority of Superfund-based insurance claims, while imposing on insurers and insureds costs which are fair, affordable, and predictable.

With that background in mind, in the remainder of our testimony we will describe precisely how the insurance industry came to be involved in Superfund and why Superfund has become such an enormous problem. Then, turning to Title VIII of H.R. 3800, we

discuss our conclusion that the Administration's proposal for dealing with this problem is unworkable and would actually make the situation worse for insurers. Finally, we review efforts by the Coalition on Superfund, a broad-based coalition of chemical companies, manufacturers, and insurers, to develop a workable solution to the insurance problem, based on the core concepts contained in the Administration's proposal.

INSURANCE INDUSTRY INVOLVEMENT IN SUPERFUND

The insurance industry was brought into the Superfund liability quagmire by potentially responsible parties ("PRPs") facing liability for cleanup of old waste sites. Insurers are involved in two different ways.

First, as PRPs are notified of their potential liability or are assessed their share of cleanup costs, many have claimed that liability for their past hazardous waste management practices is covered under old insurance policies in effect at the time the waste was disposed of at the site. Insurers believe that these old policies do not cover Superfund cleanup. These PRP law suits, however, threaten to expose the industry to multi-million dollar claims. The result is time-consuming, expensive insurance coverage litigation that forces both PRPs and insurers to spend large sums of money on more lawyers and consultants.

The second way insurers are involved in Superfund disputes is in the defense of PRPs. While reserving the right to later have the coverage issue resolved, insurance companies often defend their PRP policyholders against claims the policyholder contends are covered by the insurance policy. Thus, insurers frequently wind up doubly involved in Superfund litigation. This also fuels the litigation fires: the PRPs lawsuits against the government and other parties are "free" to the PRP -- paid for by the insurers -- as the PRPs try to reduce their own exposure.

All levels of the state and federal judicial system are currently occupied in the interpretation of insurance policies, often written years or even decades before the enactment of Superfund. There are a number of specific issues of contention which make this litigation extremely complex. Our purpose in mentioning the coverage litigation is not to delve into these issues, or to give the insurance industry's perspective on them, but simply to underscore the unsettled nature of the law with respect to insurance coverage, and the concomitant uncertainty about the potential effects of Superfund on property/casualty insurers. Most legal experts believe it will take many years for all of the issues involved in the coverage litigation to be resolved. Moreover, even after all of the legal issues presented by the coverage litigation are resolved, we will still be litigating for years over the application of the facts in each case.

How much money is wasted on insurance-related transaction costs? Transaction cost information for the private sector has been difficult to assemble, largely because of the diverse number of parties, and the lack of site-specific accounting. In the most authoritative study so far, a 1992 study by Rand, it was reported that average transaction costs associated with insurance claims paid under Superfund were 88 percent of total costs. Even on closed claims, transaction costs averaged 69 percent, more than double the average for other general liability claims. Rand found that insurer transaction costs were running at $400 million per year for all waste cleanup claims. Transaction cost expenditures for PRPs must be at least equal to that figure.

The bottom line is this: the insurance coverage litigation will continue to result in hundreds of millions of dollars in unproductive, wasteful expenditures for years to come unless serious reform is adopted during this reauthorization of Superfund.

FINANCIAL IMPLICATIONS FOR PROPERTY/CASUALTY INSURERS

No one knows the ultimate financial implications of Superfund costs for the property/casualty insurance industry. Much will depend on the total number of sites which need to be cleaned up; the cleanup standards which are applied; the cost and availability of the chosen technology, as well as its permanence; and the percentage of costs allocated to insurers as a result of coverage litigation which is pending in courts throughout the country.

Robert Litan, formerly of the Brookings Institution and now with the Justice Department's Antitrust Division, has examined the implications of potential Superfund liability for the insurance industry [Robert E. Litan, "Superfund: Assessing the Program and Options for Reform" (1993)]. Litan asserts that it could have significant adverse effects throughout the entire economy. He says that losses of $30 to 50 billion could fall on insurance companies whose total capital reserves total about $70 billion. Losses of this magnitude would be more than double payments for the most economically devastating natural disaster to date, Hurricane Andrew. Litan argues that they would devastate the industry: some insurers would become insolvent; others would have to curtail their activities. The unavailability of commercial casualty insurance would ripple through the entire economy, as the Savings & Loan crisis did, making it more difficult to raise capital as well as putting many people out of jobs.

To whatever extent insurance companies are required to pay Superfund-related costs, funding for such payments would have to come out of their surplus, or net worth. Surplus, in turn, is a factor used by state regulators (through application of premium/surplus ratios) in determining how much business an insurer can write, while remaining on a sound financial footing. If there is a reduction in surplus because of Superfund, there would be a corresponding regulatory limitation on the extent to which insurers can serve all of society's insurance needs, in lines such as automobile, homeowners, and workers' compensation.

In addition, Superfund is likely to have a disparate impact on individual companies, depending on the amount of commercial liability coverage they have written, when it was written, the specific language of applicable contracts, and how those contracts have been or will be interpreted by the courts. Individual insurers which are the most adversely affected could suffer serious financial problems, or even insolvency, while others may face few direct losses. However, individual company insolvencies would affect the entire industry because industry-wide guaranty funds would be used to pay claims against an insolvent insurer.

Frankly, we believe that there are simply too many unknowns to predict the ultimate costs of Superfund for the insurance industry at large or for individual companies. But, it is clear that these costs have the potential to be enormous.

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THE ADMINISTRATION'S PROPOSAL

(TITLE VIII OF H.R. 3800)

Summary of Title VIII

The Administration's Superfund reform proposal, introduced as H.R. 3800, leaves the current retroactive liability system unchanged. However, it would superimpose two kinds of liability-related reforms on the current liability system.

First, Superfund cleanup costs would be allocated among PRPs using a new allocation system, set out in Title IV. In our testimony on February 10, we commented on our misgivings about the non-binding nature of the Administration's cost allocation proposal, as well as other significant defects. We think the allocation process proposed in Title IV will require much improvement before it will succeed in reducing litigation.

Second, in an attempt to eliminate a large part of the current insurance litigation, Title VIII would establish an "Environmental Insurance Resolution Fund", financed by a "fee" paid by the insurance industry, which would reimburse PRP claims for insurance coverage for waste disposed of prior to 1986. (For waste disposed of in 1986 or later, this insurance claims process would not apply.)

Briefly, here is how the system would work:

- A new Environmental Insurance Resolution Fund ("EIRF") would be created to handle claims for insurance coverage for the cleanup of pre-1986 waste.
- The Fund would be financed by a fee paid by insurers that would raise, depending on the Fund's needs, $2.5 to $3.1 billion over the first five years.
- PRPs would be required to place a claim with the Fund for reimbursement of their cleanup costs before they may sue their insurers.

- PRPs making a claim must prove they have insurance, by a minimal test (seven years of "comprehensive general liability" insurance or "commercial multi-peril" insurance in any 14 year period).
- Insurance policy limits are not considered, so long as a threshold of $15 million in available limits is exceeded. Demonstrable limits below $15 million set a lower ceiling for eligible costs.
  - -- The Fund may reimburse "eligible costs":
    - Cleanup costs at NPL sites
    - Natural resource damages
    - Costs of removals required by CERCLA at NPL and non-NPL sites
    - Superfund-related defense costs
  - -- Insurance policy limits will not be considered.
- The Fund offers a settlement of either 20, 40, or 60 percent of a PRP's claim, depending on the likelihood of the PRP recovering from insurers in the relevant state courts.
  - -- The Fund's trustees will determine by rulemaking which states fall into which category, based on the court decisions on insurance coverage in each state as of January 1, 1994. Those states with court decisions generally favoring insurers will be in the 20 percent category; those favoring PRPs in the 60 percent category; and those states whose courts have not yet decided the issue will be in the 40 percent category.

-- In general, the question of which percentage category a PRP is in for purposes of the settlement offer will be determined by the following:

  - In the case of a PRP who has filed a lawsuit against its insurers prior to December 1, 1993, the Fund's offer will be based on the category for the state in which the lawsuit is pending, regardless of where the PRP's Superfund sites may be located.

  - In the case of all other PRPs, the Fund's offer will be based on the category for the state in which the PRP's Superfund site is located, or if more than one site, an average of the percentages applicable to those sites. PRPs who accept the Fund's offer give up the opportunity to sue their insurers.

- PRPs who do not accept the offer from the Fund may sue their insurers, just as they do now. However, the defendant insurers will be protected up to the settlement amount that was offered by the Fund.

-- For example, if the Fund offers $60 million and a court subsequently awards $100 million, the Fund will still pay $60 million, and the defendant insurers will pay $40 million. If the court awards $35 million, then that is paid by the Fund, and the defendant insurers pay nothing more. Recovery of insurer coverage litigation costs would also be allowed in the latter case, but no more than the difference between the fund offer and the final award.

-- A small penalty is provided to encourage PRP participation: A PRP who opts-out is subject to fee-shifting of up to 20% of the fees incurred by the insurer in coverage litigation after the fund's offer is rejected.

- The Environmental Insurance Resolution Fund and the insurance fee would be authorized for five years and would automatically expire if not reauthorized.
- The insurance fee would raise $2.5 billion ($500 million per year) over the five years of the authorization. The fee would increase to a maximum of $3.1 billion for the five-year period if it becomes apparent that there are insufficient funds available. Thus, the fee would raise $500 million in the first year, $500 million in the second year, and, if there were insufficient funds available, would increase automatically to $700 million in each of the remaining years.

The Need for a Workable Solution

We are greatly encouraged by the fact that the Administration has recognized the importance of the insurance industry's Superfund problem and has attempted to solve that problem. Nevertheless, while Title VIII as introduced was a necessary first step to initiate further debate, it does not yet come close to achieving the two most important objectives agreed to by the Superfund working group led by the Administration: resolving 80 to 95 percent of CERCLA-based claims and doing so at a cost which is fair and affordable to the insurance industry.

A brief look at the evolution of this proposal gives some insight into the difficulties it presents in its present form.

The idea of creating an independent facility to resolve Superfund insurance claims arose from efforts begun last Fall by a handful of insurers and industrial companies to come up with an imaginative solution to the insurance litigation mess. These efforts centered on a "Hybrid" idea offered by the representative of a large industrial company. Under the

Hybrid, the insurance industry would pay an annual contribution to an insurance fund, which in turn would pay a uniform fixed percentage of the cleanup costs at all Superfund sites. In exchange for this insurance contribution, no insurer would be liable for defense or indemnification of any Superfund cleanup costs. Under the Hybrid, participation by all PRPs and insurers would be mandatory. And the insurance litigation would simply be ended.

The Hybrid provoked a great deal of interest in the industrial community. It was not difficult to understand how both PRPs and insurers would benefit from the "hybrid" proposal: (1) The PRPs would receive the certainty that a percentage of the waste cleanup costs at each site would be paid by insurers; (2) both PRPs and insurers would have eliminated the enormous transaction costs now incurred by insurance coverage litigation; and (3) insurers would obtain the financial certainty of a regular annual tax, instead of uncontrollable, unquantifiable litigation risk.

White House officials and others in the Administration became deeply interested in the Hybrid as a possible way to defuse the controversy over the Superfund retroactive liability system. They objected, however, to one crucial feature of the Hybrid: its mandatory nature. As a result, they sought to develop a "voluntary" system for resolving the insurance litigation.

Early in January the Administration began convening a small group of private sector companies to work on a voluntary system. AIA appreciated being asked to participate in these meetings, despite our misgivings about the Administration's ground rules and time limits. This small group devised the outlines of Title VIII in about two weeks of intensive and chaotic work. The result was a proposal which amounted to a "first step," useful as a

basis for further review and negotiations. This is not a surprising outcome: the time allowed had been too short to permit adequate analysis and the ground rules did not permit wide-ranging innovation.

Following intensive analysis of the Title VIII provisions as they were introduced, AIA concluded that the bill as drafted was unworkable and unacceptable. In short, we are convinced that in its present form the bill will not achieve its primary objectives: it will not eliminate 80 to 95 percent of the insurance litigation and it will not be fair and affordable to the insurance industry.

WHY TITLE VIII IS UNWORKABLE AS INTRODUCED

To facilitate understanding of Title VIII and its major deficiencies, we have divided our analysis into three main parts: the voluntary nature of the system; the rules for developing offers to the PRPs; and the authorization and funding of the EIRF. For each of those parts, we summarize the provisions of Title VIII and then identify and discuss the issues raised by those provisions.

A. Voluntary Participation for the PRPS

The Current Provisions of Title VIII:

1. PRPs must request a settlement offer from the EIRF before they may sue their insurers. However, participation in the EIRF is voluntary, i.e., a PRP may either opt to accept the offer from the EIRF or reject the offer from the EIRF and file (or resume) a lawsuit against its insurer (just as PRPs are permitted to do under the current Superfund liability system).

Problems Presented by the Voluntary System:

The Administration and some PRPs have been unwilling to agree to a mandatory EIRF process, i.e., one in which all PRP claims must be settled by the EIRF. Yet for the insurers, a voluntary system does not provide the necessary assurance that enough PRPs will "opt-in" to the system so that 80 to 95 percent of the insurance litigation will in fact come to an end.

To put it another way, if only half of all eligible PRPs elect to participate in the EIRF process, the insurance litigation will still continue at full speed ahead, since the insurers will still have to defend thousands of lawsuits in all fifty states. Worse still, those who opt-out of the EIRF system can be expected to be those PRPs who think they have the strongest cases, have their lawsuits in a particularly "favorable" state court, or who perhaps are simply opting-out for unquantifiable reasons. Thus the EIRF would resolve only weaker cases, at generous payment levels.

The voluntary nature of Title VIII could leave the insurers with all the same enormous expense, waste, and uncertainty that we have now -- but we would have the added burden of a $3.1 billion assessment on our industry. Obviously, this is an unacceptable outcome, which we must and will vigorously oppose.

The Administration has been reluctant to propose a mandatory EIRF system, hinting that it could be unconstitutional. In response to that objection, we provided an analysis by Mr. William T. Coleman, Jr., a copy of which was provided to this Subcommittee. Mr. Coleman concluded that a mandatory system would not be unconstitutional, on either due process grounds or as a "taking." We understand that the Department of Justice has not done a written analysis of this issue.

The voluntary nature of Title VIII also has not been overcome by the addition of a "disincentive" to PRPs who reject the EIRF process and resume lawsuits against their insurers. The requirement in Title VIII that a PRP who loses its lawsuit against its insurers must pay 20 percent of the insurers' fees and costs is minimal: in the typical Superfund coverage suit, with millions of dollars at stake, this penalty would not deter anyone from suing. Moreover, it is only a fraction of the penalty that is available right now under Rule 68 of the Federal Rules of Civil Procedure, which allows recovery of 100 percent for litigants in Federal court.

As a practical matter, simply requiring the losing PRP to pay all or part of the insurer's litigation fees will not, in itself, deter many lawsuits. Something more will be necessary.

B. Payment of Insurance Claims

The Current Provisions of Title VIII:

1. The Fund offers a settlement of either 20, 40, or 60 percent of a PRP's claim, depending on the likelihood of the PRP recovering from insurers in the relevant state courts.
2. The EIRF may reimburse "eligible costs":
    a. Cleanup costs at NPL sites
    b. Natural resource damages
    c. Superfund required removal costs at NPL sites and non-NPL sites
    d. Superfund-related defense costs

Problems Presented:

Our major objection to these provisions is that, taken in combination, they will result in grossly inflated payouts from the Fund -- payouts which are beyond all current or anticipated experience and without regard to actual insurance coverage and policy limits.

Revisions to these parts of Title VIII must focus on placing more reasonable limits on the ultimate payouts from the EIRF, recognizing two major points: (1) percentages which are unrealistically low will result in large numbers of PRPs opting out of the EIRF; and (2) it does neither the PRPs nor the insurance industry any good if the funds in the EIRF are depleted because payouts are unrealistically high.

That being understood, major issues which must be addressed include the following items.

1. Policy limits and deductibles:
    a. PRPs seeking an offer from the EIRF must first show all of their applicable insurance policies in order to establish that they had insurance for the applicable period and to establish the amount of their policy limits.
    b. The deductibles and SIRs (self-insured retentions) applicable to these policies should be subtracted.
    c. Occurrence policies must be defined and limited.
2. Windfall claims:
    a. Claims which normally would not have been paid, either because they were filed too late or are dormant, should not be paid by the EIRF.

b. Claims for cleanup costs arising from actions that resulted in a criminal conviction should not be paid.

3. Venue:

The current provisions of Title VIII determine the percentage offer from the EIRF based on where the insurance coverage suit has been filed. As a practical matter, whenever possible, large PRPs have filed their suits in states they believe have laws favorable to them, regardless of where the Superfund sites included in the lawsuit are actually located. The Administration's bill unrealistically rewards this forum shopping. The insurers believe that the percentage offers from the EIRF should be based on where the Superfund sites are actually located, not where the lawsuits have been filed.

4. Owned Property:

The insurance policies at stake in Superfund coverage litigation do not cover pollution resulting from activities at sites owned by the policyholder. The insurers have a very high rate of success in court with this "owned property" defense. Thus, the percentage offers made by the EIRF should be lower for Superfund sites which constitute "owned property" to better reflect the amount a PRP could reasonably expect to receive for these sites.

5. Assignment of States to Percentage Categories:

The Administration's bill directs the EIRF Trustees to assign states to the percentage categories, with the 10 states where coverage law is most favorable to insurers in the 20% category, the 10 states where the coverage law favors

PRPs in the 60% category, and the balance in the 40% category. However, leaving this determination to the Trustees without any criteria or other guidance, will produce enormous uncertainty. In fact, it makes it virtually impossible for business to assess the value of Title VIII. Criteria for categorizing the states must be inserted in the bill.

6. One Set of Rules at Superfund Sites:

   Superfund costs covered by this proposal should be subject to the CERCLA liability system and no other. We are concerned that state laws could be used to circumvent the EIRF.

7. Amortization of Past Costs:

   Under the current bill, EIRF payouts for cleanup costs incurred prior to creation of the EIRF are paid out over 8 years, with no interest accruing. We believe that a more reasonable period is 10 years.

C. **The Authorization and the Insurance Fee**

Although this hearing is limited to Title VIII, there are points at which come of the organizational concepts of Title VIII can be best understood by also considering the insurance fee that would be established by Title IX of H.R. 3800.

The Provisions of Title VIII and Title IX:

1. The EIRF would be financed by a fee paid by insurers that would raise $2.5 billion ($500 million per year) over the five years of the authorization. The fee would increase to a maximum of $3.1 billion over the five years if it becomes apparent that there are insufficient funds available.

2. The EIRF and the insurance fee would be authorized for five years and would automatically expire if not reauthorized.

Problems Presented:

We will reserve for another forum our comments on the mechanism for collecting the insurance fee. Relevant to this hearing, however, is the question of how to deal with ensuring that the EIRF has adequate resources and time available to carry out its duties without causing the insurance litigation to start all over again.

1. Ten-Year Authorization: The EIRF should be authorized for 10 years to give it a chance to work.

2. Stretch-out of Past Costs and Risk Sharing:

   a. If the EIRF experiences greater demands for payouts than it is able to satisfy with existing revenues, the EIRF should be authorized to stretch-out the payment of those costs over a period of years, rather than become insolvent.

   b. In recognition that there may be a demand-bulge in years 6 to 10 or later requiring the stretch-out of payments, the insurance tax could be increased in specified annual increments, if the Secretary of Treasury found it necessary to enable the EIRF to meet its obligations.

   c. To avoid shutting down the EIRF, if these amounts prove inefficient, the fund would be required to schedule payments to the PRPs rather than pay them immediately.

THE COALITION ON SUPERFUND

At the close of our testimony at this Subcommittee's February 10 hearing, we promised to work with all stakeholders to further develop this unique idea and to do everything possible to make it a practical solution to the Superfund problem. To that end, we have been engaged in very intense discussions with a broad group of chemical, manufacturing, and insurance companies hosted by the Coalition on Superfund. We have retained a member of a prominent law firm, experienced in Superfund issues, to mediate and facilitate these discussions.

This is a much broader group than that which took part in discussions wlth White House staff prior to introduction of H.R. 3800, and, thus, to some extent our discussions have been more sweeping, more lengthy, and, yes, at times more combative. But, the same thing which makes these discussions more penetrating and more combative has also made them more candid. And that has been for the good.

We have made serious, substantial progress in resolving many of the major issues to which we have alluded in this testimony. Pressed by the Congressional schedule, we have worked day and night to seek a resolution of this matter. For our part, this effort has involved managers at the very highest levels of our companies.

I am happy to say that this intense effort has been successful. We have reached agreement on all of the core issues. The major agreements are summarized below.

1. **The 85% Opt-in Threshold:**

   The Coalition has agreed in principle on a very significant advance toward protecting the insurers from possible adverse selection. Under this proposal, the EIRF would

not begin to operate until 85 percent of all existing PRPs have made a decision to accept the EIRF's offers. If at least 85 percent of all PRPs (weighted to ensure that at least 85 percent of the large PRPs are included in this figure) do not accept the EIRF offer, then the EIRF will go out of existence and the present liability system will resume. If the EIRF goes out of business because the 85 percent threshold is not met, the insurance fees will be refunded to the insurers, minus the administrative costs of the EIRF.

2. **Disincentives to Opting Out:**

PRPs who reject the EIRF offer and are unsuccessful in subsequent litigation against their insurers will pay 50 percent of the fees and costs of the insurer defendants, but capped at an amount equal to 200 percent of the PRP's fees and costs.

3. **Policy limits and deductibles:**

a. PRPs seeking an offer from the EIRF must first show all of their applicable insurance policies in order to establish the amount of their policy limits. The limits of these policies will be added together ("stacked") to establish their total limits.

b. The deductibles and SIRs applicable to these policies will also be stacked and then subtracted from the total limits. The remainder will be the PRP's limits for EIRF payouts and cannot be supplemented later.

c. All deductibles and SIRs will be averaged and that average subtracted up-front on a one-time only basis from whatever payouts the PRP receives from the EIRF.

d. Occurrence policies will be limited to one occurrence per site.

4. **Windfall Claims:**

A board of insurers would have the power to "knock out" claims made by PRPs for cleanup costs resulting from criminal activity and claims which have lain dormant.

5. **Venue:**

The applicable state percentage will be determined by splitting 50/50 the percentage between the venue of the lawsuit and the average percentage resulting from the percentages assigned to the states where the sites are located. Large sites (over $50 million in remediation costs) which are located in the same state as the venue of the suit related to that site will be counted twice.

6. **Owned Property:**

Payouts for claims related to sites constituting "owned property" will be reduced by 30 percent.

7. **Assignment of States to Percentage Categories:**

The PRPs and the insurers have listed the states by the status of their coverage rules and assigned the states to their respective categories. The states in each percentage category will be listed in the bill.

8. **One Set of Rules at Superfund Sites:**

Superfund costs covered by this proposal shall be subject to the CERCLA liability system and no other.

9. **Amortization of Past Costs:**

EIRF payments for past costs will be amortized over 10 years, with interest beginning five years after enactment.

10. **Ten-Year Authorization:**

The EIRF should be authorized for 10 years and the "Sunset" provision in the current Administration bill eliminated.

11. **Stretch-out of Past Costs and Risk Sharing:**

If the EIRF experiences greater demands for payouts than it is able to satisfy with existing revenues, the EIRF may stretch-out the payment of those costs over a period of years, rather than become insolvent. In recognition that there may be a demand-bulge in years 6 to 10 or later requiring the stretch-out of payments, the insurance tax may be increased in years 6 to 10, by $100 million increments per year, up to a maximum of $1.2 billion. To avoid shutting down the EIRF if these amounts prove insufficient, the Fund would be required to schedule payments to the PRPs rather than pay them immediately.

CONCLUSION

We appreciate the opportunity to appear before this Subcommittee today as it considers these very important issues. We have come a long way and we have a long way to go. We look forward to continuing to work with the members of this Subcommittee and with all Superfund stakeholders to enact these essential reforms.

Mr. SWIFT. Thank you very much, Mr. McGavick.

We have a quorum call and I think a 5-minute vote, and so the subcommittee will recess. We will come back and go to questions of the panel as soon as we reconvene.

[Brief recess.]

Mr. SWIFT. The subcommittee will come to order.

I think we have arrived at the point in this hearing where I am reminded of something that the former Senator from our State, Warren Magnuson, used to say. He said, "All anybody wants is a fair advantage." It seems to me we are having a little trouble determining who gets the fair advantage here.

We have really narrowed this a lot and we have still got a ways to go, apparently. Let me start with asking a couple of questions of the insurers.

PRP's who are opposing this proposal point to the new Federal cause of action that would be created under title VIII for insurers who were successful in court cases with PRP's, and the problems they feel would be encountered in determining who actually prevailed in the coverage litigation.

These PRP's also argue that these provisions will prevent settlement of coverage claims by insurers.

What is the insurance industry's response to those concerns?

Mike?

Mr. MCGAVICK. As was noted in earlier testimony, this was a package of ideas that has things that are very favorable to each side in balance. The penalties that are described are disincentives to the continuation of lawsuits, are to try and achieve one of the fundamental goals of creating this thing and getting rid of the litigation. The idea is a simple one.

If you had this chance to just go to the window and take your money and stop suing, and you passed on that chance, and by passing on that chance you defeated the public policy intent and you have now dragged the insurers back into court, so they are paying their taxes and they are now back in court paying for their litigation again, if you don't win as much as you could have got, you ought to have a penalty that removes some of the burden that was borne by the insurers in the continuation of litigation. That is the concept. It is a fairness concept.

It is not a penalty. It is a penalty only to someone who would foolishly pursue litigation and doesn't win money. If they pursue it and it turns out the fund would have paid them less than they would have gotten, so be it, and there is no cost to them other than their own lawyers.

The reason for a Federal cause of action is it was difficult to come up with a system for calculating who won and lost and it was felt we needed a system for calculating that.

Frankly, we are open to different suggestions of how that might be done, but the central principle that a person who defeats the public policy principle and goes out and sues needlessly in the end should pay some part of the insurer's costs.

Mr. SWIFT. That sounds reasonable. What is wrong with that? If anybody——

Mr. DICKERSON. I would like to comment on that. What we have here is a basic disagreement between two parties to a contract that

was written under State law decades ago. The parties outlined their interest, outlined the terms of their coverage of the agreements, and also outlined how they would resolve their differences in the future. Trades, trade-offs, exchanges, compromises were made at that time. The parties left to the determination of the courts any disputes, and this in this case was the State courts, any disputes that might arise that they had not thought of at the time they entered into that rather basic contract called an insurance policy.

Now, there is a subsequent overlay which is being passed on, in this case, a proposal before the Congress, that if we become involved, the interesting thing about who is paying for what here, ARCO has hundreds of policies and not one penny has ever been paid to ARCO under Superfund coverage—not one cent—even though we have received summary judgment awards, that at the very least the carriers should pay part of our defense cost. We have hundreds of cases that have been filed against us. Not one penny has been paid by the insurance industry.

ARCO pays $40 million a year in the Superfund, and I run ARCO's remediation efforts and I am paying $115 million a year in cleanup costs just for the sites that I manage.

So ARCO has huge dollar outlays, and we are not dissimilar from others in the country. These dollar outlays are being made. We anticipate based on what the Treasury representative said today, that we, the insureds, will pay all of the funds, that is prospectively, that go into the fund that is to be created, the resolution fund to be created by this proposed legislation. It appears to us that most, if not all of the funds will be prospectively collected from policyholders.

So we are paying into Superfund. We would pay increased premiums, perhaps no surcharges but increased premiums, which would create this fund. To do what? To pay us under a contract that we entered into 30, 40, 50 years ago, which we thought was reasonably clear at the time, that if an event occurred, we would be covered.

Our concern, and I think the concern of many people, and it has been stated today that most PRP's would be willing to accept this, we have been contacted by a number of PRP's who say, Not so. It has gone too far. Compromise is not always a good thing.

What the administration initially proposed was a reasonable compromise. ARCO did not seek out congressional involvement to say, "Would you please solve our disputes with the insurance carriers." We merely said, "This is really a burden on all of us." However, we were quite content to go forward to resolve that in an orderly way as we always do when is there is a dispute with carriers.

So we didn't seek Congressional intervention to resolve a problem. What we fear and what we have seen happening over the past several months is more and more encroachment into the contract that we entered into with a carrier who wanted to sell us a policy, and we, who wanted to buy the policy, and now the rules are changing, whether it be the penalty for opting out, whether it be the stay, the Congressional stay—and that is a serious problem for us, because if you can't act under this contract, if you are told by Congress, stand down for a year, stand down for 2 years, and if you

have expended hundreds of millions of dollars as we and others have, then you are delaying the recoupment, the recovery that you thought you contracted for many years ago.

So that is the concern I think you will find from many PRP's who are in the same position that we are in.

Mr. SWIFT. Let me then, Mr. Dickerson, ask you a couple of questions, because I think I do understand the differences between you, that have been laid out I think very articulately by both you and by Mr. McGavick. It would seem to me that as long as you have the voluntary nature of title VIII, and if we maintain that, that a lot of your objections on the way the fund might be administered or how the settlements might be offered are—I don't know that they become moot, but aren't they modified? Aren't you concerns modified in a very major way?

Mr. DICKERSON. If it is truly voluntary, settlement would be factors that a PRP would take into account in determining whether to opt out. The problem is when you can opt out and if you choose to opt out, how you measure wins and losses, that is, how you determine whether or not you receive more through litigation than you did or would have received had you accepted the offer.

Opting out carries with it some burdens. The opting out—as I mentioned earlier, when can you opt out? If you are told that there were no burdens from withdrawing from the system and you could do so upon the effective date of the legislation, that you could notify the court that you could go forward, you take your chances with the courthouse, then what happens within the system would be of no concern to a PRP, because the PRP would do an analysis of whether it was a 60 percent recovery or 20 percent or there was a 30 percent further discount on owned property, and all of those factors, and decide whether to stay in or out of the system.

That, to me, would be a reasonable approach. It is when you are held hostage by the system for a year or 2 years and then told, "Now you go to the courthouse if you wish, but you better do better than what we would have offered you, otherwise you have got a penalty."

Mr. SWIFT. If I understand you, you have two objections to the stay. One is just how long you have your money tied up, and the other one is that you object to the penalty that you have to pay.

Mr. DICKERSON. That is right.

Mr. SWIFT. Let's take those one at a time. Let's deal first with the stay. What would be your feeling if we could come up with some means by which PRP's would have an early opportunity to opt out, that they could do that and the stay wouldn't apply to those who made an early opt-out?

Mr. DICKERSON. Certainly we would encourage the committee to do that. I think the effective date of the legislation would be a reasonable time to permit a PRP to withdraw, because by then the PRP would know whether or not the system that is in place or would be in place upon the effective date was going to be of benefit to that PRP or not. It may choose to go back to the courthouse and go through the agonizing delays that are there as opposed to taking their chances within the system.

But the early opt-out is critical to PRP's who have been at this for many years. The system, as it is designed at the present time—

it has been mentioned by one of the other witnesses and I think it is a truism, that if you delay the distribution of dollars to companies that are financially strapped, you are going to slow down remediation.

As I mentioned earlier, we spend about $100-, $115 million a year. We are fortunate to be reasonably solvent. Most PRP's are not so fortunate and they are dependent upon the receipt of proceeds from some form, from carriers or wherever, to assist them in cleanup. If these funds are not forthcoming in a reasonable period of time, either through litigation or the system, remediation slows down and this thing becomes agonizingly painfully slow.

Mr. SWIFT. I am interested in what other panel members were to think if we take a look at the stay, maybe find some way of reducing the length of it but also providing some kind of an early out for those people who knew right off the bat what they wanted to do, if they wanted to opt out.

What are the problems with doing that? Does that screw up some carefully calculated compromise or anything like that?

Mr. JOHNSON. We were not involved in the compromise. I can't really comment, sir.

Mr. MERRETT. If one could look at this and be comfortable that the number of PRP's who were going to be in the fund at the end would be at least the 85 percent threshold or as high as the 95 percent which the administration was hoping to take out of litigation, then I can't at this stage see that it would have a profound detrimental effect.

But I think the basis on which insurers did—the basis on which we approached it was that this is essentially a compromise. The percentages which have been adopted in the formula are not nearly as satisfactory as we believe that we are currently achieving through litigation. And therefore we are prepared to trade that because there are incentives to bring people to the table, and avoid the litigation, and we see that as the profound attempt of the proposals.

Mr. SWIFT. I certainly do see the tension that is posed if we don't have some penalty that would prevent frivolous suits. And that still is a main concern of Mr. Dickerson. But on the issue of just having your money tied up for 1 year, 1½ years, 2 years, for no particular purpose, is there some way that we can address that part of the concern without encouraging people to go to frivolous suits?

Mike?

Mr. MCGAVICK. Using your words, it is being tied up for a useful purpose. The goal of this legislation is that through these payouts, this litigation will go away. We want the companies to have the time to reflect upon the benefits of being in this system as opposed to not.

I can guarantee you that if only the claims departments of the insurance industry had been asked their opinion on this, they would be universally against it because it is a new and different world from the litigation they are engaged in. They don't like that. They don't have the defenses they have.

Let's remember, these cases are not just about the coverage of the contracts. After the State establishes what particular rules of coverage it will respect or not respect, then we argue over the facts.

Did these companies know what they were doing when they did it? And that is where most of the money is spent, is on discovery in these lawsuits.

We are saying that during the time when we are waiting to see if this fund will work, and we are obligated to paying the taxes and paying the cost of setting it up, we would like that litigation not to go forward and consume more of society's resources until the PRP's have a chance to carefully and fully evaluate the benefits or lack of benefit of being in.

Then if he thinks, Mr. Dickerson or any other company in America thinks he can do better, so be it, we will see them in court. But we doubt it. If they, upon reflection, choose that, that will be their right. That is the main imbalance of this proposal, mandatory on us, voluntary on them.

One of the ways we think we can achieve a higher participation rate is time to reflect and cool the litigators' heels while all of the corporations think about whether they should proceed with litigation, the opportunity for everybody to take the time to reflect on the benefits of the offers. We think once that reflection is done, as Mr. Pollak's testimony suggested, for a number of concrete reasons these offers will be largely taken by the overwhelming majority of PRP's.

Mr. SWIFT. Any other comments?

One last question, and then I am going to yield, and I will have some other questions, I think.

The 15 percent provision is interesting. It seems to me that it could kind of run both ways. If Mr. Dickerson doesn't like this, he doesn't have to get a majority of PRP's to kill it. He has just got to get 16 percent of them, or one more than 15 percent. That seems to me that weighs heavily in his favor. On the other hand, I suspect the insurance industry wouldn't have agreed to 85 percent if they didn't think they had a pretty good chance of getting it.

Can you discuss the two points of view for me a little bit? I think that—I want to be sure if we do this it is going to work. And how do you get 85 percent? Why doesn't Mr. Dickerson have a rather substantial opportunity to bring this whole thing down if he wants to?

Mr. POLLAK. Well, Mr. Dickerson has said that he thinks a substantial number of PRP's will opt out of the system. If he is right, we will have made a bad mistake, because the object of all of this is to create a vehicle where people will opt in.

I have expressed my opinion, and I have gotten my phone calls, and I believe that we are right. Certainly from the perspective of the insurance industry, if this thing doesn't fly, as Mike has stated, they will have paid a big cost for this mistake. They will pay for the mistake, not the rest of us.

We won't know, but what we have all tried to do is to design a system where that 15 percent plus one will not happen.

Mr. SWIFT. So they are assuming that risk.

Let me then turn the question around and ask Mr. Dickerson, if you can't get more than 15 percent of the PRP's to agree to this, then wouldn't that be kind of prima facie evidence that you have probably got something that is generally acceptable and generally

fair to most people, which is sometimes as good as we can do in this legislative business of ours?

Mr. DICKERSON. I am not able to predict how many companies may or may not want to stay in the system or attempt to opt out, because I think they will have to do their own analysis. They will have to look at their own policies. They probably have hundreds of policies that analyze, compare the recovery of the States where they have filed. If you throw in this issue of the situs of the site, that is another complexity. I think this is going to be a difficult exercise for any PRP to determine, whether to stay in or to stay out.

The proposal initially put forth by the administration was a lot more straightforward and a lot less complex. As you move forward with additional provisions, it takes on the appearance of your casualty policy with 15 riders. It becomes very difficult to do all of the analysis that enables you to determine whether to stay in or stay out.

We, just our company, not speaking for any other organization, have done a preliminary analysis, and we have seen a very significant reduction in the potential recovery on the sites that we own, because, as has been mentioned many times already, this is all in or all out. You have to do the analysis to each of your sites, wherever they are located, and companies of any size will have potential sites in a dozen, two dozen different States. You will have hundreds, perhaps hundreds of policies that will have covered you over this period of time.

The suggestion that you had an 8-foot-long chart to determine what is going on is I think indicative of what each PRP will have to do. So I can't predict what the vast majority of PRP's will do. But if their experience is similar to our analysis of our own sites, with our own coverage, with the policies that we have tried in California, where we are located, then my guess is they will opt out.

If they are in a 20 percent State or less, where they are quite unlikely to recover anything under State law interpreting their contracts, then you would assume they would opt in. I think you will begin to see the results of that soon.

This is rather fresh language. This is something that has emerged in recent days. We have not solicited the views of other PRP's. But we have been told by a number of people in the last 24 hours, fairly significant organizations, that they could not go with the system, the revision that is currently proposed, because they seem to have done the analysis that we have.

In answer to your question, I can't tell you about the 15 percent. It wasn't our number, nor was the 85. I would suggest to you that serious PRP's will have difficulty with this provision.

Mr. SWIFT. The gentleman from Ohio.

Mr. OXLEY. Thank you, Mr. Chairman.

Mr. McGavick, if less than 85 percent of the PRP's opt in, then the insurance industry essentially obtains nothing from this proposal. If that is a real possibility, will the insurance industry agree to increase the proposed tax and the proposed State percentages in exchange for a certainty that the 85 percent threshold would be achieved?

Mr. MCGAVICK. No. I think it is as simple as that. This proposal is also, in our view, generous. If in fact the PRP's come to analyses

that yield that they should not be in, we would just as soon see those PRP's in court under the current system.

Mr. OXLEY. Even though the 85/15 was based on a negotiated——

Mr. MCGAVICK. The 85/15, sir, is a proposal to try and overcome our concern that the system wasn't mandatory, that we wouldn't know if we were going to get value for the taxes that would be paid. In essence, it came down to two disparate sides. They were saying, "We think everybody will be in." We were saying, "We want some more certainty in it because the tax is certain."

The PRP's made the proposal originally that 85 percent be a threshold for starting the whole operation. I think they view it as a call of the bluff. OK, if you really believe it will work, put in your money and here is the deal. We believed it was a fair standard. That is how it came about.

We have great confidence it will be met, not because cases will get money which they wouldn't have foreseen before, but also the incentives for small businesses who will get a favorable reading on their limits than in previous years, and will get things they probably wouldn't have received given the difficulty of suing insurance companies for their dollars.

We are dealing with 25,000 of them out there, and we have reason to believe that most of them are going to find this an exceedingly attractive offer. Where there are isolated cases where litigators are able to convince their management not to take the dollars on the barrel but to go ahead and sue, we have our lawyers also standing by.

Mr. OXLEY. I am glad that everybody is armed with lawyers.

Mr. Merrett and Mr. McGavick, I would like to know what the British and American insurance industries are spending per year on the defense of environmental coverage actions by policyholders and your projections for the future. How much are you paying out in indemnification for environmental claims and the amount of reserves that has been established to cover the payment of environmental claimants?

Mr. MERRETT. I am afraid that I can't give you that information to hand. I don't have it.

Mr. OXLEY. Will you provide that for the committee at your convenience?

Mr. MERRETT. We can certainly try and provide it as far as Lloyd's is concerned. I don't think I can do it for the British insurance industry.

Mr. MCGAVICK. The only information I know of that is available on this question is the study by RAND which estimated that 400 million a year was being spent by insurers on Superfund, and of that, 88 percent was going into litigation.

The NPL-related part of that was about $160 million a year in NPL-related litigation. The balance was in other kinds of environmental claims. That is the best study, the only one we know of.

In terms of reserves, that is proprietary information of the companies and I have never seen any study or acknowledgment of exactly what the amount is or is not in reserves.

Mr. OXLEY. If an environmental resolution fund is established by the legislation, what will the insurance industry do with these re-

serves? How will the moneys that will be freed up by this legislation be used?

Mr. MCGAVICK. If there were or are reserves, which we don't know, it partly will depend upon the design of the tax and the way in which the tax may be designed to go after those kinds of moneys. But if they were able to increase their surplus ratios, they would be able to write more insurance.

One of the negative effects of Superfund today is it constrains the ability of insurers to provide insurance, particularly in the environmental area, because of both the joint and several nature which makes insurance writing impossible, and because these clouds over the industries have depressed the value of the companies. This resolution should brighten that so they can write more insurance for America.

Mr. OXLEY. Let me ask you, Mr. Merrett, as a follow-up to the questions I had asked the first panel, what percentage of the American direct property and casualty insurance and reinsurance market did the British insurance industry underwrite in the 1960's, 1970's, and from 1980 through 1985?

Mr. MERRETT. I don't have those figures. And I am not sure how—you would have to quantify, sir, how you wish to express it, in terms of exposure or in terms of premium income.

In terms of exposure, it would be extremely difficult to establish. In terms of the reinsurance and retrocession proportions, frankly, I don't know how you begin to get a figure.

I think the Treasury concluded that the only basis on which you could begin to establish proportions and proportionality of it was through premiums received.

Mr. OXLEY. Is it your understanding that the present tax treaties between the United States and Britain bar any taxation by the United States of premiums paid by British insurers?

Mr. MERRETT. Lloyds is excluded because of the basis on which we have agreed to pay taxes to the Treasury. I don't have a detailed knowledge of the way the British companies are governed. But as I understand it, the basis on which the Treasury's proposals were put forward would not run afoul of the tax treaty.

Mr. OXLEY. Mr. Dickerson, you have testified that you are opposed to this proposal. What percentage of cleanup costs do you believe should be paid to policyholders under the proposed legislation in lieu of payments from their insurers under their insurance policies?

Mr. DICKERSON. Congressman, that is difficult to say because they have contracts with their insurers and I am not familiar with all the different forms of contracts that exist. Now, if you are talking about under the legislated proposal that initially was put forward by the administration, we did not disagree with those percentages. We thought that was a fair compromise. Again, those were not our numbers. They were not our suggestions.

But in terms of just who will pay what under the existing policies, I am not entirely sure of that.

Mr. OXLEY. What I am trying to get at is, what would it take to get you folks to opt into the coalition proposal?

Mr. DICKERSON. With the exception of things like the stay that was in the administration proposal, we were in agreement with the proposal that was submitted to you by the administration initially.

Mr. OXLEY. You mean the administration's bill?

Mr. DICKERSON. Yes.

Mr. OXLEY. What has been ARCO's experience in the past in terms of the percentage of actual environmental cleanup cost that it has been successful in recovering from its insurers?

Mr. DICKERSON. Zero. Those cases have not gone to trial yet.

Mr. OXLEY. Why does 20 percent, potentially 20 percent or more look bad compared to zero?

Mr. DICKERSON. Because the cases have not gone to trial yet. We are about a year away from trial. The case has been pending about 3 years in California. California is one of those States that is thought to be, someone suggested earlier, rather generous. That is, they interpret the policies to protect both the insured and the insurers. So California probably would be in the 60 percent category.

If you suggest that 20 percent is what would be applicable to California, that would almost guarantee you that anyone that resided in California that had that as their situs for their litigation would opt out. Twenty percent, to answer your question, seems like a very low number for consideration if you are a resident of California suing in California.

Mr. OXLEY. It might be hard to deliver the California delegation on that issue also.

Mr. DICKERSON. I wouldn't want to speak to our delegation. They seldom get together on anything.

Mr. OXLEY. Mr. Pollak, Mr. Johnstone, drafted and endorsed an 8-point Superfund reform plan with Dr. Chavis of the NAACP. I understand that the Business Roundtable's Superfund working group, which you chair, recently voted unanimously to have the roundtable CEO's consider an alternative liability plan called a rapid site settlement election.

You are endorsing the coalition proposal. Do you still support the 8-point plan and the settlement election plan, or do you support all of them or part of them?

Mr. POLLAK. Let me try to answer the latter first and then perhaps repeat what Mr. Johnstone said yesterday when he was asked the same question at the press conference. The working group of the Business Roundtable submitted for consideration by the CEO's a rapid site selection plan.

As a fallback position, should the EIRF fail to pass muster in this bill, it was not an alternate to the EIRF, it was a fallback position, recognizing the fact that if we were not successful in resolving these problems, the insurance industry would have had no relief under any of the current provisions of the bill, and this was to start the brainstorming of what might be a fallback position.

I must emphasize that the Business Roundtable has no position until it is sanctioned by the policy committee of the Business Roundtable. So this is a working level proposal for consideration as a fallback position.

With regard to the 8-point plan and to Olin's membership in ASAP, Olin has made no secret from the very beginning of this debate that our proposed solution to the liability issue is the repeal

of retroactive liability. In that regard, we have been very vocal and have supported all efforts to achieve that repeal.

I think our interest in ASAP, as Mr. Johnstone said quite eloquently yesterday, was not only a result of our feelings towards retroactive liability, but as Mr. Johnstone, as a member of the national commission, became exposed to Dr. Chavis, to some of the community activists from these disadvantaged communities near Superfund sites, he was quite moved by the issue, and admitted yesterday it was something that he had never thought about prior to his participation on the national commission.

So he believes and Olin believes that the 8-point program is a fine, worthwhile program to support. You reach a point, as was pointed out by the chairman earlier, where it is time to say, "OK, now what is possible and how much of your agenda can you achieve?" That is why we are supporting the EIRF, because we think it is a significant improvement.

If we were casting the vote, we would vote for repeal of retroactive liability. It was made quite clear earlier that is not on the table anymore.

Mr. OXLEY. Thank you.

Thank you, Mr. Chairman.

Mr. SWIFT. Thank you very much.

Just a very few additional questions. The administration proposal suggests that the tax used to finance the settlement be funded 70 percent retroactive, 30 percent prospective, while the Coalition on Superfund supports a totally prospective tax. I just would appreciate the insurers here discussing the pros and cons of those two proposals, and what are the advantages of either.

Mr. MCGAVICK. The central advantage of a prospective tax is that if does not artificially attempt to apply some kind of false fairness that will cause businesses in the future to fail.

The retrospective tax, as it was designed by the administration, is from 1970 to 1985. It tries to say those who wrote the insurance in that period ought to pay a disproportionate share of the tax. That is a terribly ironic period of time to pick to try to slap some fairness on all of this.

That is the period of time during which we had begun to include pollution exclusion language, that is the core issue that is contested around the State courts. So you happen to have picked a period in which insurers have better defenses than prior times and try to allocate the cost on those who were writing at that time.

The people who wrote those policies are gone. The employees who would suffer competitive disadvantages are working today. It would create, in my view, the only sector of Superfund where anybody finally tried to go back and slap a cost on that was truly proportional to the retroactive behavior.

We have all said—I think you have heard many of us say the retroactive liability is an unfairness, but it would be doubly unfair for the insurers to drag them into this with a creation of liabilities that are sometimes misinterpreted by courts and then to say we are also going to slap it on the insurers who survived during the 1990s but were active during a time during which you happened to have written better exclusion language into your policies.

We think it would be helpful to have it borne on a forward-going basis. We would be interested—if there were some parity we might be more open to this, if, for instance, I no longer had to pay a nickel to ARCO for what they are doing on cleanup, it might be an intriguing proposal, to make all of corporate America eat the cost. It is not how things are done in this country.

What we are going to do in the insurance industry is make sure it is not a surcharge. We will have to make difficult, significant pricing decisions about how to deal with this new and dedicated Federal cost, how we will bear it, is it going to be a function of the marketplace, as it should be.

The fact is it is not just how we compete with each other in this highly competitive industry, but it is how we compete with self-insured-risk retention and captive insurance where they are taking market share away from the property casualty insurance providers and retaining it themselves.

When our prices go up, we lose market share, not just among ourselves but among other products to provide risk transfer. And we cannot by any means see that this cost would all be passed forward.

Therefore, it seems to be equitable and fair and the least disruptive way to pay for this in the future, and we pay the claims of the PRP's in the future.

Mr. SWIFT. Anyone else have any comment on that?

Mr. MERRETT. I absolutely agree with what Mr. McGavick has said. I would just like to emphasize that the difficulties that the retrospective allocation provides in terms of insurers who are either in liquidation or some other scheme of arrangements at the present time, it would be a terribly complicated procedure, and really not beneficial for the PRP's at all.

Mr. JOHNSON. Mr. Chairman, we do have a different view about all this. And I suppose it does go back to a point I made in my oral comment, that if the EIRF is to be funded exclusively by the insurance industry, you are going to inevitably come up with a challenge, a very serious challenge of trying to develop the intellectual framework for coming up with a tax, if you start from the premise that it is to be based in some way on the issue at hand, namely the Superfund-related exposures, in this case, supposedly at the doorstep of the insurance industry.

Our feeling has been at AIG from day one, going back to a point Mike made, that the society benefits that have developed from the technologies and the products that have resulted, unfortunately, in hazardous waste byproducts, are benefits that society in turn should bear when it comes to paying for what society has now decided should be a cost worth bearing.

And we proposed 5 years ago that indeed a prospective tax be applied to all businesses by way of, yes, a surcharge, 2 percent, to be added, recognizable and identifiable on insurance premiums paid by all businesses to the insurance industry collected by the industry and turned over to government.

So I guess, point one, if you start from the premise that the insurance industry only is to bear the tax, you have a real challenge in trying to come up with one that is fair.

Now, with respect to prospective and retrospective, we do have differences of opinion. And again, our feeling is that if you have to ask the question, Why is the insurance industry sucked into this Superfund problem in the first place, it is because contracts were entered into where expectations on both sides were higher or lower than perhaps they should have been. And the PRP's, who have very little recourse when they receive a PRP letter of identification from the EPA and have to figure out a way to pay for what is potentially an extremely large amount of cost borne by them for the cleanup of sites around the country, they are very understandably going to do everything they possibly can to find a way of paying for that.

It often doesn't take more than a couple of minutes before someone in the risk management department of a PRP company is asked to go out and uncover every insurance policy you can possibly find going back 30, 40, 50, 100 years, that can possibly be construed some way in some language by some court to allow to us recover something from our insurance industry.

So when looking at the tax, if you don't bear some relationship between this problem of associating the industry, the insurance industry with these exposures, but put it all prospectively on the insurance industry only, you are delinking the solution and the funding of it from where it originated from, in our view.

And so there are intellectual arguments one could make on both sides, I will grant you, but we think the strongest one suggests the only way to go is a retrospective tax if it is borne exclusively by the insurance industry.

Mr. SWIFT. Thank you.

Mr. Johnson has also said in his testimony that a sizable new bureaucracy is going to be needed for the settlements. They will have to review each policy of the PRP's, and so forth and so on. Do you agree with that? How difficult do you think it is going to be to make the determination necessary under your plan?

Mr. MCGAVICK. We don't believe there will be a sizable new bureaucracy put in place. In fact, I recall a question earlier in this same hearing where it seemed to be the Chair's view that there was some concern that there wasn't enough protection against fraud in this system. That would be a concern of ours as well.

Right now it is largely a good-faith belief that the PRP will put together honest materials about the state of their insurance, their limits, moneys they have received in the past, all of those factors that go into the offer.

Right now there isn't any contemplation in any proposal I have read of a very significant board of review for that. There is an additional proposal coming from the Coalition on Superfund for a small panel of insurers to have that effect on those two cases I mentioned, dormant claims and illegal acts. But we don't anticipate even that will require much effort. That is a fairly simple thing. We can put together a list of the claims on that and watch for that coming in the window.

So we think once the States are listed and people are able fairly easily to calculate what they will receive, and then they will have to come forward with their own submission of what they are entitled to, the real question is how much double-checking you are going to do, because the actual function of making these payments

and checking the bills strikes us as a fairly simple and straightforward process, not one that will require immense organization.

Mr. JOHNSON. If I could comment, Mr. Chairman, I do beg to differ on this but would point out that we have not been party to the negotiations.

However, having read the compromise fairly carefully, I think you have to examine the question of, what are the additional disincentives to the PRP's to not use the fund? And you come down to how to determine if they go ahead and sue their insurers whether they got what they should have gotten from the fund after they lose their cases.

And there is a significant penalty indeed in the proposal to force the PRP's to use the window. But if you examine the details, you are asking the fund if the PRP comes back to it—sorry, if the insurance company comes back to it to collect what it spent to defend the PRP, you are asking the fund to get into all kinds of esoteric issues, fundamentally associated with problems I pointed out in the coverage chart, which look at limits of liability, deductibles, reasonably incurred expenses by in-house counsel, whether awards of fees required, including the value of the offer made by the EIRF, et cetera, are reasonable, and that is going to get the government or whatever this entity is right into the heart of what is in these charts.

They have to audit, second-guess, confirm that the judgments made to award or not to award the insurer or PRP are in effect valid.

Setting aside all the questions about auditing this procedure, if the government creates an auditing function to oversee whether these decisions are in fact proper ones, can you imagine?

I do question, from what we know of the details, whether there wouldn't be indeed a very significant oversight, bureaucratic function established as almost a parallel function to the existing insurance PRP processes involved in all of this by the government.

Mr. MCGAVICK. That is interesting. I think it is important to note that the determination of whether an offer met or did not meet the original offer of the fund is not made by the EIRF but rather by the courts in its distribution of attorneys fees provision.

You raised the question whether that should be the Federal Court or whether it should be just done in the court of dispute as an additional decision by the judge, probably a decision that judge will already be making about how to deal with attorneys fees requests from both sides. So I am confused as to why the EIRF would ever be involved in making all of that analysis.

In all of the thinking we have done, although we would be happy to sit down with anybody who is concerned about this and work through it, we see a fairly straightforward and simple process. People are able to calculate relatively easily, in very generous and sort of gross ways, what amount of money they have available. They bring it into the fund.

We presume there would be some sort of random audit to ensure they did indeed have it. But I think the vast majority are going to be on a good-faith basis. From there forward it is a fairly simple process, come by and pick up a check. That is one of the reasons we think so many people will do it.

In this isolated case where you have to go back and measure all of this, that is not done by the EIRF. That is done by the court in the resolution of determination of attorneys fees.

Mr. SWIFT. I think the committee as it examines this in greater detail would probably be interested in further submissions either of you would like to make in how you perceive this will work, what your intent is, whether you think there needs to be any specific language that would make the simple or less bureaucratic method in fact pertain. That would be very helpful to us.

One last question for Mr. Cooper, and then we will let you all go and have lunch. You mentioned the problem that a lot of small firms have in retrieving their old insurance policies and their records, and you said it is hard to justify but it is natural. I think that is right. In some perfect world it is hard to justify, but if you understand the limited resources of most small businesses, I think it is fairly easy to understand, if not to justify.

Do you think there should be some mechanism built into the law, this law or somewhere, that will allow PRP's to obtain that kind of documentation, that kind of information from the insurers who tend to keep records forever, and that you should be able to get that prior to having to submit a claim?

Mr. COOPER. There are several things in this we would like to continue to explore. This is an area that is on the fringe of our understanding, quite candidly. It is not something that we have a lot of experience with.

I have discussed this with members of the panel this week and prior to this about what kinds of things we can explore in terms of filling in those gaps of records we have. It is really something—we are fairly open with this. I am very appreciative to the members of the panel that have offered to discuss it with us.

Certainly we are not looking for anything like a setaside or some sort of guaranteed payment, because many of these companies candidly didn't have insurance and we really are not seeking a windfall. But if there are legitimate ways that are understandable and rational to go about gathering this information, we would certainly like to pursue it.

Very frankly, the appeal of the fund is that our companies simply are not going to court. That is not going to happen. So you typically—even if you had the coverage, you end up foregoing the coverage unless—and we have those cases whereas the claims can be fairly significant. They will pursue them, again, just a cost-benefit ratio. But we are certainly willing to continue working at it, because this is something we don't have now. Whatever gains we make will be better than the current situation.

Mr. SWIFT. It would be very generous to suggest that it was even on the fringe of my understanding. But if—and I certainly am not suggesting something where we just open up insurance records to fishing expeditions by thousands and thousands of small businesses—but if there is something in this area that either the insurers or your group would like to suggest to us that would be helpful, we would be very interested in hearing that.

The panel has been extremely useful. You didn't put me to sleep, which is in itself a great accolade. And we thank you very, very much for your help. We hope to proceed. We hope to try and get something this year. Thank you very much.

The subcommittee stands adjourned.

[Whereupon, at 12:40 p.m., the hearing was adjourned.]

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