S. HRG. 105–60

SUPERFUND CLEANUP ACCELERATION ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON
SUPERFUND, WASTE CONTROL, AND RISK
ASSESSMENT

OF THE

COMMITTEE ON
ENVIRONMENT AND PUBLIC WORKS
UNITED STATES SENATE

ONE HUNDRED FIFTH CONGRESS

FIRST SESSION

ON

S. 8

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

MARCH 5, 1997

Printed for the use of the Committee on Environment and Public Works

U.S. GOVERNMENT PRINTING OFFICE
40–816 CC WASHINGTON : 1997

For sale by the U.S. Government Printing Office
Superintendent of Documents, Congressional Sales Office, Washington DC 20402

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(II)

C O N T E N T S

MARCH 5, 1997

ADDITIONAL MATERIAL

SUPERFUND CLEANUP ACCELERATION ACT

WEDNESDAY, MARCH 5, 1997

U.S. SENATE,
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,
SUBCOMMITTEE ON SUPERFUND, WASTE CONTROL
AND RISK ASSESSMENT,
Washington, DC.

The committee met, pursuant to notice, at 9:34 a.m. in room 406, Senate Dirksen Building, Hon. Robert Smith (chairman of the subcommittee) presiding.

Present: Senators Smith, Inhofe, Allard, Thomas, Lautenberg, and Chafee [ex officio].

Also present: Senator Baucus.

OPENING STATEMENT OF HON. ROBERT SMITH, U.S. SENATOR FROM THE STATE OF NEW HAMPSHIRE

Senator SMITH. The subcommittee will come to order.

I'd like to welcome Administrator Browner here this morning and thank her for being here. We look forward to hearing your testimony and discussing Superfund reform.

We do have 11 witnesses this morning, 10 following you, Administrator Browner, so I'm going to be very brief in my opening remarks.

We've expended a lot of time and effort over the past 3 or 4 years to try to get Superfund reauthorized. I think there are a number of areas that we agree upon; there clearly are many that we don't agree upon. I hope though that we can reach common ground.

I think the American people realize that this legislation, in spite of good intentions, has not done the job that it was designed to do. While we continue to debate it, there are people out there who are frankly innocent victims of this. We will hear from some of them today who are caught up in this liability mess.

We owe it to them and to the environment to get this situation straightened out so that more money can be put toward cleanup and less toward administrative and legal costs. So I think we can do a better job, we can do a faster job, we can streamline and I'm hopeful that we'll be able to come up with some type of compromise, if that's what it takes, to get Superfund reauthorized.

I must say I was somewhat taken aback by the intensity of the negative comments in your statement, Administrator Browner, regarding S. 8, but I look forward to discussing that with you. We spent many hours, many days, many weeks of meetings both at the staff level and at the personal level working from the committee's bill from last year, S. 1285, to work toward a compromise.

I felt that we were a lot closer than the remarks that you made in your statement seem to indicate, but maybe we'll be able to find some common ground along the way this morning.

Thank you.

[The prepared statement of Senator Smith follows:]

PREPARED STATEMENT OF HON. ROBERT SMITH, U.S. SENATOR FROM THE STATE OF NEW HAMPSHIRE

Good morning. I would like to thank everyone for coming to this morning's hearing. We are here today to receive testimony on S. 8, the "Superfund Cleanup Acceleration Act of 1997."

I am going to be brief in my remarks. Frankly, the American people have been waiting too long for comprehensive Superfund reform, and I for one, don't want to waste any more time. We have expended a lot of effort on this subject over the past 4 years, and as a result of extensive negotiations we conducted in the last Congress, I believe that I can say that the number of areas we agree upon, significantly outnumbers the areas that we don't. In those areas we don't agree, I believe that we are close to reaching common ground.

Superfund came about in 1980 in an effort to quickly clean up the toxic waste sites that scarred our Nation. We all agree that these sites need to be cleaned up. It is not right that one out of four of our citizens lives near a toxic waste site. Yet, the results of the Superfund program could be better. After 17 years, only 125 sites have been cleaned up and deleted from the National Priorities List. There are still more than 1200 sites left on the list and more are still being proposed. While some will suggest that more sites are being cleaned up now than previously, recent EPA testimony estimates cleanups are still taking 8 to 10 years to complete. *The fact is, we can and should do a better and faster job of cleaning up these sites, and I am encouraged that everyone seems to agree on this point.*

Administrator Browner, whom we will hear from today, has sincerely tried to improve the Superfund program during her tenure though the use of administrative reforms. I think our agreement in many of these areas is indicated by the fact that some of the provisions in S. 8 were derived from the administrative reforms, and likewise, some of the EPA's administrative reforms were based on proposals that I had made in the last Congress. Yet, Ms. Browner has nonetheless, remained a vigilant supporter of comprehensive Superfund reform. I appreciate her position, and I agree with her.

Today, I hope we get past the rhetoric that clouds this issue. It would be unfair and untrue to state that anyone on this Committee doesn't want to clean up toxic waste sites. That is not the reason for this bill. Instead, this bill recognizes that these sites are not being cleaned up fast enough. Our citizens and environment deserve better.

Today, we will hear from representatives of Federal, State and local organizations, from environmentalists, and from businesses large and small. I want to take the opportunity in advance to thank the witnesses for coming today. By the end of their testimony, I am sure we will have a clearer picture of how we should proceed toward reauthorizing this important legislation.

Senator SMITH. Senator Lautenberg.

OPENING STATEMENT OF HON. FRANK R. LAUTENBERG, U.S. SENATOR FROM THE STATE OF NEW JERSEY

Senator LAUTENBERG. Thanks, Mr. Chairman.

In the interest of time and showing my appreciation for your calling this hearing, I will be brief.

I particularly want to see us do the job better and more efficiently, to speed cleanups; but in the process, I am not willing to abandon the safeguards that protect the public. I believe that it's possible, based on our past experience of working together—Senator Smith, Senator Chafee, Senator Baucus and I came very close to a solution last Congress.

Perhaps this is a bit of nostalgia. I feel like Frank Sinatra—they were very good days, but if we can be assured that the costs will

be distributed fairly, that the process will be closely monitored, we may have a successful law. I think there are certainly some weaknesses in the present law. We're going to have to work very hard, all of us, if we're going to pass a bill that achieves full, bipartisan support.

I would put my entire statement in the record and Mr. Chairman, you heard from our distinguished committee chairman, that he promises to read every word of the statement if I put it in the record. Thusly, I'm willing to acquiesce and I will put my statement in the record.

I thank you very much.

[The prepared statement of Senator Lautenberg follows:]

PREPARED STATEMENT OF HON. FRANK R. LAUTENBERG, U.S. SENATOR FROM THE STATE OF NEW JERSEY

Mr. Chairman, I welcome this opportunity to hear from the Administration and a cross section of stakeholders on the reauthorization of the national hazardous waste cleanup law, known as Superfund. As you know, this is a program of great importance to my State of New Jersey, and to innumerable communities across the country. 73 million Americans live near toxic waste sites. That is about one in every four of our citizens.

Although it is difficult to say precisely how dangerous there sites are, recent data from the Agency for Toxic Substance and Disease Registry are troubling. For example, some studies found that in all but one of New Jersey's 21 counties, cancer rates in areas around hazardous waste sites exceeded the national average. Studies from other parts of the country also suggest that those living near toxic waste sites suffer disproportionately from serious health problems.

Beyond their adverse health effects, hazardous waste sites often have serious negative economic effects on our cities and neighborhoods. If we don't clean these sites up, we will deprive communities of good jobs and needed local tax revenues.

Unfortunately, the Superfund program got off to a slow start. However, in recent years, the program has turned around. Under the Clinton Administration, toxic waste cleanups have been 20 percent faster and 25 percent cheaper. We have seen real progress in cleaning up sites, as well as an increased emphasis on fairness to settling parties.

Still, all of us here today are trying to help make the system work better yet. We would like very much to speed cleanups, to reduce unnecessary litigation, and make the program work more fairly and efficiently.

I am especially eager to hear from our witnesses about the various administrative reforms that have been implemented in the program. Many criticisms of Superfund address problems that existed long ago. In fact, I used to be a leading critic of the program.

However, today's program has changed considerably, thanks largely to improvements begun by Administrator Reilly and a broad range of significant new reforms developed by Administrator Browner. EPA's reform efforts have led to a Superfund program that is much faster, fairer, and more efficient than it was 4 years ago, when these reauthorization efforts started. We need to build on those reforms, rather than addressing problems that no longer exist.

During the last Congress, Senators Smith, Chafee, Baucus and I spent countless hours, along with the Administration, trying to resolve our differences. I remain committed to a process that will improve Superfund, and produce a bipartisan bill that deserves the President's signature. I am hopeful we will succeed. We have made some significant process in certain areas, and have faith that this will continue.

At the same time, I am deeply concerned about some of the provisions in S. 8 that would dramatically reduce the responsibility of many polluters. For example, S. 8 relieves from liability generators of industrially-derived hazardous wastes if they were savvy enough to have buried their waste at a landfill that also accepted ordinary household trash. In other words, the companies who elected to use midnight dumpers will profit. Responsible industrial generators, who paid a higher price to dispose of their wastes at industrial landfills, will continue to be enmeshed in Superfund's liability scheme. This makes Superfund more unfair, not less.

I am also concerned that S. 8 fails to adequately protect the safety of our drinking water because it fails to require that groundwater be cleaned up. The bill also re-

peals an existing preference for cleaning up the pollution to protect future generations and the environment. Instead, S. 8 would allow the materials to remain at sites, so long as there is a fence around them, even if the materials continue to pose health risks.

In addition, I am very concerned about the broad authority granted to States without a showing that they have the technical and financial capacity to adequately protect public health and the environment.

To help us explore these issues, I look forward to the comments today of Carol Browner and all the witnesses, in particular the two witnesses from New Jersey. Robert Spiegel will explain the importance of community participation in Superfund decisionmaking. His experience at the CIC site in New Jersey shows the benefits and savings that can be achieved if the community is part of the process. I also want to welcome one of the leading State managers of hazardous waste cleanup, Rich Gimello, who operates the hazardous cleanup program in New Jersey and today is representing Governor Whitman and the National Governors Association.

Senator SMITH. Senator Chafee.

OPENING STATEMENT OF HON. JOHN H. CHAFEE, U.S. SENATOR FROM THE STATE OF RHODE ISLAND

Senator CHAFEE. Thank you, Mr. Chairman.

Yes, indeed, I will read Senator Lautenberg's statement. I will curl up in bed this evening with it and look forward to it as an exciting bit of reading.

It isn't just this statement of yours, Senator Lautenberg, that I'll read, I make an effort to read all of your statements. The effort hasn't been totally successful, I will confess.

[Laughter.]

Senator CHAFEE. I will not have a long statement, Mr. Chairman.

I just want to say that we've made tremendous efforts to accommodate the desires that have been put forth over the years. You and I joined together in co-sponsoring S. 8. It's not a dream package for any particular interests; it's an effort that I believe will greatly improve the status quo.

I don't think that anybody thinks that the existing law is functioning correctly. Our new liability proposal moves a considerable distance toward the Administration and the proposals that the current minority had made in years past.

I look forward to Administrator Browner's testimony.

Mr. Chairman, I also want to thank you for all the time and effort you've put into this over the years. You've been a stalwart in trying to achieve success in this measure and I want to publicly commend you for what you've done.

[The prepared statement of Senator Chafee follows:]

PREPARED STATEMENT OF HON. JOHN H. CHAFEE, U.S. SENATOR FROM THE STATE OF RHODE ISLAND

Good morning. I want to thank Senator Smith for holding this hearing on S. 8, the Superfund Cleanup Acceleration Act of 1997. Thanks to his leadership, we are closer to comprehensive reform of this troubled program. We are off to a very fast start this year. Working together with the Minority and Administration, we stand a good chance of enacting Superfund reform legislation in the 105th Congress.

I also want to thank Senators Baucus and Lautenberg. While I know they continue to have problems with provisions in S. 8, I know they are ready to roll up their sleeves and get to work on our common agenda: real legislative reform for Superfund's problems.

Finally, I want to thank Carol Browner, EPA Administrator and the Administration's leader on Superfund. We have spent many hours together personally trying to bridge our differences on Superfund. I look forward to her testimony today and

to a successful conclusion to the bipartisan negotiations we started but could not finish in the 104th Congress.

I would like to say a few words about how S. 8 was developed. At the outset of the 105th Congress, the Republican Conference collectively decided to include a Superfund reform bill as one of its ten highest legislative priorities. S. 8 was drafted in a short period of time in order to be introduced with other Republican Leadership priority bills on January 21, 1997.

S. 8 is based on the discussions and negotiations conducted in the 104th Congress on S. 1285. It differs significantly from its 104th Congress predecessor in a number of key areas. The most significant changes in S. 8 from S. 1285 are in titles dealing with brownfields, selection of remedial actions, liability, and natural resource damages. We intentionally drafted S. 8 to considerably narrow the differences with the Minority and the Administration that were identified in the previous negotiations on S. 1285. I must say, however, after reading through EPA's testimony I fear the Administrator may think that this bill moved away from her position and not towards it.

Superfund remains our most troubled environmental statute. The time has come to reform this program, which was designed to clean up toxic waste sites. Instead, it has brought about too much litigation, not enough cleanup, inefficient use of scarce resources, and decaying cities, where many abandoned sites are not being redeveloped because potential developers fear incurring Superfund liability.

I have joined Senator Smith in cosponsoring S. 8. The bill is not a "dream package" for any particular interest. Rather, S. 8 is a comprehensive reform effort which, when enacted, will be a tremendous improvement over the status quo.

As we discussed at yesterday's hearing, a central focus of the Superfund Cleanup Acceleration Act of 1997 is brownfields revitalization. It is our position that comprehensive reform of Superfund is necessary to spur redevelopment at low-risk sites, and the higher-risk sites that might score high enough to be on the Superfund National Priority List. In all likelihood most of these "NPL-caliber" sites never will be added to the list. There are 200 such sites in Rhode Island alone, many with redevelopment potential.

Our new liability proposal moves a considerable distance towards the Administration and Minority proposals of years past. It attempts to target relief toward three central problems in Superfund liability: first, the unfairness of imposing joint and several liability on parties whose liability is in fact capable of proportional allocation; second, the unfairness of a liability net that is cast so wide that it sweeps in parties no one ever foresaw as potentially responsible parties, like small businesses; and third, a liability system that encourages claims and counterclaims at sites with hundreds or thousands of small-volume waste contributors. S. 8 does not create a blanket exclusion for any class of site. Instead it focuses on the parties and their conduct.

So who will pay for cleanup under this new proposal? If you polluted a site, you will have to pay your proportional share of the costs of cleanup. If your liability is excused in some way by the public policy-based liability protections in this proposal, your share is paid by the taxes we are reimposing upon industry. What could possibly be fairer?

There are significant changes to other provisions of the bill that reflect our hundreds of hours of negotiations last year. We have clarified groundwater provisions to ensure protection of uncontaminated groundwater and where, technically practicable, restore contaminated groundwater. We have limited more narrowly the circumstances under which an old remedy can be reopened and strengthened the roles of governors in that process. We have loosened the cap on additions to the NPL. We have streamlined the natural resource damages provision to focus on restoration and not speculative damage measures. We have added money for Brownfields remediation. We feel we have moved a great distance in a short time.

The effort to reform Superfund should be a bi-partisan one. In the last Congress, Senator Smith and I enjoyed a positive working relationship with our Minority counterparts, Senators Baucus and Smith. I know that the Minority and Administration have concerns over the process for moving forward, and I appreciated Senator Baucus' comments on this issue before yesterday's hearing. I know we can work out a process that is acceptable to all sides.

President Clinton and others in his Administration, including Administrator Browner, have long-since recognized the need to reform Superfund. In fact, EPA has undertaken three rounds of Administrative reforms of Superfund. While these reforms do address some of the problems inherent in Superfund, they are no substitute for a thorough legislative overhaul. I know the Administrator agrees with me on this.

There is merit in many of the EPA reforms. Indeed, many of policies contained in these reforms have long been advocated by Republicans. Two examples are cleanups based on future use of the site, and an expanded use of federal money for orphan shares. However, these administrative changes are mere exercises of EPA or Justice Department discretion. Because these reforms are discretionary, there is no long-term certainty in EPA-issued guidance. Guidance can be changed at the whim of the issuing official. For these reasons, any significant changes to the Superfund statute must be achieved through the legislative process.

It is long-past time that we reform the Superfund statute. With a concerted bipartisan effort, we can achieve Superfund reform this year. We cannot put off Superfund reform any longer; the cost is simply too great.

Senator CHAFEE. Thank you, Mr. Chairman.

Senator Baucus.

OPENING STATEMENT OF HON. MAX BAUCUS, U.S. SENATOR FROM THE STATE OF MONTANA

Senator BAUCUS. Thank you, Mr. Chairman.

Mr. Chairman, I'm not sure anybody's going to read my statement, so I'm going to give it. It's very brief.

As I look out in the audience, I'm struck with how many years we've been at this. I'm reminded of Yogi Berra's statement, "It's deja vu all over again."

Administrator Browner has talked to us many times about Superfund; we've had a large number of witnesses at hearings and spent many hours on this subject. During the last 4 years, we've had 20 hearings on Superfund.

We've had 3 days of markup, and we've heard from 161 witnesses, whose compiled testimony comes out to 4,490 pages already and we still don't have a bill. It's my hope, and I know it's the hope of all of us, that is going to change, that this might be the beginning of the end.

I'm reminded of Winston Churchill's statement many years ago during the Second World War and whether the war was at the beginning of the end, and he said that it was the end of the beginning.

It's my hope that this effort is the beginning of the end and we're going to wrap this up in this Congress.

I'd like also to recall a point that I made in yesterday's hearing—maybe we can use the Safe Drinking Water Act as a model. We worked together, and worked hard without a lot of fanfare, getting the job done. As I mentioned yesterday, that bill passed because it was a "win-win" situation.

It was win-win, first of all, because we did reduce Federal regulations, but we also helped improve the quality of drinking water. In this case, I think we can and we should reduce the cost of the Superfund program. We should make cleanups more efficient. I think we can do that in a new law. In many respects, Administrator Browner has already done so with the regulatory powers of the EPA Administrator. I think we can also make the liability system more fair. Those are very important goals.

On the other side of the "win-win" coin, I think we can also increase environmental protection. More than 70 million Americans live within 4 miles of a Superfund site. I think those Americans want us to pass a law that provides them with more protection, Mr. Chairman, not less, and also a statute that gives them a greater voice in how a cleanup will affect the future of their communities.

If there is an opportunity for more local involvement earlier on, that will help improve environmental protection.

So as we work together, I urge all of us to look creatively for win-win solutions.

Turning very briefly to the specifics of S. 8, first, there is good news. S. 8 is better than S285 from last year, in the last Congress. That's a fact. A month of discussions and negotiations have paid off.

Still, we still have a long way to go. I have several significant concerns which I have described in my prepared statement which I know all of you will read very assiduously and I ask that be included in the record, Mr. Chairman.

I'll mention just one, natural resource damages. I don't want to belabor the point, I've made it before, and the natural resource damages provisions of S. 8 contain improvements over previous versions. Let me just say this: The Clark Fork site in Montana is the largest Superfund site in the Nation—I repeat, the largest Superfund site in the Nation. The natural resource damage is massive; it stretches for 135 miles from Butte, MT, to Missoula, MT. The State of Montana has filed a damage claim for more than $700 million to restore the damaged resources.

The State of Montana has pressed this case hard to Republican administrations, to Democratic administrations in Montana for 13 years. The case finally went to trial just a few days ago on Monday of this week.

Maybe we will prove our case, maybe we won't; that's for the court to decide. For my part, I will do everything in my power to prevent anyone from pulling the rug out from under Montana on the courthouse steps.

These and other remaining issues are very serious, Mr. Chairman. We all know that, but they are not insurmountable. It is my hope, with a little more hard work, and with the cooperation of the Administration, we can get a good bipartisan bill this year finally.

[The prepared statement of Senator Baucus follows:]

PREPARED STATEMENT OF HON. MAX BAUCUS, U.S. SENATOR FROM THE STATE OF MONTANA

Thank you, Mr. Chairman.

I never intended to make Superfund the focus of my Senate career, but it is starting to seem that way.

During the 103d Congress, we held 11 hearings and 3 days of mark up on Superfund reform. Last Congress, we held nine hearings. We've heard from a total of 161 witnesses, and compiled 4,490 pages of testimony.

Hopefully, today's hearing is the beginning of the end.

I'd like to make a couple of basic points.

First, Superfund is a very important environmental program. Love Canal was not some kind of a fluke. As our country industrialized, there was an unfortunate side effect: the creation of toxic waste sites that threaten public health and the environment.

There are at least 1,300 of these sites, all across the country. When State and local resources seemed inadequate to clean these sites up, Congress created the Superfund program to get the job done. And we were right to do so.

Second, Superfund has had its problems. The program got off to a terrible start. Some people went to jail.

Even after the initial problems were solved, cleanups were slow, paperwork piled up, and transaction costs were out of sight.

But things have changed. First under Bill Reilly, and now under Carol Browner, EPA has made significant improvements in the Superfund program.

As we will hear today from Administrator Browner, EPA has taken steps to accelerate cleanup, cut litigation, and improve the quality of cleanup. Many of those reforms seem to be working.

EPA has now cleaned up over 400 sites, begun work at more than 1,200 sites, and settled liability with 14,000 small parties. These are positive steps.

I believe that we can go even further. For example, I support legislative changes to make cleanups more efficient. To reduce litigation and other transaction costs, especially for municipalities and small businesses. To enhance the State role.

I also believe that we have a good opportunity this Congress to produce a solid bipartisan Superfund bill that the President will sign.

But we are not there yet.

Clearly, S. 8 is better than where we started last Congress. The months of discussions and negotiations seem to have paid off. But a number of serious concerns remain.

Most importantly, the new bill includes changes that allow up to 600 existing cleanup agreements to be reopened, restudied and renegotiated. Undoing decisions that have already been agreed to will only delay cleanup and reopen old wounds.

It also includes changes that will dramatically reduce the amount of cleanup at some sites.

For example, it allows highly toxic wastes to remain untreated and left in place. And it requires groundwater to be cleaned up only if doing so will cost less than letting nature do the job or restricting the uses of that water.

It continues to prevent streams, wildlife habitats and other natural resources damaged from long-term pollution from being fully restored.

Finally, it exempts many large, viable companies from their responsibility to clean up toxic dumps that they helped create. By exempting these companies, it puts the burden of paying for cleanup on the backs of the taxpayer.

The proposal would have a particularly harsh effect on my State of Montana. It would allow signed cleanup agreements to be reopened, thereby delaying cleanups in a dozen places throughout the State. And it would undermine efforts to restore the damage along the Clark Fork river.

I don't want to belabor this point. I've talked about it before, at some length. And the natural resource damage provisions of S. 8 contain some significant improvements over previous versions.

But let me just say this. The Clark Fork site is the largest Superfund site in the Nation. The natural resource damage is massive. It stretches for 135 miles, from Butte up to Missoula.

The State of Montana filed a damage. claim seeking more than $700 million to restore the damaged resources. Montana has prosecuted this case vigorously, through Republican and Democratic administrations, for 13 years.

The case finally went to trial Monday.

Maybe we'll prove our case. Maybe we won't. That's for the court to decide. But, for my part, I will do everything in my power to prevent Congress from pulling the rug out from under Montana on the courthouse steps.

These and other remaining issues are serious. But they are not insurmountable. It is my hope, Mr. Chairman, that with a little more hard work, and the cooperation of the Administration, we can get a good bipartisan bill this year.

Senator SMITH. Thank you very much, Senator Baucus. I have a statement by Senator Boxer for the record.

[The prepared statement of Senator Boxer follows:]

PREPARED STATEMENT OF HON. BARBARA BOXER, U.S. SENATOR FROM THE STATE OF CALIFORNIA

Thank you, Mr. Chairman, for calling this hearing today to continue discussions toward meaningful reform of the Superfund program. I am hopeful that your dedication, and the hard work of Senator Lautenberg and other members of this subcommittee, will make Superfund reform a reality this session.

Mr. Chairman, as you know, Superfund is one of the most important environmental laws for the people of California. California has ninety-six Superfund sites, the third highest number of any State, and seven Natural Resource Damage sites, more than any other State. Over forty percent of Californians live within four miles of a Superfund site.

Superfund helps protect the health and environment of millions of Californians by addressing some of the most contaminated sites in my State. An example is the Montrose Chemical Corporation Site (that contaminated with DDTs and PCBs four different groundwater aquifers, two of which are a source of drinking water. An-

other is the Purity Oil Sales Site in Fresno, where the soil is contaminated with lead. This was an area where the children of migrant farm workers regularly played.

Clearly we need to fix the problems with Superfund, but I am concerned that the proposal before us does not adequately reflect fundamental principles that I believe need to be the basis for reform.

We need reform that will streamline the Superfund process, speed-up cleanups at Superfund sites, and help eliminate unnecessary litigation without compromising the principles of "polluter pays" and "putting public health and safety first".

Provisions such as the reopening of Records of Decision (ROD's) seem to go against the concept of streamlining and speeding up cleanups. If ROD's are reopened, the over 46 sites (48 percent of California National Priority List Superfund sites) that have a final ROD in place could face ROD petitions that would stop all ongoing cleanup efforts pending review.

If ROD's were reopened, the San Gabriel accord (which was signed in March 1994) would be undermined. The groundwater aquifer underlying the San Gabriel Valley is one of the most complex and contaminated Superfund sites in the country. The site has been on the Superfund list since 1984. Over 10,000 businesses and other parties potentially share liability for this problem. It is a truly unique site that is being successfully worked on by PRP's, EPA and the State of California.

At the Baldwin Park site in San Gabriel Valley, a reopening of the ROD could result in an additional year plus $800,000 to redo the documentation. The San Gabriel Valley Water Quality Authority has estimated that the delays in cleanup would add $25 million to the cost of treatment because of further spread of contamination during the delay.

The groundwater aquifer underlying the San Gabriel Valley is one of the most complex and contaminated Superfund sites in the country. The site has been on the Superfund list since 1984. Over 10,000 businesses and other parties potentially share liability for this problem. It is a truly unique site that is being successfully worked on by PRP's, EPA and the State of California.

Mr. Chairman, the goal of minimizing the cost of cleanup is a sound one, but I believe that cost should come into consideration only after we agree to certain cleanup standards and remedies that have been selected on the basis of public health and safety. Provisions in the bill emphasize cost savings over public health and environmental restoration.

I believe that if we mandate that selection of cleanup remedies be dictated by cost considerations, it will inevitably lead to cleanups that are less protective of the public health. Putting cost first will in effect shift our emphasis away from cleanup toward less expensive short term containment strategies. We will in effect be putting the burden of cleanup on future generations.

On the issue of remedy selection, I would also like to emphasize my concern with provisions in the bill which could limit EPA's ability to protect children and other sensitive subpopulations. This could lead to the selection of cleanup remedies that overlook the fact that children are more susceptible and more at risk from exposure. Cleanups and even containment strategies might not be protective of our children's health and safety.

Mr. Chairman, our liability scheme in Superfund must reflect the "polluter pays" principle. This principle has been very successful in requiring polluters to pay for cleanup. It has helped recast a corporate mind-set that once saw the careless dumping of toxic waste as every day business-as-usual and has acted to deter careless disposal and encourage pollution prevention.

The bill before us contains very broad liability exemptions that will in effect remove cleanup responsibility from polluters and place the burden on States and taxpayers. I believe that the goals of the Superfund program can best be achieved with a sound liability scheme and an effective funding mechanism to pay for cleanups.

Another concern I have with the bill is the provision that would not allow the States to enforce their own stricter cleanup standards and recover costs from Potential Responsible Parties. The preemption of California's ability to apply stricter cleanup standards would mean that, in the case of the Baldwin Park site, the State of California would have to pay an additional $5 million in capital and $20 million in operation and maintenance costs to bridge the gap between Federal and State drinking water standards.

One other concern I want to briefly mention is the bill's provisions on groundwater cleanup which I believe would jeopardize groundwater safety. Groundwater cleanup issues are of major concern to California. Ninety-two percent of the sites in California involve groundwater contamination. Most (81 percent) NPL sites are in residential areas. At least 3.2 million people get their drinking water from aquifers over which a site is located.

The bill before us only requires the selection of cleanup remedies that will "prevent or eliminate any actual human ingestion of contaminated drinking water". The most cost effective strategy might be to put a filter on a tap or simply provide bottled water—delaying any cleanup and allowing contaminated groundwater to spread or go unchecked.

Mr. Chairman, thank you for the opportunity to express my concerns. I look forward to continued work with you to achieve meaningful reform and would like to extend a warm welcome to Administrator Browner and all of today's witnesses.

Senator SMITH. Administrator Browner, before I turn to you, I just want to mention one of your aides, Bob Hickmott, who is the Associate Administrator for congressional and Legislative Affairs, I understand is leaving to go to Secretary Cuomo's department. He now goes with Elliott Laws. You're driving everybody out of your department now.

[Laughter.]

Senator SMITH. You can defend yourself on that, if you like.

Let me just say good luck to you, Bob. It's been a pleasure working with you.

I'll turn to you now, Ms. Browner. As you know, your statement is made a part of the record and if you can summarize as briefly as possible, we'd appreciate it.

Welcome.

STATEMENT OF HON. CAROL M. BROWNER, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY

Ms. BROWNER. Certainly, Mr. Chairman.

Members of the subcommittee, thank you for this opportunity to testify on the subject of reforming our country's toxic waste cleanup program.

Several times, I don't think at all 20 hearings, but certainly at a number of hearings over the past 4 years, I have had the privilege to appear before this subcommittee to discuss how we can best work together to eliminate the toxic waste sites that plague far too many of our communities, and to do it faster, fairer and more efficiently.

Each time, you have heard me say that legislative reform is needed to improve Superfund. Each time, I think there has been a consensus in this committee that something should be done legislatively to strengthen the program and to enable it to fulfill its potential for improving the quality of life in our country.

On behalf of the 1 in 4 Americans, including 10 million children who live within 4 miles of a toxic waste dump, we must not let Superfund fall short of its promise. We must not shrink from our shared responsibility to find better, more effective ways to clean up the Nation's worst sites, to work with affected communities and to give them hope for the future.

Mr. Chairman, it is time for us to hammer out responsible, consensus-based legislation that we can all agree on and to finish the job of ridding America's neighborhoods of toxic waste dumps.

Speaking on behalf of the Clinton administration and the array of Federal agencies that have a role in Superfund, let me say to you and to each member of this subcommittee and committee, we are ready, willing and able to work with you, Members of Congress from both sides of the aisle, with stakeholders, and especially with the communities across the Nation to enact legislation that will

cleanup these sites, return land to communities for productive use, and protect the health of our citizens.

I would respectfully suggest, Mr. Chairman, that a good starting point would be to recognize the positive success of the administrative reforms that we have already put in place.

When we first took office 4 years ago, I said on numerous occasions, and the President said, that Superfund was broken, that it needed to be fixed, and so we launched a series of innovative measures designed to improve the work within the current statutory framework.

I think we've all heard the story about the man, when asked why he kept hitting himself in the head with a hammer, replied because it feels so good when I stop. Mr. Chairman, I'm happy to say that we can now put the hammer away when it comes to Superfund.

The Superfund Program of today, site after site, is vastly different than it was 4, 8, 12 years ago. We have made major improvements through our administrative reforms, we have made it faster, fairer, more efficient.

We have instilled the system with more common sense and as a result, I think it is fair to say that many of the old criticisms simply do not apply anymore. Thanks to our administrative reforms, today's Superfund provides significantly faster cleanup at lower costs. On average, we have cut more than 2 years off the time it takes to clean up a Superfund site and we are well on our way to a goal of saving even more time.

In addition, our reforms have protected thousands upon thousands of small parties from Superfund litigation, removing them from the liability system, the liability net, and thus, ensuring that their dollars are spent on actual cleanup and not on lawyers, not on expensive legal costs.

We've worked to reduce transaction costs, to work more cooperatively with responsible parties, and to increase fairness. We've created a National Remedy Review Board to review Superfund decisions, ensure consistency, fairness and cost effectiveness. We've updated existing remedies to ensure they are consistent with the latest science and technology, and we have developed standardized remedies for certain kinds of sites.

These save time, they save money by eliminating the need for studies that, in effect, have already been performed at similar sites.

We've expanded our contact with stakeholders and citizens, appointing a Superfund ombudsman in each region, creating community advisory groups, and putting a wealth of Superfund information on the Internet.

We have formed a closer relationship with State environmental agencies, helping them forge a greater role in the Superfund site selection process, and working with them through our Brownfields Initiative to promote the cleanup and redevelopment of lightly and moderately contaminated sites.

Mr. Chairman, these are just some of the improvements that have enabled us to complete a total of 250 Superfund cleanups over the past 4 years, more than in the previous 12 years combined.

We all recognize that the job is not done. We have promised the American people that toxic wastes should be cleaned up, should be

removed from their communities, and we have a responsibility to finish what we have started.

As President Clinton mentioned in his State of the Union Address, we are determined to double our current pace and cleanup another 500 toxic waste sites by the year 2000, literally allowing millions of children the ability to live and play in neighborhoods free of toxic threat.

We have provided for faster, fairer, more cost effective cleanups and more common sense in the system and we will continue to do so without sacrificing one iota of our commitment to protect the public health and the environment. That is this Administration's No. 1 priority.

Every time we complete another toxic waste site cleanup, every time we close the books on a Superfund site, we want to be satisfied that those who live in the community, who live nearby, can go on with their lives free from worry that the site will one day reemerge as a health threat to their communities and to their children.

At the same time, we are also committed to ensuring that those responsible for polluting these sites are indeed held responsible for cleaning them up. Why should we stick the taxpayers with the bill.

Mr. Chairman, we fully agree that the bulk of Superfund money should go to clean up activities and not to lawyers. That is why we have acted to reduce transaction costs, that is why we have acted to reduce litigation between the parties.

We agree that the churches, the Girl Scout groups, the mom and pop businesses should be protected from the broadly cast litigation net, often put in place by private sector parties. That is why we have acted to remove more than 9,000 small parties from Superfund litigation over the past 4 years.

Let us not forget the benefits of the unfairly maligned Superfund liability system. That system, and we admit there are problems, and we have worked to fix those problems, is responsible for more than $12 billion committed by responsible parties to clean up hazardous waste sites.

That is $12 billion in money that otherwise would not have been available for the critical task of ridding the Nation of these highly dangerous hazardous waste sites. That is $12 billion that responsible parties have committed to clean up the polluted environment.

Is the system perfect? Of course not. Can we continue to improve it? Absolutely. That is why we believe we need consensus-based, legislative reform.

We do have problems with S. 8. We believe that it is important to build on the proven successes of our administrative reform. We are concerned that S. 8 would impose a new system that could, unfortunately, result in delay of cleanup, shifting costs from polluters to taxpayers, reducing community involvement, and preventing hundreds of sites from being addressed.

We believe that S. 8, as we read it, is a creative system that is less protective of the public's health than the one we have today. We believe it would end requirements for the treatment of even the most highly toxic and highly mobile waste. Contaminated groundwater might not be cleaned up in perhaps most, if not all, cases.

It would impose redundant expense of time-consuming, new risk requirements as well as new cost considerations on existing cleanups, cleanups actually being performed in the field today resulting in further delay and disruption. We believe it might undermine the efforts by the States to work with EPA in partnerships to address their hazardous waste sites and to limit real community involvement.

We are also concerned that S. 8's numerous liability exemptions and limits basically reject the notion that the largest polluters provide the funds for the cleanup costs. We believe that is not something the American taxpayers will tolerate, nor should they be expected to.

Mr. Chairman, I want to be very clear that while we do have our substantive differences, we do not believe they are insurmountable. Many visions in S. 8 where we have problems appear to be the result of honest efforts of people in this body to address problems that quite frankly, no longer exist in the day-to-day operation of the program.

They seem to be focused on outdated anecdotes about goldplated, overprotective remedies, or liability provisions that purportedly prevent cleanup. We think that a consensus-based process must be based on where we find the program today; that by focusing on today's Superfund program, a program that now has more than 70 percent of NPL sites cleaned up or in cleanup construction, we stand a much better chance of developing a consensus and enacting responsible reform legislation in this Congress.

If I might just very, very briefly speak to the four points, the four cornerstones of what we think would be responsible legislation.

First, it should protect public health and the environment, promote cost effectiveness, and foster the return of contaminated sites to protective use by their communities.

Second, it should hold polluters responsible while at the same time, allowing parties to resolve their liability as efficiently as possible and not trapping parties unfairly in the liability net.

Third, it should encourage and support citizens in their efforts to participate in the cleanup decisions that ultimately affect their lives. We have learned over and over again, when we involve the citizens on the front end, we save time on the back end. Let's bring them to the table, let's make them part of the decisionmaking from the beginning.

Finally, it should support a continued working relationship between all levels of government in cleaning up the toxic waste sites. This is not something that any one level can do alone. It will take all of the Federal, State, and local governments working together to get the job done.

We all know how much Americans want these hazardous sites removed from their communities forever; we know how much they actually want the Superfund Program to succeed. I believe we can, in fact, work out something for their benefit.

Mr. Chairman, if I might suggest, why don't we get everyone together, why don't we pull out a blank sheet of paper, why don't we draft a Superfund reform bill that recognizes the progress that we've made, addresses the remaining problems, and sets the program on the right course for the future, with an ultimate goal of

ridding our Nation of hazardous waste sites and protecting the public health.

I can assure you that we are eager to get on with the job of making America's toxic waste cleanup program faster, fairer and more efficient, and thus, bringing relief to many more communities. Let us work together to forge a consensus that will protect future generations of Americans, let us all say yes to a stronger, better, more effective, more successful Superfund process.

We look forward to working with you, Mr. Chairman. We have enjoyed I think a very positive dialog over the last several years. We would like to build on that. Together we can see Superfund legislation drafted and passed this year.

Thank you.

Senator SMITH. Thank you very much, Administrator Browner.

Senator Inhofe, do you have a statement you want to make at this time?

OPENING STATEMENT OF HON. JAMES M. INHOFE, U.S. SENATOR FROM THE STATE OF OKLAHOMA

Senator INHOFE. Thank you, Mr. Chairman.

As you know, we have a Senate Armed Services Committee also simultaneously, so I'll have to be leaving.

I did want to get something in the record, so I do have an opening statement, but I'll just read a little bit of it so that I can get the point across.

The point that I have tried to get across in many of these hearings over the past 2 years is that even though most of the people in this room probably work for the EPA and wouldn't agree with this, at the local level, we've had such great successes. I won't use the old examples, we've got new ones this time, Madam Administrator. Instead of using OxyUSA, let me just share an experience in Oklahoma that I think illustrates this perfectly.

Two former refineries were purchased by the same company, Arco. Both had similar wastes and similar remedies and both needed to be cleaned up. The difference was that the State of Oklahoma took the lead for one, while the Federal EPA managed the other. The difference was dramatic and underscores the inherent problem of directing a local cleanup process from Washington, DC. The EPA site took 8 years longer and $37 million more.

Specifically, the State site was a refinery located in Vinta, OK. Remediation began in 1989, took less than 3 years and only cost $6 million. The Federal site was a refinery located in Sand Springs, OK. Remediation began in 1985 and it was finished in 11 years in 1996, just finished, at a cost of $43 million. Both remedies involved the solidification of an onsite land filling of petroleum refinery acid sludges.

I only bring this out because we have case after case, and you mention in your fourth point, working together, working relationships with the States and the counties and the Federal Government. I'm just saying I think we have one very expensive step that has not demonstrated that it has been able to clean up these sites efficiently.

I'd ask my entire statement be placed in the record.

[The prepared statement of Senator Inhofe follows:]

PREPARED STATEMENT OF HON. JIM INHOFE, U.S. SENATOR FROM THE STATE OF OKLAHOMA

Mr. Chairman, thank you for calling today's hearing and I want to commend you for your quick start on Superfund reauthorization. I believe we will be able to move Superfund this year, provided we have the support of the Administration. You have done a good job of taking the Superfund discussions from the last Congress and drafting legislation that moves the process forward. I am looking forward to working with my colleagues on both sides of the aisle to fix a system that everyone agrees is broken.

While I recognize that EPA has made some administrative changes in the Superfund program, it is not nearly enough and a congressional overhaul of the entire system is desperately needed. We must:

1. We must shift the program to the States and local communities.
2. We must improve the cleanup process and shorten the time it takes to clean up a site.
3. We must reform the liability structure to ensure that parties are responsible for only their own actions, not others.

The best way to change the system is to get the cleanups down at the State level. The added bureaucracy of the Federal Government only adds unnecessary costs and red tape to the process. Cleanups are delayed and more people are exposed to hazardous waste under the Federal system. I have one example from Oklahoma that illustrates this perfectly.

Two former refineries were purchased by the same company, ARCO. Both had similar wastes and similar remedies and both needed to be cleaned up. The difference was that the State of Oklahoma took the lead for one while the Federal EPA managed the other. The difference was dramatic and underscores the inherent problems of directing a local cleanup process from Washington D.C. The EPA site took 8 years longer and $37 million dollars more.

The State site was a refinery located in Vinta, Oklahoma. Remediation began in 1989, took less than 3 years, and only cost $6 million dollars.

The Federal site was a refinery located in Sand Springs, Oklahoma. Remediation began in 1985 and was finished 11 years later in 1996 at a cost of $43 million dollars.

Both remedies involved the solidification and onsite landfilling of petroleum refinery acid sludges.

The extra Federal costs included multiple demonstrations of solidification technologies which added years to the project and extra EPA reviews of the design documents which caused the project to be delayed numerous times. It actually took longer for the EPA to review the documents than it did to produce them.

At the conclusion, the State site cost $92 per cubic yard to clean up while the EPA site cost $313 per cubic yard. And this was not a site that was cleaned up 15 years ago, it was just finished last year while we were debating Superfund. We need to get more sites cleaned up at the State level, they do it cheaper, faster, and more efficiently than the Federal Government will ever be able to do.

Mr. Chairman, I am looking forward to working with you on this legislation so that we can finally get these Superfund sites cleaned up and off the list.

Senator SMITH. Senator Thomas, any opening remarks?

OPENING STATEMENT OF HON. CRAIG THOMAS, U.S. SENATOR FROM THE STATE OF WYOMING

Senator THOMAS. Mr. Chairman, I do have a statement I would like to have entered in the record.

[The prepared statement of Senator Thomas follows:]

PREPARED STATEMENT OF HON. CRAIG THOMAS, U.S. SENATOR FROM THE STATE OF WYOMING

Mr. Chairman, thank you for scheduling this hearing, and for your hard work to see that the Federal Superfund law is finally reauthorized. I want to commend you and Chairman Chafee for your hard work on this important issue.

Nearly everyone agrees the current Superfund law is broken and changes need to be made. Unfortunately, the consensus doesn't last much past that statement. A program designed in 1980 to clean up hazardous waste sites has cost us over $30 billion and we've cleaned up less than one-quarter of the over 1300 sites on the National Priorities List (NPL). More disappointing than the lack of progress is the fact

that by some estimates, less than half the money spent goes to actual cleanup. So the lawyers line their pockets while the vast majority of Superfund sites see little progress. The bottom line is that the current system doesn't protect the environment or preserve the health and safety of future generations.

There are several changes Congress must make to the current law if we are to achieve our goal of protecting public health: provide a common sense approach to cleanups, control costs, reform the liability system, accelerate cleanups, increase State and public participation in the process, and address Natural Resource Damages (NRD). S. 8 moves us toward achieving those goals.

S. 8 injects some common sense into the cleanup program by allowing cost-effective remedies that protect human health and the environment, including groundwater. It takes the future use of the site into account when selecting the cleanup remedy. In addition, the current rigid statutory preferences for permanence will be replaced with flexibility to allow consideration of all cleanup options based on several important factors. These provisions will help accelerate cleanups and control costs.

If there's one area of the current law that has driven much of the public outrage over Superfund, it is the liability system. All across the country, and in my State of Wyoming, small business owners who sent a tiny amount of waste to an eventual Superfund site are drawn into the costly litigation process. Remarkably, the system of liability puts every potential party on an equal liability footing, so even though a small businessman may have only contributed a small amount of contaminant, he's on the hook for the full amount of the cleanup, just like the major contributors to the site. S. 8 addresses this concern by eliminating liability for small businesses, parties that contributed extremely small amounts of waste, and religious and charitable groups among others. It also proposes a "fair share" allocation process for multiparty sites. These changes will dramatically reduce the litigation costs associated with Superfund.

I regard NRD as the "sleeping giant" of the Superfund program. This is a program that is just beginning to develop, and it's clear trustees—States, the Federal Government and Indian tribes will use this portion of the law to file huge claims against companies for questionable "values" of the lost use and non-use of natural resources. I'm concerned that reforming the Superfund

Cleanup program without addressing the NRD portion of the law will only move our problems with the current law from one portion of the program to another. I am pleased S. 8 addresses this concern by eliminating non-use and lost use damages for pre-1980 activities.

The opponents of Superfund reform like to talk about making the "polluter pay." The fact is, however, that the Federal Government is the single biggest "polluter" in this country. There are over 155 Federal Superfund sites, there's even one in my State of Wyoming. These sites are some of the most complex and costly in the country. The inability to control costs, reform NRD and get cleanups done quickly result in additional liability to Federal agencies, costs that are passed along to the American taxpayer. Therefore it is in everyone's interest that we pass substantial reform quickly.

I am sure we will hear from some of today's witnesses that the reforms the Clinton Administration has initiated have solved the problems with Superfund. I agree that they have made some improvements to the system. However, there remains a good deal of work to be done. Even with these reforms, there is too much litigation, cleanups cost too much and sites are not being cleaned up quickly. I encourage the administration to come to the table so we can work together to pass comprehensive legislation in order to truly reform Superfund.

S. 8 makes some very real improvements to the current mess. It's not perfect, but it takes us a step forward on resolving these contentious issues. S. 8 represents an excellent effort and I hope we can move forward very soon.

Thank you, Mr. Chairman.

Senator THOMAS. I hope things are going as well as you report. Each time you come before Congress, Madam Administrator, it sounds like everything is perfect and the Congress just ought to keep quiet. Frankly, I have to tell you that we have a role too and our role comes from where we live and our experience.

You come and lecture us about how things are going so well that we ought to shut up and go home. I just don't agree with that and I want you to know that.

Ms. BROWNER. Mr. Chairman, if I might just briefly respond.

I have absolute respect for the role of the Congress. I am here today to ask you to please rewrite the law. I am in no way suggesting you don't have a very important role.

Senator THOMAS. I'm not just talking about today. We were here last year and it just seems like you always talk about partnerships, but the partnership is like horse and rabbit stew, one horse and one rabbit. It's about that equal.

I think we could really get along a little better if you accepted us as partners, real ones.

Ms. BROWNER. Senator Thomas, with all due respect, we worked with this committee to craft very important legislation last year, we worked in partnership.

Senator THOMAS. Yes, I was on this committee.

Ms. BROWNER. And that is what we would like to do here. In no way do we suggest, nor have I ever suggested to this committee or any body of this Congress, that we don't welcome the oversight, that we don't welcome involvement.

We may have the need for in-depth discussion and debate, but if we can sit down together, which is what I am asking for here today, and look at where the program is today. It is a different program, it is not the same program of 5 years ago.

Senator THOMAS. I don't mean to be argumentative, but I'm sharing a perception. You can dismiss it if you like, but that is the perception. I'm not the only one in the world who has that perception.

Ms. BROWNER. I'm sorry if you have that perception. I believe that I have demonstrated personally and my agency and this Administration have demonstrated a real willingness to work. We wrote two pieces of legislation together last year that make fundamental changes in programs for the people of this country, and we are proud of the work we have done together.

Senator THOMAS. I'm sharing my view. You can reject it if you choose.

Senator SMITH. Administrator Browner, let me start by first of all saying there is no question that you have made great strides in regards to making administrative changes during your tenure that I think most of us would agree are certainly in the right direction.

Without being confrontational or directly critical, let me just say people, private parties, people out in the various States say though that although these administrative reforms are well-intentioned, in fact, they are not being consistently implemented, and that the scenario that you paint here is not as rosy as you say it is.

Could you just respond to that briefly? Is there some evidence that you're having a difficult time implementing these administrative changes.

Ms. BROWNER. The changes which we have unfolded in three sets of administrative reforms over the last 3 years are at various phases. We'd be the first to admit, the ones we started 3 years ago are further along than the ones we started a year ago.

There are parties other than EPA that have looked at these administrative reforms and their success. For example, the Superfund Settlement Project, which is made up of companies like Ciba-Geigy, Dupont, General Electric, General Motors, IBM, so on and so forth,

and we can provide this to the committee, looked at the first year of implementation of our administrative reforms and what they found is they're working and they do make a difference.

These come on a long history, and I think we would all agree, a sometimes painful history, but we have absolutely committed ourselves to change, we have been willing, we have encouraged third parties to come in and review the changes. The Chemical Manufacturers Association, CMA, also has a project underway to evaluate our reforms.

At the end of the day, the best thing we can all do is take those reforms, understand them, and rewrite the law. That is what is the most important thing to do now.

Senator SMITH. But that report does not cover all of the EPA regions is my understanding. That only covers some of them and there are some successes in there, but there are other regions where the success has not been that good.

Ms. BROWNER. The report looked at, in an effort to take a snapshot, if you will, of activities across the country, it did look at activities outside of Washington. I think that's extremely important.

The reforms are going on in all 10 of the regions. The nature of the problems in individual regions will vary. In Senator Baucus' part of the country, we have large numbers of mining sites and those tend to be different than the sites we see in the industrial northeast or the midwest, for example. So there are variances in the type of sites.

I think there is a study now underway in all 10 of the regions and we can certainly provide that for the record.

Senator SMITH. Is it still your position that we should have comprehensive Superfund reform in spite of the administrative changes you've made?

Ms. BROWNER. Absolutely. Yes.

Senator SMITH. In your comments about S. 8, if in fact some of the changes that we make in S. 8 are based on problems that you say don't exist—maybe you're right in some areas, maybe we're right—let's assume that many of the problems that we say exist don't exist and you have taken care of them, what would be wrong—if we codified the changes?

Ms. BROWNER. We don't disagree with taking the administrative reforms and placing them in legislation. Unfortunately, as we now read S. 8, and perhaps we misread it, and we will stand corrected if we do, the way in which the reforms are playing out, our experience of the reforms in the field is not captured in S. 8.

For example, we do believe it is important to update cleanup decisions. We absolutely agree with the need. Technology does advance, there are cost savings that can be brought to bear.

As we read S. 8, it would literally allow everything to be reopened, including where you have construction underway and we think that is, quite frankly, going to result in significant delay at far too may sites. So maybe it's a judgment call.

We agree with the need, the flexibility should be embodied in the law to allow the update of remedy decisions, but to require every single remedy on the books to be reopened, we think will not serve anyone well.

Another example would be orphan shares. We couldn't agree more with the need. I think every time I have testified I have spoken to the need for an orphan share fund. We are doing orphan share allocations right now. We have more than 20 sites where we've made it available, it's more than $50 million.

The way we read S. 8 would essentially put orphan share funding in front of every other activity in the program, and so you would again have, we think, unfortunate and unwise delays in cleanups.

I think as both you and Senator Lautenberg said, we've made a lot of progress. This is not a gap that cannot be closed. We think it can be closed. We would just ask for the opportunity, and this is a very detailed process, to actually sit down with your staff, with yourselves, whomever, to go through what is actually working, what should be put into the law in a very strict manner, and where perhaps some flexibility would serve all of us, and most importantly, the communities where the sites are located.

I can give you a number of examples where we've moved, you've moved, but we're not quite there yet, and I think maybe we can get there, but it's going to take some real dialog.

Senator SMITH. Senator Lautenberg.

Senator LAUTENBERG. Thanks very much, Mr. Chairman.

Thanks, Ms. Browner, for your excellent statement.

As I listened to my distinguished colleagues ask some questions about your management and your response to inquiries on oversight, I'm reminded of the fact that the Superfund program was developed at the end of 1980; that it had its first dozen years under Presidents Reagan and Bush; and in the first dozen years, this program barely moved and we spent a ton of money.

As a matter of fact, we had one of those terrible incidents that occur sometimes in government when the person responsible for managing the program was accused and a deputy was punished severely for malfeasance or misfeasance, whatever the appropriate word is, of duty. So we spent 12 years learning what was happening and we've begun to catch up with this thing.

We had rampdowns and rampups because we couldn't get the funding for it, I'd point out to my colleagues here that this is a job I think that has developed very well in the last few years and it's a testimony of you, Ms. Browner. The fact is that you have been responsive.

I have yet to hear about your unwillingness to appear before a committee or unwillingness to answer questions. You've been there when asked and I must say I admire your courage because you've stood up and taken the criticism not only graciously, but also with a follow-up to the programs that further distinguishes you and your department.

I'm pleased to see you here and hope that we can work something out that would satisfy both parts, both ends of the spectrum. I don't know whether it's possible. I think we have an obligation to the American people to do it.

My mission is not to protect any of the parties who are responsible for pollution. Those who are exempt are exempt. We've agreed with that, but to make sure that those who are responsible pay the

price for their deeds, but above all, that we protect the citizens who live nearby and whose responsibility we share.

I'd like to just get a couple of questions in and time runs fast here.

Your administrative reforms have been recently reviewed by Superfund settlement projects, the Industrial Coalition which is chaired by John Quarles at Morgan, Lewis & Bockius.

Can you tell us about the third round of administrative reforms that you implemented and their results? Is that something you can do sort of quickly so we can get in as much time as possible?

Ms. BROWNER. When you take the three rounds of administrative reforms, there are more than 50 specific actions that they entail. The third round did such things as create a National Remedy Review Board which actually looks at sort of the most complex, the largest sites, in terms of what is an appropriate remedy.

That group is already meeting. They've been looking at sites and they currently estimate potential savings of $15 to $30 million based on just 12 remedies at 11 sites. They expect to review an additional 10 to 12 remedies in fiscal year 1997.

Again, this is focusing on the worst, the most complex sites. That is what it is designed to do. It comes in prior to a final decision to make sure that the best technology is really being brought to bear.

We have also, as I mentioned briefly, created a mechanism for reviewing existing remedy decisions, for updating them, to take into account the fact that technology does advance in this field. Over 30 site remedies have been reviewed because of technology advances and the cost savings there are estimated at $280 million in future cost reduction, in other words as application of the new technologies are brought to bear at the site. We will review an additional 60 remedy decisions in the coming months.

We've offered $57 million in orphan share compensation as I mentioned previously. We're out there trying out this idea of orphan share. We're finding out whether the parties come to the table, what does it take to bring them to the table, what does it take to get the lawyers out of the picture, to reach an agreement on who does what in the cleanup and to actually get the cleanup done.

Finally, we were able to reach an agreement with the Department of Treasury that the dollars that the responsible parties place in trust funds or escrow accounts, if you will, for cleanup costs down the road, can accrue interest and that interest goes back into that account, so there are more dollars available for those cleanups. It is the Site Specific Interest-Bearing Account Program.

Those are some of the Round 3 reforms. They're up, they're working and we can provide you with detailed information on each of them.

Senator LAUTENBERG. Just one more. That is that S. 8 gives the kind of crucial decisionmaking authority on remedy selection to PRPs. EPA then has to object in 180 days if they disapprove of the PRP-chosen remedy. What are the practical implications of the PRP picking their own remedies?

Ms. BROWNER. The concern we would have is that a PRP might not choose the remedy that clearly protects the public health, that

protects the environment. You could have a PRP choose a remedy, quite frankly, because of dollar amounts and not the level of public health and environmental protections that are promised to the American people.

We think there has to be a check and balance in the system. In many instances, the sites we're dealing with are sites where PRPs have not been forthcoming, have not been willing to accept the responsibility to get on with the task.

Now, to suddenly allow them to make a choice without that check and balance, without that public participation, we don't think guarantees the environment and public health protections, and moreover, we are concerned that we may be moving problems onto future generations that we'll just sort of deal with the surface problem and leave the underlying problem.

Senator LAUTENBERG. Thanks, Mr. Chairman.

Senator SMITH. Senator Chafee.

Senator CHAFEE. Thank you, Mr. Chairman.

I'd just like to comment on that last point of Senator Lautenberg. Under S. 8, and I believe under your administrative reforms, the PRP has a say in the selection of the remedy with the oversight of the EPA. So I don't think it's quite accurate to say we're handing it over or to suggest that we're just turning the problem over to the responsible party and letting them just choose cleanup remedies, the easiest and the least expensive.

You and I met, Madam Administrator, a couple of weeks ago and the question I asked you was, "Who is in charge here from the Administration's point of view." In your statement, you talked about "We are eager to get on with the job. Let us work together." The "us" and the "we," I assume is you?

Ms. BROWNER. It's me.

Senator CHAFEE. It's not Ms. McGinty from CEQ and it's not the Vice President, and the Department of Justice or the Department of Energy, or the Department of Defense. It's you, is that correct?

Ms. BROWNER. That is right. I am responsible, for the day-to-day operation of the Superfund program. Obviously I answer to the President, I answer to the Vice President. I am also the person that the President has asked to work with Congress to fashion a legislative proposal. That is something he asked me to do before I even accepted his offer of the nomination to this job more than 4 years ago.

Now, Mr. Chairman, as I know you are aware, Superfund involves many parts of the Federal Government. It is not something EPA does on its own—the Department of Defense, the Department of Transportation, the Department of Energy, the Department of Justice all have a role to play in administering the law.

We promise you that whatever consensus-based process this subcommittee and committee create, we will undertake the responsibility, I, EPA, to ensure that we have the right Federal agencies and departments in the discussion at the right moment, as we did on drinking water, as we did on food safety.

Senator CHAFEE. As you know, last year, I asked, pleaded perhaps is a better word, that the rhetoric be reduced on this "polluter pays" or "letting polluters off the hook." I wasn't totally successful in my plea.

I'm interested in the part of your prepared testimony in which you say, "EPA's reforms"—I'm talking about the section at the bottom—"getting the little guy out early."

"EPA's reforms are removing thousands of small volume waste contributors from the liability system." Under the liability system, there is a joint and several liability and by definition, the small-volume waste contributors are polluters, aren't they?

Ms. BROWNER. They are people who have certainly participated in a site, that is true.

Senator CHAFEE. So what you have done, and I have no objection with this, but the facts are you're "letting the polluters off the hook," is that correct?

Ms. BROWNER. Senator Chafee, as we have said, we do believe there are parties unfairly trapped in Superfund, absolutely, positively. I don't think Congress, when it created this law, when it reauthorized this law, envisioned that a homeowner, that a pizza parlor owner would become a part of Superfund.

What we've sought to do is honor that intent within the existing law. So homeowners are absolutely out.

Senator CHAFEE. I've only got limited time, Madam Administrator, but the facts are that these are polluters. What I tried to say last year, as I say without total success, was that we're talking a matter of degree. These are polluters. If you strictly enforce the law, some dentist that had some pollution go into a site, could be responsible and joint and several liability for the whole thing, right? That's the law.

Ms. BROWNER. I think that it is fair to say that courts have interpreted the law as you suggest. I do not think that's what Congress intended, I do not think that makes sense for the American people and that's why we've had a set of administrative reforms.

No one ever thought when Congress wrote this law that a dentist, that a pizza parlor owner would find themselves a "polluter." The courts interpreted it that way, EPA has acted now to protect them.

Senator CHAFEE. Madam Administrator, you have taken on yourself, and I don't argue with it, but the facts are that you've taken on yourself to excuse some individuals or some small companies. You've done that. This is what you say right here, "EPA's reforms," and so you've drawn the line at a certain place. I don't know where the line is but whatever you call a "small-volume waste contributor," here in your testimony.

Ms. BROWNER. We agree. We've taken them out because we don't think you ever intended for them to be there.

Senator CHAFEE. Despite what the law says, you've taken a position that you thought was our intention. You've done it because it makes the whole process much easier. You can move on and, similarly, in S. 8, we have also removed some. Yet, you don't like what we've done. You think we've gone too far. I remind you that it's all part of the same process; we have removed some polluters, just as you've removed some.

Ms. BROWNER. We do not disagree——

Senator CHAFEE. But what gets me is this aggressive language—that we all have heard, about "polluters let off the hook," or you're

not "making the polluter pay." You're letting them off the hook and you're not making the polluter pay, but you call that reform.

Ms. BROWNER. I think we do have agreement here in terms of the largest party should pay their fair share and the little people should be out. I don't think and you have said repeatedly you do not disagree with my efforts to protect the small parties which the law say it, this is how courts have interpreted it and we have worked around those court interpretations in terms of the small parties. This is a sensible thing to do and I think we all agree.

The question now is, and I think the question appropriately before all of us who care about legislation, is the middle and within that middle, where do you draw a line in terms of who is clearly out. The law would state is clearly out, and who remains in a fair share allocation system.

We are concerned that when we read all of the various parts of S. 8 and we connect them together—which is how we would actually do it in the field, that is how the law would come to work in the field—that the effect of all of the various sections of S. 8 result in large numbers of parties and sites, quite frankly, which we went over and over and around and around on last year. We are concerned about the obligation for the largest polluters to pay their fair share.

Senator CHAFEE. My time is up but I would appreciate it if you would take the expression "letting polluters off the hook," and bottle it and throw it away somewhere.

Thank you.

Senator SMITH. Senator Baucus.

Senator BAUCUS. Thank you, Mr. Chairman.

Mr. Chairman, I think we're maybe making a little progress here. This last exchange I think illustrates it. Namely, there seems to be agreement despite the argument. The argument is whether the Administrator is letting "some polluters off the hook." That's pretty much irrelevant I think to the greater goal here.

The greater goal here now is what is the solution. I think we're agreeing, what's the solution.

Senator CHAFEE. The greater goal is what? I missed that.

Senator BAUCUS. What's the solution to the problem? That's what we're here for, to try to solve problems, not make problems.

Congress somewhat solved the problem when it passed Superfund, but also made some problems, so our goal here is to solve the problems that Superfund made so that we have a better Superfund statute than we had before, namely addressing cleanups.

As I hear the exchange here, it seems to me one of the solutions is to let the smaller dentists, outfits, off the hook, but I think most Americans would agree, some of the largest companies who did pollute should pay the bill, not taxpayers. I think most Americans, to repeat myself, think not only should taxpayers not pay, but the smallest polluters, the dentists, should not pay either because they're unwilling parties trapped in the situation caused by the Congress.

My question to you, Administrator Browner, is this. You've outlined a lot of reforms that you've undertaken, you've done as much as I think you possibly could given the restrictions of the statute.

You also have said that you'd like a comprehensive bill, is that correct?

Ms. BROWNER. Yes.

Senator BAUCUS. Could you outline for us today again—you gave us four points in your prepared testimony, but if you could be a little more specific and say the two or three most important areas where you think the Congress should still address reform even given your argument, that S. 8 deals with outdated concepts or problems that no longer are as great as they were, say, a few years ago.

What are the two or three that you'd like to see us address, the problems that currently exist that you cannot change given the restrictions of the statute but you'd like to see changed?

Ms. BROWNER. I think it is absolutely important that the statute, when rewritten, guarantees public health and environmental protections. What I mean by that is let's not exempt the requirement, for example, that the hot spots be treated, that they actually be cleaned up and treated.

Senator BAUCUS. And S. 8 does that in your judgment?

Ms. BROWNER. We are concerned that is what S. 8 does.

Senator BAUCUS. So don't accept the hot spots. What's next?

Ms. BROWNER. No. 2, in terms of public health and environmental protections, let's not say that bottled water is an appropriate solution when we know that groundwater can, in fact, be cleaned up and treated. Let's not have a preference or an equal footing. We've had some real confusion in understanding this section of S. 8, I'll be honest with you.

We've gone back and forth with the staff, but we are concerned, and I don't think this is necessarily the intention, but that you can read S. 8 as allowing for the way the cost comes into play, the cost factors and other factors come into play, you could end up in a situation where groundwater is not addressed even though the NRC and the National Resource Council says they can do it.

Senator BAUCUS. So groundwater is another one. What's the third area?

Ms. BROWNER. Then in terms of the largest parties paying their fair share.

Senator BAUCUS. You're getting into allocation of liability.

Ms. BROWNER. Now I'm into the second category, right. We are concerned that S. 8 takes out a large category of sites when you string together the various provisions. This was the issue that I think we all spent a lot of time on last year, the co-disposal sites, which make up a significant number of the sites on the list.

What we want to do is ensure that you don't needlessly drag parties through an allocation system, that there's a bright line, you're in, you're out or you're in; that it's very clear on the face of the statute and that these 1 percent type proposals mean a party has to stay in perhaps for several years while we figure out the percentages as opposed to saying, if you meet the following definitions, and let's talk about what those definitions are.

Senator BAUCUS. Are you suggesting we enact something along the lines of your fair share allocation?

Ms. BROWNER. We would suggest a process. I think this is an important example of where we had one position, one opinion 3 years

ago based on in the field experience with our administrative reforms. Today, we have a different opinion. If I might just briefly explain it.

We all spent a lot of time 3 years ago looking at an allocation system, where there would have to be people who were certified, allocated, and it was very rigorous and rigid, if you will.

When we went out and actually used our administrative reform allocation system, what we found is people didn't want to be limited to a list of who they could choose as their allocator. They needed more flexibility.

We would encourage you, based on that experience, and you can talk to parties who have been involved, to provide more flexibility in the allocation system. The real point of the allocation system, of the orphan share, is to get everyone in the room, get the liability resolved, move on to clean up.

Senator BAUCUS. I see my time has expired. I just want to say, Ms. Administrator, I think you're doing a good job.

Ms. BROWNER. Thank you.

Senator BAUCUS. You have a nearly impossible task dealing with this statute as well as some other statutes that this Congress has enacted, all well intended, but sometimes there are also some unintended consequences which you have to live with.

I might say for the benefit of my colleagues too that you've also responded very well to a lot of local initiatives and local concerns, particularly in my State of Montana. The best example that I can think of right off the top is a very innovative approach I might say to my colleagues here.

We have a huge Superfund site on the outskirts of Anaconda, MT. It's a problem and the local communities as part of the cleanup got the approval of EPA to do this, and turn this Superfund site into a golf course.

Jack Nicholas has designed the course. It's a great course and it is going to be open this summer. It's going to be so good, we're going to rival the U.S. Open. This golf course is going to put Montana on the map.

I invite my colleagues to come out the opening day of the Jack Nicholas golf course in Anaconda, MT, which was a Superfund site this summer.

Senator SMITH. What are the greens fees to pay for that?

[Laughter.]

Senator BAUCUS. I don't want to get into the Senate gift rules, but I urge you to come out this summer on opening day.

Ms. BROWNER. If I might say, this is an example of how we are taking a very common sense approach to the cleanup plans and incorporating future land use. Sixty-three percent of the cleanup plans now incorporate the community's desires in terms of future land use.

You're providing an equal level of public health and environmental protection, but you're making adjustments within the cleanup plan that reflect what the community wants. Here they wanted a golf course. That does change your cleanup plan. It doesn't change your level of protection, but it allows for flexibility in designing cleanup plans.

Senator BAUCUS. I might say to the Chairman, I don't know about greens fees, but Jack Nicholas is going to be there on opening day.

Senator SMITH. Senator Thomas.

Senator THOMAS. Ms. Browner, I haven't heard you mention, perhaps you did before I came in, the natural resource damage aspect. What's your position on that?

Ms. BROWNER. I should explain that you will have people testifying later today specifically on the natural resource damage portion of the bill. We do believe that there should be a natural resource damage provision in a reauthorized Superfund bill.

We're concerned that S. 8, the language on NRD, may impede response actions. We are concerned that it may create some inflexibility, but we do think that it is an important issue. When we say comprehensive, we mean comprehensive and we do have with us today the natural resource trustees who will be speaking specifically to that.

Senator THOMAS. I see, but if we had the piece of paper out here, what would you write down on NRD?

Ms. BROWNER. I wish we could write it down in a second. I think it would take many, many sentences.

Senator THOMAS. Do you relieve the liability before 1980, for example?

Ms. BROWNER. No, we would not.

Senator THOMAS. They're too big?

Ms. BROWNER. Excuse me?

Senator THOMAS. They're too big a polluter? They don't fit in your category?

Ms. BROWNER. I think the question of dates, whether it be in the case of NRD or in other instances, raises a new round of litigation quite frankly and I think the goal of all of us is to reduce litigation.

What will happen is parties will come in and argue they did something before or after a particular date and parties will be litigating a whole other set of issues. So we have, since we began this discussion 4 years ago, consistently recommended that we not use dates as a means of determining who is in or who is out.

Senator THOMAS. You talked about getting polluters to pay. There is a substantial number of these sites that are Federal sites, are they not?

Ms. BROWNER. Seventy-five percent of the cleanup expenditures now underway are being done by the responsible parties, by the PRPs if you will. The lion's share are, in fact, not Federal sites.

Senator THOMAS. I was confused on the numbers. I noticed in some of the material, it said——

Ms. BROWNER. I'm sorry, are you talking about Federal facility sites?

Senator THOMAS. Yes.

Ms. BROWNER. I apologize.

Senator THOMAS. Like Rocky Flats.

Ms. BROWNER. You're right, there are a number of very large Federal facilities sites in the Superfund Program. You mentioned Rocky Flats. There are any number of them.

I apologize, I thought you were talking about the non-Federal sites. My confusion.

Senator THOMAS. We had a hearing last year on Rocky Flats. Are we making any progress? We've spent how many million dollars there and almost all of it has gone to lawyers as I understand it.

Ms. BROWNER. I apologize, I know there was a different site with a similar name.

We continue in the dialog. This is not an easy site, as you are well aware.

Senator THOMAS. The dialog is we pay the legal fees, while somebody else does the talking?

Ms. BROWNER. I'm not sure I understand what you mean by we pay the legal fees?

Senator THOMAS. That's precisely what we do, is we pay the legal fees for the defense and two other parties are in the litigation.

Ms. BROWNER. Where you have a Federal facility, in the case of the example you use, we seek to work with the other Federal agencies to shape a solution. There may be litigation in terms of other parties who participated in that site, but the energy tends to focus on finding a resolution between the Federal departments and agencies.

Senator THOMAS. It indicates in some of this material, there have been 50 sites cleaned and deleted from NPL in the last 2 years.

Ms. BROWNER. I'm sorry, could you say that again?

Senator THOMAS. Fifty sites cleaned and deleted from NPL. You were talking about 250 or something of that nature?

Ms. BROWNER. Right. In the last 4 years, we have completed work at more than 250 sites now.

Senator THOMAS. So you did 200 in the first 2 years?

Ms. BROWNER. No, I apologize. I'm not familiar with the 50 number that you're using. If you want to tell me where it comes from, that would be helpful.

Senator THOMAS. OK, I'll get it to you and perhaps you can respond to it.

Ms. BROWNER. The 250, no, we didn't do 200 in the first 2 years. They are spread out over the 4 years.

Senator THOMAS. Thank you, Mr. Chairman.

Senator SMITH. Thank you, Senator.

Senator Allard.

OPENING STATEMENT OF HON. WAYNE ALLARD, U.S. SENATOR FROM THE STATE OF COLORADO

Senator ALLARD. Thank you, Mr. Chairman.

I missed my opening statement, so I'd ask unanimous consent that be made a part of the record.

Senator SMITH. Without objection.

[The prepared statement of Senator Allard follows:]

PREPARED STATEMENT OF HON. WAYNE ALLARD, U.S. SENATOR FROM THE STATE OF COLORADO

Thank you, Mr. Chairman. I look forward to today's hearing which I hope will shed some light on the urgency of cleaning up highly toxic sites around the Nation. In order to quickly and effectively clean up these sites, we need to modernize Superfund so it can work effectively, that's why I am pleased to be a co-sponsor of S. 8, the Superfund Cleanup Acceleration Act of 1997.

While there may be some concerns with certain aspects of this legislation, I believe that if all interested parties make a good faith effort we can move this legislation expeditiously through Congress. Yesterday's hearing was a good lead in for

today. We heard excellent testimony from State and local officials who have done as much as they can within their authority. We now need to build upon the progress they have made in the States and provide them with the responsibility and power to clean up the contaminated sites that many of them drive by every day.

If we don't empower State environmental officials to act, we would be ignoring the successes we heard yesterday. I believe inaction in this case is probably the worst course we could take.

Mr. Chairman, thank you for leadership in this issue, and I look forward to today's hearing.

Senator ALLARD. Yesterday, Ms. Browner, we had a variety of witnesses who explained the States are doing a good job in running their own cleanup programs. Mr. Fields was on one of those panels.

Are you wholeheartedly behind the States in controlling and running their cleanup programs?

Ms. BROWNER. That is a complicated question. If I might take a moment to explain?

Senator ALLARD. Yes.

Ms. BROWNER. As I understand yesterday's hearing, it was on brownfields?

Senator ALLARD. Yes, it was. I think we're setting down some very basic principles in brownfields and I'm trying to figure out if you're willing—and they look to me like they've been successful. I'm seeing if you're willing to carry those on with the Superfund sites.

Ms. BROWNER. We are very proud of our Brownfields Program. We think it has been tremendously successful in addressing lightly or moderately contaminated sites.

In terms of the worst sites, the Superfund sites, the big sites, it is our experience that in some instances, at some sites in some States, working with them in partnership, we would even say providing in the law that they take lead responsibility makes sense. We have supported those proposals in the past.

The problem we have with the current proposal in terms of the States is that we think it is incredibly rigid, that it is sort of a one-size-fits-all approach. Let me give you an example.

As we understand the current legislative proposal, if a State had what is called a remedial action plan on a site in their State, EPA could not become involved. New Jersey, which has a State cleanup law, recently had a very unfortunate situation involving mercury in an apartment building, actually in the walls, underneath the floor. It was a former industrial site that had been converted to lots and rented or sold.

The State had been involved in activities there previously. I think it is fair to say they would have what amounted to a remedial action plan on that site. When they discovered this situation, they needed us to come in. They called us, they invited us in and we came in and worked in partnership and are working today to address the problem.

The concern we have with S. 8 is it's an all or nothing type approach and we would encourage the committee to recognize the need for flexibility in dealing with the worse sites.

We had another example recently in Georgia. They discovered a site literally 24 hours after the business shut down, decided to go out of business. They called us and said it's yours; we can't deal

with this. We've already removed at this site, 415,000 pounds of mercury. We were literally vacuuming it up at the site.

You need that kind of flexibility so if the State finds something it can make a judgment and we can work together to address the public health and environmental concerns. So I would just say, as I think is true for the majority of environmental and public health issues we face today, let's avoid a one-size-fits-all, rigid system of the States do everything and EPA does nothing or EPA does everything and the States do nothing. Let's recognize the differences between the States.

Senator ALLARD. Would you be happy then to put a provision in the bill that said if the States requested you to come in, that you could be available as a consultant for them? That's what your testimony said.

Ms. BROWNER. There are other problems with the State section of S. 8. That's one portion I was speaking to and I think what you suggest in terms of EPA being able to come in may make some sense, but there are other problems. I don't want to suggest that is the only problem, and I'm more than I'm happy to detail them for you.

Senator ALLARD. I'm all ears. Let's hear it.

Ms. BROWNER. One example would be when a State files under S. 8, when the State seeks delegation of responsibility for Superfund in their State, they get to self-certify in terms of their ability to assume the program. EPA is not allowed to request documents, to verify that self-certification, as we understand the provision.

We have 60 days to make the decision. There is not at the conclusion of our decision, a requirement of public notice and comment. We think the stakeholders in the State should have an opportunity to comment on EPA's decision. If we fail to act in 60 days, the program is immediately moved to the State.

Senator ALLARD. On that issue, what would be the problem with us saying if the Superfund is strictly a State issue, let them deal with it. If it's on the border of the State and could have ramifications with their neighbors, then perhaps maybe the neighbors could bring you in on that consulting basis. Would you be agreeable to that kind of arrangement in that issue?

Ms. BROWNER. We have talked to the States about what they are willing to do and what they're comfortable doing. Many States, I wouldn't suggest all, do not want to take responsibility for every Superfund site in their State. We don't think they can.

Senator ALLARD. In which case, they could invite you in.

Ms. BROWNER. If you give the States the primary responsibility, I think the question you need to address is are you going to give them the authority in terms of ensuring the largest polluters pay their fair share or does the State have to pick up the tab.

Senator ALLARD. I think those things are working. I don't see a real problem.

Ms. BROWNER. We would agree that there is a way and we made a legislative proposal that has the support of many States to recognize the very good work that States can do, are doing at these sites. The concern we have is that there are many authorities which are vested in us through Congress that are important to the

successful cleanup of these sites and we have not seen a willingness in Congress to delegate all of those authorities to the States.

I think you may put the States, if you're not careful, in an awkward position of having responsibility with little or no resources to do the job of public health and environmental protection.

Senator ALLARD. I guess the point I wanted to make is that they're closest to the problem, they have to live with the problem, I think there would be a real interest in them trying to clean up that environmental problem and the sooner you get it cleaned up, the better.

I can understand those problems that may exist on State borders where you may have two States in conflict and we'd make some provisions in there to adjust that. We're getting away from the one-size-fits-all and we're setting up a mechanism where resolutions on conflicts can be reached, but basically you're not going to be calling the shots, it's going to be coming from the local level. You'd be brought in on a consulting basis and be supportive of what the States are trying to do.

If we've got two States that can't agree, then maybe you'd move in as a mediator, help resolve that joint problem, working with both those States.

Ms. BROWNER. I think, again this is not an easy issue in terms of what States would like and what individual States feel they can, in fact, assume. I think when you will find when you talk to the States great difference among them.

I think it's also important to understand that it's not just a question of does a site happen to fall in two States and there are a number of the Federal facility sites that, in fact, do involve more than one State, but you may also have a situation in terms of groundwater contamination that could affect the site, that would appear to occur in one State, but could affect the groundwater supplies for any number of States.

Senator ALLARD. Obviously those things have to be worked out, again, can be worked out between the States and maybe bring you in as a mediator in those situations, but I don't see why we can't put more confidence in the State role.

Ms. BROWNER. Again, we did make a proposal working with the States on how to structure a program so that they could assume—we suggested a State be able to assume responsibility for individual sites, if that's what they wanted to do.

I'm a former State Director and let me tell you, there are sites in Florida I'd be happy to take over day-to-day management and they're the worse ones I wouldn't want to touch and I think you have to allow for that kind of literally State-by-State dialog between EPA and the State.

Anything that lock, stock and barrel just moves everything, particularly if you don't move all of the legal authorities that are important to ensuring that the largest polluters pay.

Senator ALLARD. That's not what I'm talking about. I'm talking we don't lock, stock and barrel to the States, that we give the States that ability to pull in the EPA as a mediator.

Thank you very much, Mr. Chairman.

Senator SMITH. I want to move on to one more round. We'll do 3 minutes and hopefully try to get the next panel up.

Senator BAUCUS. Mr. Chairman, are we going to stick within our time limits here?

Senator SMITH. We'll do the best we can.

Senator BAUCUS. Because I notice we've been pretty liberal.

Senator SMITH. Pretty liberal. I haven't been called liberal in a while.

Senator BAUCUS. That's why I said it. I was waiting for you to pick up on that.

[Laughter.]

Senator ALLARD. Mr. Chairman, if we could get brief responses to our questions, I think our time would be much better allocated.

Senator SMITH. Let me start, Administrator Browner, by going back to Senator Chafee's line of questioning because I think that really goes to a major difference between us in terms of who you define as those people who should be in and who should be out.

I think again, there's common agreement, as Senator Baucus said, Senator Chafee said, we agree with the *de minimis* parties, they should be out, but when you start moving down the line, then you're starting to pick winners and losers here and that's where we disagree in terms of how we apply that standard.

Let me just use the example on the co-disposal. There's been a long debate over whether the cost of cleaning up co-disposal sites is driven mostly by toxicity, by hazardous materials or whether it's by the volume that's in the site or the solid waste.

Senator Chafee and I thought in S. 8 we had addressed this by saying it makes a lot more sense to collect the taxes, the environmental income tax, the chemical feedstocks, the oil import, collect those taxes and recognize that these other sites that we're arguing about here are a problem, take those dollars and put them in and cleanup those sites.

You say we are letting them off the hook. You also say the taxpayer pays. I want you to explain to me how the taxpayer, any taxpayer is paying for the cleanup of those sites? Where in our bill does it say or in any way infer that the taxpayers are paying for this?

Ms. BROWNER. As we understand the effect of S. 8, if I might step back for a second because I do think there is an important agreement here.

When it comes to sole source sites, one party is responsible for the site, I think we all agree they should pay, solve the problem. There's sort of three categories of sites in Superfund—one party, a site, they deal with it; then there are what we call multiparty sites where maybe you have six or a dozen or so parties at a site and we have mechanisms for that. Then that leaves the third category which are these co-disposal, largely landfills and I think that's where we've had the most difficulty in finding common ground.

Senator SMITH. But other than the taxes, if those taxes are reinstated and we do call for the reinstatement of those taxes in our bill, those taxes, yes, they are taxes, they are paid, but I don't want to speak for the corporations that pay these taxes, but the frustration has been that they've not been used for cleanup, those dollars. They've been used, in some cases, in the general fund, and in others, to pay for attorneys rather than cleaning up.

The point is we reinstate those taxes, those dollars then go into these co-disposal sites. Take out this group of people that you now want to keep in. The point is if you talk to people around the sites, they want the sites cleaned up.

Ms. BROWNER. We agree.

Senator SMITH. They're not looking to hunt down people as common criminals here and apply a group of penalties; they want the sites cleaned up. You say the taxpayer pays. Where does the taxpayer pay for this?

Ms. BROWNER. First of all, the taxes that are collected for Superfund are ultimately passed onto the consumer. I think we would all agree with that, the corporate environmental tax, the feedstock taxes, ultimately some portion, if not all of that, is passed onto the consumer.

Senator SMITH. You're not advocating getting rid of them, are you?

Ms. BROWNER. No.

Senator SMITH. Then it's an academic argument. We accept that. We're on common ground here. We accept those taxes should be reinstated. The question is, why not reinstate them, take from those funds and go to these co-disposal sites and get these people out and stop arguing and doing litigation?

If you would agree to that, we'd have common grounds on 50 percent of the bill anyway.

Ms. BROWNER. Could I ask a question, a point of clarification? I know you get to ask me the questions and I answer, but I do have a question here.

Is it your proposal to take out the co-disposal sites? Is that what you're proposing? It would help me to understand because I admit, and I have tried to say repeatedly throughout this hearing, that we are confused by sections of S. 8. There were staff briefings and we came away with one impression; perhaps it is wrong. It would be helpful to me to understand if your position is——

Senator SMITH. Yes.

Ms. BROWNER. Yes, you want to take out the 250 co-disposal sites?

Senator SMITH. Yes. You put degrees to it; we want to take them out so we don't argue about it.

My time has expired. I'm not trying to be argumentative, I'm trying to get common ground here. I think the frustration I feel is you apply a different standard of fairness to a *de minimis* person or site or an entity that happens to have a larger liability. I'm fully supportive of taking care of the *de minimis* people, but again, it's still an issue of fairness and we're paying. We're going to clean it up.

Ms. BROWNER. If I might respond. This is obviously the issue we spent a lot of time on last year and we were hoping that S. 8 made some progress in this regard. Perhaps it doesn't make the progress that we thought it made. If might just succinctly state our concern.

Because someone happened to choose to send their toxic wastes to a landfill—that's what these co-disposal sites are in large measure. We estimate there are approximately 250 under your definition, co-disposal sites. Because they happened to send it to a landfill and not to a multiparty site or didn't keep it in their backyard, you would say that the nature of the site where they sent it ex-

cludes them from a responsibility. What we're saying is don't do it by site, do it by party. That's the only difference here.

Senator SMITH. It's because you wouldn't agree to multiparty. I have long been an advocate of repeal of retroactive liability, but you won't even get to first base on that one, so we have no choice. So we went to co-disposals because that's where you were headed to try to get some common ground and now you don't want to move on that either.

Ms. BROWNER. No, we can address the small parties, the municipalities. There is a way to address those people that I think we all agree are at the co-disposal sites and unfairly trapped in Superfund, if we can do it by party and not by site.

Senator last year, we costed out, we looked at what it would cost to deal with all the co-disposal sites and there are many more coming. In fact, we would probably litigate many other sites because everyone would try to become a co-disposal site to get out of any obligation and quite frankly, we couldn't afford it.

Senator SMITH. My time has expired. Go ahead, Senator Lautenberg.

Senator LAUTENBERG. Vigorous.

Senator SMITH. I was trying to get some common ground.

Senator LAUTENBERG. Yes. Madam Administrator, the present national contingency plan expresses an expectation that aquifers be restored to drinking water uses wherever practicable, but S. 8 establishes rules for groundwater remedies that favor natural attenuation and give equal weight to alternatives such as water treatment systems in people's homes rather than removing the contamination from the environment.

Is this backsliding necessary? Does it accomplish what we think that the rules ought to accomplish for the safety and well-being of our people?

Ms. BROWNER. I think it is now well documented by independent groups, including NRC, the National Research Council, in a 1994 study, that we can, in fact, cleanup groundwater. I think everyone recognizes there may be a handful of places where it is more difficult than not but in large measure, the technology exists.

Our concern with S. 8 is that it seems to require a justification that the cleanup of groundwater substantially accelerates the availability of drinking water beyond the rate of natural attenuation.

You have two problems there. No. 1, is why would you do that if the technology exists to actually clean it up, but No. 2, is there are many of these groundwater sites which may not today be a drinking water supply but could easily become a drinking water supply in the not too distant future. I think here is an example where we are very concerned that you're passing a problem onto a future generation and unfairly so.

Senator LAUTENBERG. The remedy selection in S. 8 that would elevate engineering and institutional controls to a level on the par with treatment would eliminate the preference for permanence or treatment from the present scheme. What might this lead to? Are we talking about hazardous waste museums?

Ms. BROWNER. The concern we have is that there appears to be a provision essentially if implemented would say that if cleanup, actual cleanup, removal, treatment cost too much, then you can es-

sentially avoid the goal of human health and environmental protection.

The concern is that you could find in situations, sites fenced off and again, we had a discussion about this last year. We certainly hope that's not what these provisions mean. We've gone over this and we are concerned that institutional mechanisms being given the kind of equal footing, if you will, in terms of solving problems, could result in some sites not actually being cleaned up, could result in bottled water being made available as opposed to treatment of potential drinking water sources.

Senator LAUTENBERG. Thanks, Mr. Chairman.

Senator SMITH. Senator Chafee.

Senator CHAFEE. Ms. Browner, I just want to point out that you specifically stated that you wish a rewrite of the Superfund law and it is very apparent that can't be accomplished without bipartisan cooperation. There can't be a law unless we pass one up here. We can't pass a law without the cooperation of the Administration. We certainly can't have it enacted into law.

There have been various attempts to do something about this. In the 103d Congress, we had the situation where the Democratic Party controlled the House, they controlled the Senate and they controlled the presidency. They had a Superfund bill that came out of this committee, I voted for it, but it didn't pass in the Senate and no Superfund bill passed in the House. So there's really a tough challenge. It behooves all of us to be in a cooperative mood if we're going to get anything.

On the co-disposal sites, it was our philosophy that the dumping was done legally; that's one of the requirements we had under the co-disposal sites, it would be legal when they did it. That's where the biggest controversies come, that's where they have to hire a hall to take care of all the lawyers. Our philosophy was, let's just get it over with but that's a philosophy, at this point, you don't agree with.

I want to say I listened to the three issues you listed. Your first one was hot spots and the third one was the co-disposal exemption for big industrial waste. We can negotiate these. Your second one was on groundwater and I believe that there's a misreading or an ambiguity in there and that can be straightened out. So this thing can be solved.

We've got to start with something. This business of taking a blank sheet of paper, we spent a lot of time on this and we've got to start somewhere. I would hope that you'd give further consideration to using S. 8 as a starting vehicle, recognizing that it's not written in concrete and it is subject to negotiation and to be amended.

Thank you, Mr. Chairman.

Ms. BROWNER. Mr. Chairman, we would like nothing better than to work on a consensus-based process with you. We would look forward to you setting out a process; we'll be here ready to go.

We would hope, as I think you would, the importance that all of the parties, and there are unfortunately many—I'm not talking about Federal Government, I'm talking about communities, State, local government, PRPs, big, small—be a part of that process also.

I have high hopes that we can finally see Superfund rewritten. It remains something that I am personally committed to; it is one of the reasons I came to EPA and it is something I would like to see done this year.

Senator SMITH. Thank you.

Senator Baucus.

Senator BAUCUS. Madam Administrator, we all agree we want to speed up the cleanup of sites, not slow it down. You have indicated in your statement that there are portions of the bill before us, S. 8, which you think will have the opposite effect, that is, it will not speed up cleanups but rather slow down cleanups. Could you be much more precise, please?

Ms. BROWNER. I can give you examples of provisions that we are concerned about.

First is what we refer to as the ROD reopener, the fact that you can go back into essentially any and all of these decisions that have been made and reopen them. We would suggest that there be a threshold, that cost and technology be brought into play because we are concerned that someone could merely engage us in a sort of round-robin of discussion where there are no new technologies.

Senator BAUCUS. As you read S. 8, could all sites be reopened?

Ms. BROWNER. Our understanding is not only can all decisions be reopened, but even once construction has commenced, the decision can be revisited.

Senator BAUCUS. Would you give us a sense of how that slows things down?

Ms. BROWNER. We enter into 150 decisions in terms of cleanup plans annually. If all of those can be reopened, that means there are literally 1,500 right now on the books, if every single one is reopened, what is to prevent a party from reopening? Why shouldn't a lawyer reopen it, a private party's lawyer? It means they don't have to get around to cleaning it up anytime soon. You could see us doing almost nothing but dealing with these reopeners.

Senator BAUCUS. Is there ever a good reason to reopen?

Ms. BROWNER. Yes, and we have a program to do just that.

Senator BAUCUS. When? Give us a sense.

Ms. BROWNER. Where you have a real advance in technology, and that does occur, where you have a new discovery, a new solution. That is absolutely appropriate.

Senator BAUCUS. Can you give us an example, for the record if you don't have it right now?

Ms. BROWNER. Some of the sites where initially maybe 8 to 10 years ago the preferred treatment would have incineration, today bioremediation solves the problem. That's an example.

Senator BAUCUS. So you believe on this issue that there is reason to reopen some decisions, but we shouldn't go all the way allowing construction or RODs to be reopened?

Ms. BROWNER. We do have a program today for updating remedies. We have a program right now for sites, to come in, to review them, based on cost and technology advances and make adjustments. We have made adjustments and we will provide you with a list of the sites and the projected cost savings. I think the cost savings are $280 million for the sites that we have revisited the remedies because of technology advances.

Senator BAUCUS. Thank you very much.

Thanks, The CHAIRMAN.

Senator SMITH. Senator Allard.

Senator ALLARD. Thank you, Mr. Chairman.

You would agree that the liability is a real problem with these Superfund sites, I believe, and if we don't get the liability issue straight, I guess no amount of money is going to lead to clean up of sites because everything is going to be eaten up by lawsuits and lawyers and we'll never get around to getting the bottom line resolved. Would you agree with that?

Ms. BROWNER. I think it's important to understand what EPA spends its money on. A very, very small percentage of Superfund dollars go to parts of the program other than cleanup. This chart shows you that 77.6 percent of the money you appropriate goes to clean up activities from people out in moonsuits to the brownfields work we're doing and a very, very tiny part goes to a variety of other efforts.

Certainly in reauthorizing Superfund, the question of who pays is not a small question. We absolutely agree that the little parties should be taken out, absolutely, positively. We have programs doing that as I said. We've taken out more than 9,000 parties in the last 4 years; homeowners are protected now.

I think the discussion that we will all need to engage in as we seek to find consensus is, of the remaining parties, is it appropriate to shift their responsibility to the fund and thereby to the taxpayer.

Senator ALLARD. Is it possible for a company that's been cleaned up under CERCLA, to then have RCRA applied to that same site?

Ms. BROWNER. I think the easiest way to make a distinction here is RCRA is for facilities that are ongoing operations and it requires a certain set of activities to prevent problems and to address any problems that may develop in an ongoing action.

Superfund not exclusively, but does tend to focus on those facilities, those sites where the parties may have moved on or occasionally, what you have in Superfund is a situation where part of the site is Superfund and then there is an ongoing activity adjacent.

Senator ALLARD. So it is possible for a company to have to deal with both CERCLA and RCRA?

Ms. BROWNER. And appropriately so. They should have to deal with RCRA because that is the permitting program we have in place, the law in place, to ensure in part that we are not creating future Superfund sites.

Senator ALLARD. I haven't got any prejudged opinion on this, I'm just asking is there a potential for a double jeopardy effect?

Ms. BROWNER. Not for the same contamination, no. They would be handled separately.

Senator ALLARD. Because one is ongoing and the other has already occurred?

Ms. BROWNER. That's one distinction. There are not any bright lines, unfortunately. Another distinction would be you might have an ongoing activity where there is historical groundwater contamination all underneath the ongoing site. That would perhaps be addressed through Superfund and then if there was some accident that happened, some inappropriate action that had taken place in

the meantime, that might be addressed through RCRA, but you don't use both laws to address the same problem.

It is true that a company, a site, there may be RCRA problems and Superfund problems but they are for different contaminants or contamination activities.

Senator ALLARD. That's all, Mr. Chairman. Thank you.

Senator SMITH. Thank you, Senator.

Administrator Browner, thank you very much for being here this morning and I think perhaps we made some progress. I think I understand some of the concerns you have. I think we certainly are going to pledge to you to work with you and with our colleagues on the other side of the aisle to do our best to get a bill because I think it's in the best interest of the country to get it done. We're going to do our best to do it and we look forward working with you.

Ms. BROWNER. That is our interest too. Thank you.

Senator SMITH. The next panel could come up—I'm just going to call the names here rather than take a recess—Mr. Richard Gimello, assistant commissioner for Site Remediation, New Jersey Department of Environmental Protection, speaking on behalf of the National Governors' Association; Ms. Linda Biagioni, vice president of Environmental Affairs, Black & Decker Corporation on behalf of The Superfund Action Alliance; Ms. Karen Florini, senior attorney, Environmental Defense Fund; Ms. Barbara Williams, Sunny Ray Restaurant, Gettysburg, PA, on behalf of the National Federation of Independent Business; and Ms. Karen O'Regan, Environmental Programs Manager, city of Phoenix.

Welcome ladies and gentlemen for being here this morning and let me just indicate to you that your statements will be made a part of the record as written. If you could summarize your statement in 3 or 4 minutes, it would be appreciated.

We'll set the clock at 4 minutes and hopefully we can wrap it up in 4 minutes and then go to some questions.

Mr. Gimello, why don't we start with you. Welcome.

Senator LAUTENBERG. If I may, Mr. Chairman, Mr. Gimello is a New Jerseyite. Unfortunately, we have grown very successfully, Superfund sites all across our State. It happened as a result of our proud industrial past and Mr. Gimello has had a lot of experience. We welcome him here this morning representing the Governors' Association.

STATEMENT OF RICHARD GIMELLO, ASSISTANT COMMISSIONER FOR SITE REMEDIATION, NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, ON BEHALF OF NATIONAL GOVERNORS' ASSOCIATION

Mr. GIMELLO. Thank you.

The testimony that I offer today is on behalf of the National Governors' Association. As I am sure you can appreciate, the NGA has a strong interest in Superfund reform and believes that a variety of administrative, as well as legislative and regulatory changes are needed to improve the Superfund Program's ability to clean up the Nation's worse sites.

We realize the importance of passing legislation this year and want to ensure that the collective interests of the States are considered carefully in development of the final bill. Funding is essential

for the continuation of cleanups in this country and the ultimate objective of the Superfund Program depends on the continued funding.

The Governors appreciate the opportunity to review and comment. I'd like to begin by stating that NGA is very appreciative of the many improvements made in the bill over last year's bill. The Governors acknowledge the vast compromises that the bill reflects and commend the committee for introducing legislation that addresses many State concerns. Today, I'd like to address NGA's overall assessment of the bill and suggest a few areas where improvements could be made.

With regard to brownfields revitalization and voluntary cleanup programs, the Governors believe that brownfields revitalization is critical to the successful redevelopment of many contaminated former industrial properties and we commend the committee for including the brownfield language.

Many States have developed highly successful voluntary cleanup programs that have enabled sites to remediate more quickly and with minimal governmental involvement. It's important that any legislation supports and encourages successful programs by providing clear incentives and by ensuring that any minimum program criteria established by the Environmental Protection Agency be extremely flexible.

Also, in the event that EPA discovers an imminent and substantial threat to human health and the environment at a site, or at the request of a State, it should be able to continue using its emergency removal authority.

With regard to State role, the impacts of hazardous waste sites are felt primarily at the State and local levels. The Governors are very supportive of the efforts of the chair, Senator Chafee and others to strengthen the role of the States in this program. We appreciate the inclusion of options for both noncomprehensive and comprehensive delegation.

We especially support allowing States to operate their programs in lieu of the Federal program. It is critical that States, with established goals and standards, be able to apply at all sites these standards regardless of the lead agency and without a cost shift.

We cannot support EPA being allowed to withdraw delegation on a State-by-State basis. Withdrawal of delegation should be consistent with the approval or rejection of a State's application for delegation.

The Governors strongly support the 10 percent cost share for both remedial actions and operation and maintenance, and we appreciate the inclusion of this provision in the bill. However, we do not support any change that will require the State cost share for removal actions. States are not currently required to cost share in this area and we don't think it's appropriate.

Selection of remedial actions, the Governors believe that changes in remedy selection should result in more cost effective cleanups and a simpler, streamlined process for selecting remedies and more results oriented.

Allowing State-applicable standards to apply at both national priority list sites and State sites is one way of ensuring such an approach. Any caveats to the use of State RARs must be minimal.

The Governors believe that groundwater is a critical resource that must be protected. The use of State applicable standards and the opportunity for State and local authorities to determine which groundwater is actually suitable for drinking are essential.

We also believe, however, that groundwater resources must be forwarded a sort of receptor status to prevent any future or ongoing impacts during the remedy selection.

The Governors recognize that there are some records or decisions that should be reopened because of cost considerations or technical impracticability. However, we believe the Governors should have the final decision on whether to approve a petition for the reopening of a ROD.

With regard to liability, liability schemes employed in any hazardous waste cleanup program are critical to the success of the program. However, the current system has a history of leading to expensive litigation and transaction costs. Therefore, the Governors can support liability reform.

In general, we support the elimination of *de minimis* and *de micromis* parties and believe the liability for municipalities needs to be addressed. However, we question broader releases of liability for other categories or responsible parties.

Further, we support the concept of an allocation process so that costs are assigned appropriately to responsible parties, but we need assurance that funding will be available for this process, including support for State allocation programs.

Finally, as I mentioned earlier, we fully support the release of Federal liability at non-NPL sites where a release of liability has been granted under State cleanup laws.

With regard to Federal facilities, the Governors support legislation that ensures a strong State role in the oversight of Federal facility cleanups. We urge you to strengthen the program by amending the statute of limitations to run for 3 years with regard to natural resource damages.

In general, I want to emphasize on behalf of the States that we do recognize the extent of the compromises reflected in this draft and are eager to work with this committee and Federal EPA to finalize this job that we've started.

I thank you.

Senator SMITH. Thank you very much, Mr. Gimello.

Ms. Florini.

STATEMENT OF KAREN FLORINI, ESQ., SENIOR ATTORNEY, ENVIRONMENTAL DEFENSE FUND

Ms. FLORINI. Thank you, Mr. Chairman.

On behalf of the Environmental Defense Fund and its 300,000 members, thank you for this opportunity to present our views on S. 8.

While the Environmental Defense Fund supports an improved Superfund Program, we regret to say that, in our view, virtually all provisions of S. 8 would not in fact lead to that result. Rather, they would have, in many instances, the opposite effect.

For example, with regard to clean up standards, the bill seems to regard doing cleanups fast as more important than doing them

right. Speeding cleanups by making them weaker is a giant step in the wrong direction.

The cleanup provisions have numerous flaws that exacerbate each other. Specifically, the bill largely puts polluters in control of decisionmaking and constrains both EPA and public oversight. Even polluters who are under criminal indictment for illegal dumping at a particular site potentially could end up with the lead role if they hire the right consulting firm. Polluters can let cost considerations override cleanup goals including health goals.

In addition, the bill completely repeals the existing preference for permanent treatment so that even highly toxic hot spots could remain onsite. Likewise, the bill makes no effort to promote restoration of land to productive use. Indeed, the future uses that can be considered are specifically limited to those that are currently planned or zoned or those that have a substantial probability of occurring. That is an inappropriately high standard, one that effectively requires a community to either have a crystal ball or limit its consideration to today's probabilities, instead of tomorrow's possibilities.

All these problems are made worse by the outrageous provisions under which polluter-written cleanup plans get approved by default if EPA is unable to act to review it within 180 days. Cleanup decisions are complex and high stakes ones for communities, particularly site neighbors. Default approval has no place in the Superfund program.

The bill also undermines public participation in several ways. It fails to let the public participate in decisions about which States shall implement the program, even though State delegation greatly, and in my view, inappropriately, constrains EPA's ability to act.

It limits technical assistance grants to $100,000 without exception even though the bill's changed cleanup standards will often lead to remedies that demand long-term community oversight, oversight that the bill fails to empower communities to provide.

S. 8 even lets polluters ignore existing cleanup decisions until and unless EPA catches them at it. Then the polluters get to decide whether to comply with the existing plan or to modify it. S. 8 reopener provision for existing decisions are also structured in a way that thwarts effective public participation and would additionally cause considerable delay in the program overall.

Another highly objectionable feature of the bill is inclusion of an arbitrary cap on the number of additional sites that can be added to the National Priority List, namely 100 until the year 2001 and 10 a year thereafter.

A cap has profound consequences because unless a site is listed, EPA cannot undertake long-term site cleanup activities. This approach effectively dumps the problem on the States regardless of their capacity to deal with it.

Finally, the bill's liability provisions create new forms of what amounts to corporate welfare. While it may well be, and in fact, probably is appropriate to tailor the liability system as applied to entities it will be unable to pay or have only a very limited connection with a site, S. 8 goes way too far.

The co-disposal provisions of this bill would exempt large companies as well as small ones, and would inappropriately let companies

that can well afford to pay off the hook. Similarly, the small business exemption applies to future as well as past conduct, thereby wiping out Superfund's powerful and significant incentives to avoid future pollution. The bill requires paybacks to polluters, including those who have already agreed to do work under existing settlements.

What's more, there is no firewall between liability to carve out dollars and S. 8's other provisions, so there is no assurance that adequate funds or indeed, any at all, will remain available for the other elements of the program.

Mr. Chairman, a substantial and growing number of environmental and public health organizations are investing major resources in Superfund reauthorization at this point. We would welcome an opportunity to work proactively with you to improve the program.

We are currently finalizing a set of principles on Superfund and hope to provide those to you later this month.

Thank you.

Senator SMITH. Thank you, Ms. Florini.

Ms. Biagioni.

STATEMENT OF LINDA BIAGIONI, VICE PRESIDENT OF ENVIRONMENTAL AFFAIRS, BLACK & DECKER CORPORATION, ON BEHALF OF THE SUPERFUND ACTION ALLIANCE

Ms. BIAGIONI. Thank you, Mr. Chairman and members of the subcommittee for inviting me to testify.

My name is Linda Biagioni and I am vice president of Environmental Affairs for the Black & Decker Corporation.

Black & Decker is headquartered in Towson, MD, and is the world's largest producer of portable electric power tools, power tool accessories, residential security hardware, and electric lawn and garden tools. We are also leaders in small household appliances, plumbing products and engineering fastening systems.

In the United States, we employ several thousand people in more than 30 manufacturing facilities in 16 States and at Black & Decker service centers throughout the country.

I'm here in support of S. 8 because of the unnecessarily high transaction costs we have incurred due to the current liability scheme and the tendency to select unreasonably stringent remedies. We are disappointed and frustrated by the failure of the previous Congresses to resolve the inefficiencies in the program.

Superfund was designed to clean up old hazardous waste sites, but the existing law causes us to proceed too slowly on many serious sites and to spend too much time and money on low priority environmental concerns and legal proceedings. Years of serious criticism of the existing Superfund Program from almost every segment of the political spectrum have damaged its credibility and periodically paralyzed its progress.

EPA's administrative reforms have apparently been somewhat successful, but the most important failings can only be cured by Congress. The program needs a new congressional mandate, public support and assured funding. I hope that the 105th Congress can find a middle ground and finish reauthorization this year before electoral politics once again polarize the discussion.

The Senate is off to a good start. Superfund reform has been identified as a high priority objective by the Majority Leader and the members of this committee from both parties appear to be moving forward constructively. S. 8 looks to us like a balanced and thoughtful attempt to resolve the crucial problems that bedevil the Superfund Program.

Like everyone else, we recommend certain changes to S. 8, but the desire for a more perfect bill should not obscure the fact that overall, S. 8 would be a vast improvement over existing law. We commend you for your diligent efforts to craft a workable approach that can attract bipartisan support.

I'll address two areas where the existing Superfund law is seriously flawed and needs immediate repair—the liability scheme and the remedy selection criteria.

With one exception, Black & Decker is not the owner, operator or a predominant generator at any Superfund National Priority List site. Nevertheless, Black & Decker accepts that it should bear a reasonable portion of cleanup costs where it contributed hazardous substances to a disposal site that has become an environmental hazard.

We also recognize the necessity for the business taxes that support the Superfund, but the burden of the current retroactive, strict, joint and several liability system is simply too high. In practice, the current law delays cleanups, misdirects the energies of responsible parties, and generates enormous transaction costs wasting money that should rightfully be directed at cleanup efforts.

The liability title of S. 8 would significantly reduce these costs. First, the exemptions for 1 percent *de minimis* parties, *de micromis* parties and certain other parties, along with the limitations on liability for municipalities will remove the threat of liability for thousands of parties at hundreds of Superfund sites.

The exemptions for small quantity generators are particularly appropriate because their volumetric contribution is usually of minimal environmental significance and they had little or nothing to do with the management of the original site.

Second, for the parties who remain liable for National Priority List sites, the allocation system in S. 8 would ameliorate much of the unfairness inherent in the current system. In my opinion, S. 8 would be fairer if it expanded the orphan share to cover fully the unallocable shares, not just shares of known insolvent parties or parties whose liability is capped.

There is one aspect of the liability system that S. 8 does not address: the small party exemptions and the allocation system only apply to National Priority List sites. Private cleanup sites which have engendered a tidal wave of litigation would still be governed by the inequitable retroactive, strict joint and several liability provisions of the existing laws.

We believe that Congress should return the lawmaking power over these sites to the States by limiting the application of section 107(a), to National Priority List sites and other sites where the Federal Government has either conducted or ordered remediation.

Again, our desire for changes to the proposed liability scheme of S. 8 does not detract from our enthusiasm for S. 8 as compared to the status quo.

Remedy selection, the selection of the most appropriate remedy for each site, is the heart of the Superfund Program. In 1986, Congress created a series of inflexible remedy selection rules requiring a preference for permanence and treatment, compliance with applicable and relevant and appropriate State and Federal laws, and groundwater standards that seem to require that all potentially usable groundwater at Superfund sites meet drinking water standards in the ground as soon as possible.

These inflexible standards have contributed significantly to the misdirection of resources and remedial activities that produce little or no benefit to the public.

In reality, Superfund sites vary widely in the nature of the risk they present and in the nature of their geological land use, locational and other circumstances. These facts should determine what remedial technology can usefully be employed.

S. 8 wisely drops most of these arbitrary requirements. It directs EPA and the States to focus on the real risk to public health and the environment posed by each site using site-specific data wherever possible to meet the protectiveness standards, taking into account long-term reliability, effectiveness, public acceptability, technical practicability, costs, and the nature of existing and reasonably anticipated land and water uses.

Cost is just one factor to be balanced in the good judgment of the agency, neither an overriding consideration, nor subordinate or irrelevant.

Unfortunately, S. 8 does not appear to apply this risk-based approach fully when it comes to groundwater. While it is true that groundwater moves and many aquifers are interconnected, the same intellectual analysis and the same criteria should apply to remediation of groundwater as elsewhere, namely identification of real risk and the reasonable remedial measures that can be employed to ameliorate those risks.

Finally, the review of remedies already selected under the existing law is crucial. Having learned from more than a decade of experience that our existing remedy selection criteria are ill-suited to the task, it would be foolish not to reconsider previously selected remedies where significant cost savings could result from applying S. 8's new criteria.

In conclusion, let me reiterate the important point. It's time for Congress to act. Only Congress can correct Superfund's crucial deficiencies and put the Superfund Program back on track.

I commend this subcommittee for its work and thank you for the opportunity to present our views.

Senator SMITH. Thank you, Ms. Biagioni.

Ms. Williams.

STATEMENT OF BARBARA WILLIAMS, SUNNYRAY RESTAURANT, GETTYSBURG, PA, ON BEHALF OF NATIONAL FEDERATION OF INDEPENDENT BUSINESS

Ms. WILLIAMS. Good morning, Mr. Chairman and members of the committee. Thank you for the opportunity of appearing before you again.

I am Barbara Williams. My business is Sunny Ray Restaurant in Gettysburg, PA. I have been a member of NFIB since 1982 and am grateful for their support.

I want clean air and water for myself and the generations that will follow me. I am not the enemy of the environment. My trash is not the problem. Small businesses are not the enemy of the environment. I am here to tell you again that your wonderful idea of cleaning up our country's environment through the EPA and CERCLA does not work in the real world. Your intentions were not followed. You legislated for results, you got bureaucracy, regulation and litigation. Legions of environmental attorneys, not environmental solutions were created.

I fight not only the unjust burden of this lawsuit, but the injustice of the landfill on the Superfund National Priority List 10 years and still no cleanup has been started. I have no graphs or charts, no auditors' reports. I believe we can all agree on this—too much time, too much money, too few results.

Please remember the more than 700 third and fourth party defendants are not businesses which regularly produce hazardous or toxic waste. We are in this suit not because of what we discarded, but because of how much waste someone has estimated we threw away. We simply and legally put out the trash according to local and State regulations.

CERCLA is unfair because it imposes strict liability on the public without any real notice as to what we should or should not put in the trash. If ballpoint pens are hazardous waste, why are there no directions for their disposal? There is no evidence that any third or fourth party defendant sent hazardous substances to the site. Our guilt is based on an expert's report which assumes some hazardous material in all garbage, but there is no real evidence.

For small businesses, this suit can be devastating. It is an uninsured loss; the money for settlement is considered a penalty, so it will not be deductible as a business expense. Small businesses will have to make enough money to pay this on top of our other bills and payroll. So here we are. The landfill is not cleaned and the litigation goes on.

When I testified last April, I was encouraged by your statement that you understood our situation and were resolved to remedy it. That hope was reinforced when I read S. 8. I am very pleased to see that S. 8 addresses many areas I was concerned about—municipal solid wastes, small business defendants, and co-disposal landfills. I believe you listened and responded. It means a great deal to learn that our voices were heard.

It appears plain to me that in S. 8, your intentions are to resolve the issues that have been used to allow litigation to take precedence over cleanup. I believe that you know how critical the wording of this bill is.

My concern is that others will not see it so clearly. I am concerned that there will always be a well-meaning official who believes he knows better than you what you meant when the law was written. My fear is that these officials will challenge the authority and intentions of Congress and the President, that some judge somewhere will listen and rule that you did not write the law to

say what you meant and this current course of action will continue indefinitely.

I am one American citizen crying out against injustice. Are regulations more important than rights and results? When Lincoln came to Gettysburg, he expressed concern for our system of government of the people, by the people, for the people. My concern is that we are perilously close to losing the government Lincoln described, not because of outside enemies, but because of an ever-growing, all-powerful bureaucracy. You are our hope. Thank you.

Senator SMITH. Thank you very much, Ms. Williams.

Ms. O'Regan.

STATEMENT OF KAREN O'REGAN, ENVIRONMENTAL PROGRAMS MANAGER, CITY OF PHOENIX, AND ON BEHALF OF AMERICAN COMMUNITIES FOR CLEANUP EQUITY, INTERNATIONAL CITY COUNTY MANAGEMENT ASSOCIATION, NATIONAL LEAGUE OF CITIES, NATIONAL ASSOCIATION OF COUNTIES, U.S. CONFERENCE OF MAYORS, AND NATIONAL SCHOOL BOARD ASSOCIATION

Ms. O'REGAN. Chairman Smith and members of the subcommittee, my name is Karen O'Regan. I'm the Environmental Programs manager for the city of Phoenix where I have been for 6 years. Prior to that, I had jobs in the Federal Government, State and private and now the local roles. I've been involved with Superfund for about 16 years.

I'm providing this testimony on behalf of the International City County Management Association, National League of Cities, the U.S. Conference of Mayors, National Association of Towns and Townships, the Municipal Waste Management Association, and the American Communities for Cleanup Equity. We very much appreciate the opportunity to present this testimony.

We represent thousands of cities, towns and counties throughout the United States. Because hazardous waste sites impact the health of our citizens and the environmental and economic viability of our communities, we are well-qualified to provide the committee with comments on how the program can be improved.

Phoenix has been heavily involved in Superfund as a generator of municipal solid waste, an owner-operator of a co-disposal site, a water provider with wells closed due to contamination, and a representative of citizen concerns. We've also been involved with four Federal Superfund sites and nearly a dozen State Superfund sites without or about our borders and paid approximately $20 million in response costs at various Federal and State Superfund sites.

We're honored to provide you with suggestions on S. 8 beginning with its proposed liability scheme.

Across America, local governments are burdened with millions of dollars of liability simply because we owned or operated municipal landfills or sent garbage or sewage sludge to landfills that were also used by generators and transporters of hazardous waste.

Most of us are drawn into Superfund because of the past co-disposal of municipal trash with more toxic industrial waste. Our situation justifies statutory relief because we are required to provide waste collection and disposal services for public health purposes. There is strong consensus in support of municipal liability relief

and the related provisions of your bill are definitely a step in the right direction. However, we do have some concerns.

First, limiting the local government owner, operator, generator and transporter relief provisions to cost incurred after the date of enactment leaves us open to potentially large costs incurred prior to the date of enactment. We urge that liability relief that is provided to local governments for activities related to municipal solid waste and sewage sludge should include relief and credit for costs incurred that have not yet been settled prior to the effective date.

Second, the conditional nature of the relief for Subtitle D facilities is slightly troubling. The bill would make the Subtitle D liability cap at co-disposal sites unavailable to a facility that was not operated in substantial compliance with local laws and permits.

Granted, we administer those local laws and permits. However, we'd request that you make the language a little more specific to ensure that local governments are not penalized for minor infractions such as vector control.

Third, local governments who are owners and operators of co-disposal sites would be asked to pay up to 20 percent of cleanup costs while generators and transporters of hazardous waste are exempt. We suggest you consider a more balanced liability scheme.

Fourth, the bill should address potential liability arising from municipal ownership and operation of public sewer systems and related treatment works. We provide this vital public service to protect the health and welfare of the community and should not be liable under Superfund.

Finally and most important, the liability scheme must be workable within the financial limits of the Fund and the demands of the cleanup program.

Onward to remedy selection. The bill has many positive remedy selection provisions that add needed flexibility to the statute. We are concerned that although it may just be an ambiguity in the way we read it, that the focus upon treatment at the point of use may not adequately protect the groundwater resource.

We urge the committee to require containment of contaminant plumes when drinking water or future potable water sources are threatened.

In addition, the Remedy Review Board has broad powers and we are concerned that this board would overturn agreements reached after years of negotiation with stakeholders, including local governments and citizens.

While we understand that RODs need to be reviewed given new technology, we propose instead that an advisory board be established to provide guidance on remedy selection and monitor Superfund Program activities. We urge that local governments be part of any such body.

The brownfields grants proposed in the bill are critical to help local governments and we very much appreciate the opportunities to redevelop and reuse brownfields with the money it provides. However, because many communities want to encourage private investment activities, we ask the subcommittee to consider other incentives such as Federal tax incentives.

We support the community response organizations. However, we are concerned that the bill establishes them as the only formal

mechanism for local governments to participate in the decision-making process. We, therefore, recommend that we have a separate and distinct route for input on decisions affecting our communities and that the bill be amended to require EPA to directly consult with us when developing and implementing cleanup plans.

In conclusion, the Superfund Program must ensure that sites are cleaned up quickly and effectively without threatening the economic viability of our communities. The Superfund Program must provide adequate funding for site remediation and establish cleanup standards that are reasonable, yet protective of human health and the environment. This will ensure that sites are not continuing problems for our communities.

We appreciate the opportunity to comment on the bill and if you have any questions, I would be happy to try and answer them.

Thank you.

Senator SMITH. Mr. Gimello, let me ask you, many critics of giving the States more authority have said that there would somehow be a race to the bottom in terms of cleanup which would result in "crummy cleanups."

Speaking for your own State and what you have done, do you agree with that assertion?

Mr. GIMELLO. I couldn't disagree more, Senator. I think that any rational look at the way cleanups are being done in this country must acknowledge the flexibility and the aggressive nature of States in actions on these areas.

We, in the State of New Jersey, as an example, are looking at 1,500 voluntary cleanup applications on a monthly basis. Other States, Massachusetts, I'd be hard pressed to point to a State that is not experiencing a lot of action in this area and I think this notion somehow that the Feds are doing cleanups one way and the States are doing them another way and not being protective of human health and the environment is just categorically incorrect.

Senator SMITH. Is there any justification to the argument that some States may not be handle it as well as you do in New Jersey?

Mr. GIMELLO. I think many States have acknowledged the fact that program size is going to differ. I think in those situations, a partnership with EPA is important and I think the opportunity for that partnership exists and it will be improved by many of the provisions in this bill.

Senator SMITH. Ms. Biagioni, I also want to say that we worked very closely with Black & Decker on legislation to provide for the recycling of rechargeable batteries and we appreciate your help on that.

Ms. BIAGIONI. We very much appreciate your help on that.

Senator SMITH. Do you think the allocation process we've outlined in S. 8 will reduce litigation?

Ms. BIAGIONI. Yes, I absolutely do because there will be more effort placed at finding the responsible parties up front rather than finding one or two large parties and then leaving the allocation process up to the parties to argue and fight amongst themselves.

Senator SMITH. Do you support the right for Governors to have a veto right over any record of decision, any ROD reopener?

Ms. BIAGIONI. I wouldn't be surprised that Governors would want that right and I think they probably have the right to have that, yes.

Senator SMITH. Ms. Florini, I know you're very critical of the legislation and we appreciate hearing your criticisms. I don't agree with all of them, but let me just give you an example of the frustrations we feel in regard to trying to get to the bottom of some of these problems and trying to come to accommodation on a bill.

Right down the road from here is the Navy Yard. There is a proposal to add the Navy Yard to the NPL and interestingly enough, the Sierra Club Legal Defense Fund is challenging the listing. The reason they're challenging it is they think it's just the Navy's way of creating another bureaucratic hangup.

What does that tell you about the policies and the problems faced by the Superfund program if one environmental group thinks by putting it under the NPL, it's a way to get out of getting it cleaned up?

Ms. FLORINI. Senator, I don't think that is a legitimate characterization of the Sierra Club Legal Defense Fund's position on the matter. In point of fact, this is a setting where for many years the site has been evaluated and processed and things are moving along. The question is would putting that site on the NPL accelerate the process or not?

In addition, it's very important to remember that what the Navy was doing was arguing that the existing litigation that the Sierra Club Legal Defense Club had brought in fact should be stayed pending the process of putting it on the NPL.

What the court recently did was say there is no reason to stay the lawsuit.

Senator SMITH. Well, the direct quote from the *Washington Post* from the Sierra Club is "We feel that this is just the Navy's way of creating a bureaucratic hangup. We want to see some action. The Navy wants Superfund because it's a lengthy process and we can't sue them."

Ms. FLORINI. That's because there is a pending lawsuit that would be disrupted by placement of that site on the NPL. This is an effort to dismiss the Sierra Club Legal Defense Fund lawsuit on the basis of an NPL listing. That is why it was being resisted.

Senator SMITH. Senator Lautenberg.

Senator LAUTENBERG. Thanks very much.

Mr. Gimello, you and I know that New Jersey has one of the best hazardous waste cleanup programs in the country, but there have been times, several times, when New Jersey felt incompetent to handle the cleanup and asked the Federal Government to take over. Some of the sites, you and I will know the names, but we'll put them in the record—Chemsol, Montclair site, Fairlawn Wells, Montgomery-Rocky Hills site, to name a few, Grand Avenue site in Hoboken.

If the State prepares a remedial action plan that isn't adequate to do the job, whether the State lacks the competence or whether there are so many problems that we can't get by the court suits et cetera, should the Federal Government come in and lend their expertise if the States aren't getting the job done?

Mr. GIMELLO. I think so and I think that kind of partnership has served us well in New Jersey as you articulate.

Senator LAUTENBERG. I think it has, but I thought from your National Governors' Association presentation that it was intimated, if not suggested directly, that the further the Federal Government steps away from it.

Mr. GIMELLO. Perhaps I could be more clear. I think what the Governors are trying to say is that the option to involve the Federal Government ought to be one that's available, but in the absence of a need to go there in a delegated State with a clear track record of successful cleanups, that the preference for how Superfund sites are cleaned up or other sites ought to lie with the State. So it's a matter of degree, Senator. I think that is what the Governors were trying to say.

Senator LAUTENBERG. You know it happens when you put down a proposal here, either of the sides will embrace it more forcefully than perhaps you intended. I think what we have to do is make sure the record reflects our intention.

What do you think, Ms. Florini, about the Federal Government jumping in? Do States always have adequate cleanup programs?

Ms. FLORINI. Unfortunately, clearly they don't. There are some States that really have not done a very effective job.

Senator LAUTENBERG. So should we say, let the citizens of that State suffer?

Ms. FLORINI. No, Senator. I actually believe that it's entirely appropriate for States that have adequate resources, adequate authorities and adequate political will to get first dibs on cleaning up sites in those States, but those are big ifs. There needs to be a process for assuring accountability, and that in fact those conditions are met, since they aren't always. That's a sad fact, but I think it is, indeed, a fact.

Senator LAUTENBERG. Ms. Biagioni, I'm surprised and a little confused by your testimony. My understanding is that the S. 8 proposal says that regarding groundwater remedies, contaminated groundwater may be allowed to migrate if it's not consumed, and that the bill requires equal consideration of temporary remedies—water purifiers under the sink, for example—as opposed to remedies that will allow the aquifer to be used as a drinking water source by future generations.

I think that your testimony indicates that you think S. 8's provisions regarding groundwater remedies don't go far enough in taking into consideration the "real risk," and that you don't believe that aquifers ought to be cleaned up for their own sake.

I would ask what do you think ought to happen, just kind of let it stand and let it seethe, boil, or whatever happens in those sites?

Ms. BIAGIONI. I believe where the aquifer is a potential future source or a current source of groundwater or drinking water, that every effort ought to be made to clean that water up. However, there are many situations where there is no potential future use for that water or the technical practicability or the cost of the cleanup is just out of proportion to the future use of that aquifer.

If that's the case and if there are other ways to provide a drinking source or if that water is never going to be used for a drinking

source, then natural attenuation or some other sort of process ought to be allowed to happen.

Senator LAUTENBERG. There could be quite a difference of view as to what potential use of that aquifer might be?

Ms. BIAGIONI. That's right.

Senator LAUTENBERG. Thanks, Mr. Chairman.

Senator SMITH. Thank you, Senator.

Senator Allard.

Senator ALLARD. Thank you, Mr. Chairman.

S. 8 eliminates non-use damages for natural resource damages. Ms. Florini, how do you interpret in your mind what non-use damages for natural resources would include?

Ms. FLORINI. Senator, with respect, I do not work on the natural resource damages issues. I believe that other environmental organizations will be submitting testimony for the record addressing those issues, but it is simply not within my expertise.

Senator ALLARD. I apologize and I appreciate your candor in that response.

Ms. FLORINI. I'm always happy to admit when I don't know something or at least willing to do so.

Senator ALLARD. Mr. Gimello, in your opinion, what three items, maybe we're putting you on the spot here, but what three items would you think would be absolutely essential if we were going to successfully reform or modernize Superfund?

Mr. GIMELLO. I think it's interesting because you've been touching on them all morning and for several years. I think the whole liability issue must be resolved. I think we're very close and I'd hate to see us lose that opportunity to finally figure out a way to address the problems and have the money to do it.

I spoke to you from the National Governors' Association testimony which is a balance between the State program and its applicability versus a potential conflict with the Federal program and it needs to be resolved. I think it's time for the preeminence of the States to be recognized and not to be excluded from involvement upon request or emergency situations, but I think the balance needs to be assured on the side of the States because I think that's where the action is.

Finally, I think this whole notion of when it is we're going to revisit RODs and how we're going to reopen them is a critical issue.

Senator ALLARD. Ms. Florini, you deal with the liability side. Do you agree that something needs to be done on the liability in the current Superfund law and what is your response to the National Governors' Association as to reform on the liability provisions?

Ms. FLORINI. I agree that there have been grievous and unacceptable abuses of the liability system, by private parties who have turned around and bought third and fourth party contribution actions. I am more than happy to see those abuses curtailed.

I think S. 8 goes too far, but I do agree that it is appropriate and sensible to keep out of the liability system folks who aren't going to end up paying much because they don't have an ability to pay. I also think it's appropriate to get *de micromis* parties out. There are some concerns about the way the *de minimis* provisions of S. 8 are worded in detail, but the basic concept of getting the small fry out of the liability system is one I in fact support.

Senator ALLARD. How would you define the small player?

Ms. FLORINI. That's the hard part, isn't it? I think it's important to have an element that is focused both on size of the company in terms of number of employees and on annual receipts because I think it's inappropriate, for example, to say that a very, very small company that was making $500 million a year would be exempted from liability.

Exactly how those lines get drawn will be unquestionably the source of considerable discussion and one in which I'm happy to participate.

Senator ALLARD. You don't necessarily think the degree of pollution the individual contributed should be a factor in that?

Ms. FLORINI. I'm sorry?

Senator ALLARD. You may have somebody who maybe is right on the margin, for example, that maybe they contributed a lot to the Superfund site.

Ms. FLORINI. I do agree that there should be, if you will, a kick-in provision for a particular entity who would otherwise be exempted has in fact been a significant contributor. There's language in the bill with regard to this, I think, for the *de minimis* parties.

Senator ALLARD. And you're comfortable with that?

Ms. FLORINI. Again, I've got some concerns about the precise way the details are set out, but the basic concept is one that I would support.

Senator ALLARD. Do you think you can work with the direction of this committee and the EPA in coming up with a compromise?

Ms. FLORINI. I do have major concerns. The site carve-out approach for co-disposal sites, which lets large as well as small entities out, is very troubling to us. I would hope, however, we can find a way to reach agreement on that. I think everybody really is primarily concerned about getting the "small fry" out or the small players, if you will. I think it may well, in fact, be possible to reach an agreement on that approach.

Senator ALLARD. Do you have any problem with combining the Superfund legislation with the brownfields sites?

Ms. FLORINI. I've got a major problem with the way the latter portion of title 1 is set up. Essentially, a relatively nebulous concept—any remedial action plan from a State—will wipe Superfund off the book with respect to that site, irrespective of whether the remedial action plan was developed with any public participation, irrespective of what it says, and irrespective of whether it will actually be carried out, irrespective of whether the State has the ability to make sure that it's carried out.

Leaving that rather large category of concerns aside, there are grants provisions in the brownfields program that we certainly don't have a particular problem with. Whether it makes more sense to move those as part of Superfund versus as an independent bill, I don't think is something that needs to be resolved fully at this point.

Senator ALLARD. Thank you, Mr. Chairman.

Senator SMITH. Thank you, Senator.

Let me just ask a couple more questions and if Senator Allard has anymore questions, I'll be happy to go back to him.

Ms. Williams, along with your testimony, you submitted a letter from a 9-year-old girl by the name of Sierra Bair?

Ms. WILLIAMS. Yes, sir.

Senator SMITH. I just want to read a couple of lines from it. "I'm 9 years old and I live in Hanover, PA. I'm writing to you because of the lawsuit of Keystone Sanitation, my parents, grandparents and other family members and other small businesses. I find it unfair and totally out of place for us to be involved in this horrific mess. We paid top dollar for people who took the garbage to a place where it was approved by the State and now we're being sued and we didn't do anything." She concludes by saying, "I'm hopeful that my little voice might make a difference," and I guess she sent the letter to the President.

[The letter follows:]

Dear PRESIDENT CLINTON: My name is Sierra Bair. I am 9 years old and I live in Hanover, Pennsylvania. I am writing to you because of the lawsuit of Keystone Sanitation.

My parents and grandparents and other family members are in small businesses such as ours. I find it unfair and totally out of place for us to be involved in this horrible mess. We paid top dollar for people who took the garbage to a place where it is approved by the State! Now we are being sued and we didn't do anything. It is not our fault that the landfill owners put in bad garbage. My family owns restaurants and they serve food not hazardous stuff. Since when is food bad for us. Come on, get real; it's not like oil.

Last year in school seminar we talked about and learned about the environment. We were taught that oil, lead paint, batteries, roof shingles, et cetera, are bad. Never did the topic of foods come up. The point I'm trying to make is that food is not hazardous.

When I lay in bed, I think about my future and what the world is becoming. I want a future, a full life of happiness, but the way things are now those things might get taken from me and my brother. The way I see it, if there were six kids and one was bad, all of the kids would get punished. I guess we're just one of those six kids being punished in this lawsuit. Isn't it a shame so many are getting punished for a few.

If I were President, I would have stopped this before it started. Why is this happening? And why haven't you taken charge. You know it took one black woman to give all equal rights for all black people, one woman to take prayer out of our schools and hopefully my one little voice will make a difference in the Keystone lawsuit when you think about what my little voice has said.

Sincerely,

SIERRA BAIR.

P.S. I pray every night that my dreams come true and you can make that happen.

Senator SMITH. What connection is there with Sierra Bair and you?

Ms. WILLIAMS. There is none.

Senator SMITH. OK. Let me ask you, in your testimony you indicated that to the best of your knowledge the only thing you put in the co-disposal site other than your normal restaurant garbage was ballpoint pens, is that accurate?

Ms. WILLIAMS. When I repeatedly asked what I had thrown away that is considered to be so hazardous and toxic, I've been repeatedly given the example that if I've thrown away one ballpoint pen in the 24 years of the liability of this suit, that I have contributed toxic waste.

My contention is what we all contributed was the same waste every person creates every day and we did it legally.

Senator SMITH. Are you a polluter?

Ms. WILLIAMS. Do you want my personal opinion or do you want the opinion of the law?

Senator SMITH. Under the statute?

Ms. WILLIAMS. My personal opinion, I am no more a polluter than every person in this room and every person in this country.

Senator SMITH. But under the statute, you are defined as a polluter and have been in litigation how many years now?

Ms. WILLIAMS. I've been in litigation a year-and-a-half now.

Senator SMITH. Do you feel that the legislation we're proposing adequately addresses your concerns?

Ms. WILLIAMS. It appears very promising to me. It addresses issues that I've been concerned about, the small business issue, the co-disposal site, the municipal solid wastes are all addressed in this bill.

What I think sometimes and what the environmental attorneys end up telling me are sometimes different. It appears plain to me that you have addressed the inequities that I find myself living under.

Senator SMITH. Certainly the intent, although we don't know the exact, specific circumstances of your own case in terms of where you are and your record of decision and all that, but the intent certainly is to help people like you.

This is the frustration that we all feel. We all have differences on this legislation. We've been 4 years trying to reauthorize it, reform it, change it, and there are some areas we have common ground on, but there are other areas we just can't agree on.

That brings me to the next question. Ms. O'Regan, I'd like to ask you the same question I asked Administrator Browner. You may remember it if you were in the room at the time.

That is, concerning the debate over co-disposal sites, where you have the toxicity of hazardous materials versus the volume of solid waste. What we get into is litigation over that issue.

When Senator Chafee and I wrote this legislation, we just thought it would make more sense to take these environmental taxes, environmental income taxes, chemical feedstock taxes, oil import, take those dollars and put them in the fund, spend the money specifically to clean up sites, reinstate the taxes and use that to clean up sites.

The difference between the Administration and us at this point, as I understand it on this issue, is that they don't feel that if there is hazardous material placed in that site by someone other than a Barbara Williams or Sunny Ray Restaurant, somehow if there's somebody a little bit bigger than that, they should not be removed from the liability scheme.

I would just ask you what is your position on this? Would you prefer to see the dollars taken from the taxes collected specifically for Superfund reform address this concern, get the administrative fees and the lawyers out and get the sites cleaned up or continue along the same vein that we're in now, which is getting no where?

What is your experience with this type of case?

Ms. O'REGAN. That's a very long question, Senator Smith and I'll try and answer that concisely.

The city of Phoenix has been involved in co-disposal allocations on several Superfund sites and it's extremely difficult to determine

who disposed of what at these sites, so I think that S. 8 which provides a cap for municipal liability is clearly a step in the right direction.

The concern that we have is that municipalities will be paying owner-operators 10 or 20 percent of the co-disposal sites based upon our population. Phoenix is a very large city and we'd be paying the 20 percent.

At the same time then, there is an 80 percent sort of orphan share, so we're being asked to step up to the plate and I guess the question is, is that completely balanced or does there need to be a similar cap on industrial generators that disposed of the industrial waste in our landfills because that's quite a large orphan share and again, we are being asked to step up to the plate.

I guess I would pose that to you and the question is really one of funding and can those taxes take care of those sites that need to be addressed in our communities.

Senator SMITH. Of course that's a legitimate question and I think you can only try to give the best estimate on that in terms of the taxes collected, approximately $2 billion a year, but a lot of those dollars go for paying lawyers that don't go for cleanup.

I think again, I've talked to I don't know how many hundreds of people who have been involved in cleanup or live near sites that are toxic and they tell me they could care less who pays, they just want it cleaned up so that they don't have to live next to it anymore. So they are not interested in who pays, they just want to get it cleaned up.

It's very frustrating as we try to go through this thing but we are looking at degrees of definitions of polluters. You just said by your own definition, Ms. Williams, you're not a polluter. I agree with you, but somebody else who did something legally in a co-disposal site in a municipality or some other place that is a larger company than you are, perhaps has a lot more assets than you, there is a different set of standards applied to them and that's where the big dollars come from in terms of these lawsuits.

It just seems to me if we can expedite cleanup, then why not just do it. Take the environmental income taxes, et cetera, put them in the fund. You say you're letting people off the hook, but people aren't off the hook. They didn't do anything wrong when they did it. We're not letting illegal dumpers out. These are people that did what they thought was right, they put some hazardous material in there.

What we're saying is let's get together, take the environmental taxes, put them over here, get these people out of the system and stop arguing with each other and move on, the same thing we want to do with the *de minimis* folks, but we cannot get accommodation on this issue, and that is what frustrates me.

We could, I suppose, take the short route and let all the *de minimis* people out and nibble around the edges in this thing and not change the law, not dramatically change the law but it's unfair. You don't think it's unfair?

Ms. FLORINI. No. I think it is absolutely fair to hold the entities that are able to pay for cleaning up the messes that they made, liable for doing so. I have no problem with that whatsoever. The fact that it was not illegal at the time—actually, under your bill they

have to have been caught and convicted within the relevant statute of limitations—but the fact that it was not illegal for them to do what they did at the time is irrelevant. They made a mess, they ought to clean it up.

Senator SMITH. Then why shouldn't Ms. Williams clean hers up?

Ms. FLORINI. Letting the small parties out of the system is a matter of making the system work efficiently. It would be fair, it just doesn't happen to be efficient. So let the small parties out.

In point of fact, I think for her kind of waste, there is a real question as to whether in fact it generated any toxicity at all. That's somewhat separate question, but in terms of the big entities, I have no problem with fairness of leaving them on the hook.

Senator SMITH. Do you have a response?

Ms. BIAGIONI. I was going to say we're a big entity and we have situations where we're being sued. We're in exactly the same position as Ms. Williams, we put only trash in a site, cafeteria waste, probably the very same material that her restaurant put in the site, yet because we are the big player and the big, deep pocket, we're in litigation. No hazardous waste went into that site.

Ms. FLORINI. For me, small refers to both the size of the company and the quantity of the stuff.

Senator SMITH. Well, you've helped us to understand why we have a difficult problem ahead of us. Thank you very much and let's move to the next panel. I appreciate you all being here.

The third panel consists of Mr. Terry Garcia, Acting Assistant Secretary for NOAA; Mr. Larry Lockner, manager of Regulatory Issues, Shell Oil Company, on behalf of the American Petroleum Institute; Mr. Bob Spiegel, director, Edison Wetlands Association, Edison, NJ; Mr. Charlie De Saillan, assistant attorney general for Natural Resources, Environmental Enforcement Division, State of New Mexico; and Mr. Rich Heig, senior vice president, Engineering and Environment, Kennecott Energy Company.

Let me just say, gentlemen, it is kind of late and I apologize to you all. It's been a pretty long hearing this morning. Your statements will be made a part of the permanent record and if you could summarize in 3 or 4 minutes, I'll put the clock on at 4 minutes and if you can watch it when it goes to yellow and wrap it up, we'd appreciate it.

I'll start with Mr. Garcia. Go ahead.

STATEMENT OF TERRY GARCIA, ACTING ASSISTANT SECRETARY, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

Mr. GARCIA. Good afternoon, Mr. Chairman and members of the committee.

I'm Terry Garcia, the Acting Assistant Secretary of Oceans and Atmosphere for the National Oceanic and Atmospheric Administration of the Department of Commerce. I'm here today representing the interests of the U.S. Departments of Commerce, Interior, Defense, and Energy.

I would like to reassert for the 105th Congress the Clinton administration's steadfast commitment to protecting and restoring this Nation's natural resources. I will begin my testimony by quickly reviewing the progress made by the trustee agencies to-

ward restoring natural resources under the existing laws and rules governing damage assessment activities.

I would then like to highlight reforms to the natural resource damage (NRD) provisions of CERCLA that this Administration proposes. The final portion of my testimony will focus on the provisions of the Superfund Cleanup Acceleration Act of 1997. S. 8, that we feel would impede our efforts to protect and restore the Nation's natural resource heritage.

Significant progress is being made by the trustees toward restoring natural resources injured by hazardous substances. By working within EPA's remedial process, trustees have reached agreements with responsible parties to restore habitat and injured resources at more than 25 hazardous waste sites as part of comprehensive government settlements.

Restoration is underway at sites in Baytown, TX; New Castle County, DE; Tacoma, WA; New Bedford, MA; John Day River, OR; Lake Charles, LA; and the central California coast. The restoration work at these sites is detailed in my written testimony.

Last October, the Administration forwarded to the committee and other committees with jurisdiction a proposal for reforming the natural resource damage provisions of CERCLA. Federal trustees carefully considered criticisms of NRD that had been raised during previous reauthorization efforts.

Our proposal for reform is specifically designed to shift the emphasis away from monetizing the value of injured natural resources and litigation and refocusing it on restoring injured and destroyed resources. The proposal is based on our practical experience with the natural resource damage assessment and restoration process.

These reforms are designed to improve the NRD programs by providing greater clarity concerning restoration, by assuring the more timely and more orderly presentation of claims and by discouraging premature litigation.

NOAA and the other Federal trustees consider this proposal the foundation for reforming Superfund's NRD provisions during the 105th Congress.

The Federal trustees believe that revision of CERCLA's NRD provision should be based on two principles: No. 1, restore resources to baseline condition and No. 2, restore the losses that the public suffers from the impairment of natural resources from the time of injury until restoration is complete.

The Administration proposal was intended to strengthen the focus of restoration and reduce the cost associated with damage assessment claims by eliminating or reducing unnecessary litigation. Specifically, the proposal calls for adopting the restoration-based approach developed in NOAA's natural resource damage assessment regulations.

The Administration's proposal shifts the emphasis of CERCLA damage assessment efforts to restoration and away from the determination of economic damages or monetization of the injury. This fundamental shift will avoid litigation and expedite the restoration of injured resources.

We suggest amending the statute of limitations to provide that a claim for damages be presented within 3 years from the date of completion of a damage assessment by a trustee in accordance with

the regulations or the completion of a restoration plan adopted after adequate public notice.

Further, we clarify that a natural resource damage claim may be brought after an action for any other relief under CERCLA. These revisions will resolve the sequential claims issue to reduce premature filings, protect against claim splitting, and provide time for effective restoration planning, thus preserving important trust rights.

Clarifying the judicial review provision for NRDA assessment to provide for a publicly-available administrative record to be developed to guide the selection of a restoration plan, and the judicial review of such plan be limited to the administrative record with an arbitrary and capricious review standard.

Finally, relying on cost effective restoration, cost effective is defined in our proposal and in the NOAA regulations as the least costly activity among two or more restoration measures to provide the same or comparable level of benefits.

Moving to S. 8, the Federal natural resource trustees recognize the efforts of this committee. We understand the hard work that went into drafting it. As stewards of the Nation's resources, we appreciate the provisions contained in S. 8 that reflect our concerns regarding natural resources.

Nevertheless, we believe that S. 8 would weaken our ability to protect and restore the Nation's resource heritage. S. 8 precludes the restoration of non-use values, which include both ecological and human services provided by natural resources. Although these values are often difficult to quantify, they nevertheless are real.

The sights and sounds of the Connecticut River, the historical significance of the Housatonic River to the people of Massachusetts and Connecticut and the cultural significance of the Snake and Salmon Rivers are examples. To allow them to be destroyed by pollution and not restored is not acceptable.

S. 8 requires that responsible parties be allowed to pay for natural restoration over time based on the period of time over which the damages occurred. The trustees often agree to installment payments and negotiated settlements to reflect a responsible party's limited ability to pay or the time that would be needed for restoration. However, the amount of time over which the damage to resources occurred should not be considered in a settlement schedule.

Finally, S. 8 appears to preclude the recovery of all interim losses, both use and non-use.

I'll stop there. Thank you.

Senator SMITH. Mr. Lockner.

STATEMENT OF LARRY L. LOCKNER, MANAGER, REGULATORY ISSUES, SHELL OIL COMPANY, ON BEHALF OF AMERICAN PETROLEUM INSTITUTE

Mr. LOCKNER. Thank you, Mr. Chairman. I'm Larry Lockner with Shell Oil Company and chairman of the American Petroleum Institute's CERCLA Task Force. API appreciates this opportunity to present its views on reform of the Superfund Program. I'd like to point out that API strongly supports comprehensive reform of Superfund. We want to work with subcommittee members to accomplish this objective this Congress. S. 8 makes many needed

changes to the program and is an excellent vehicle to begin this work.

The petroleum industry has a unique perspective with regard to Superfund. It's estimated that the industry is responsible for less than 10 percent of the contamination at Superfund sites, yet has historically paid over 50 percent of the taxes that support the trust fund. This inequity is of paramount concern to API members. It's caused the industry to focus on those elements that affect the cost of the program and the authorized uses of the trust fund.

When Superfund was enacted in 1980, Congress envisioned a program that would cost $1.6 billion and be complete within 5 years. Almost 17 years later, however, billions have been spent but relatively few sites on the NPL have been cleaned up. This program appears to be without end.

API members are pleased that the Senate bill would reduce the number of sites to be added to the NPL and commend the sponsors for taking this important step. Limiting new additions to the NPL ensures a more reasoned Federal program with reduced future funding requirements. In our view, this provision in your legislation is critical to the reform effort.

Additionally, we support the bill's provisions that would delegate Superfund remedial authority to the States at non-Federal NPL sites. In general, the States have well-established programs and have demonstrated capabilities for cleaning up sites.

API member companies also support liability reform. Reform in this area will expedite cleanups and reduce transaction costs. Clearly under current law, too much money is wasted on legal costs. However, as an industry that has borne a highly disproportionate share of the taxes that support the trust fund, the petroleum industry is concerned about the impact that any liability changes would have on the program costs. For example, under the liability provisions contained in S. 8, the fund would pick up orphan share costs as well as enactment costs, response costs at codisposal landfills for generators, transporters and arrangers who contributed waste prior to January 1, 1997. Municipal owners and operators liability would be capped at such landfills. In addition, *de micromis* and *de minimis* parties and others would be exempt.

API members need to understand whether the cost savings associated with the bill's reform measures are sufficient to offset the additional costs arising from this shift in liability from PRPs to the fund or whether the program as envisioned under S. 8 would place increased demands on the fund. As the largest group of taxpayers to the fund, API members cannot conclude their evaluation of the legislation without fully understanding those costs ramifications.

Some of the additional costs arising from liability exemptions will be offset by other reform measures and API supports many of the remedies, selections, and reform measures provided in S. 8. We've also outlined those areas for additional reform in our written statement.

In closing, I want to note that Superfund sites are a broad societal problem, thus taxes raised to remediate those sites should be broadly based rather than focused on specific industries. Without substantial reform of the underlying program and the tax system supporting the fund, API opposes authorization of any Superfund

taxes. API members believe it is critical that Congress structure the taxes that support the fund. Thank you for the opportunity to present our views.

We'll be happy to answer any questions.

Senator SMITH. Thank you, Mr. Lockner.

Mr. Spiegel.

STATEMENT OF ROBERT SPIEGEL, DIRECTOR, EDISON WETLANDS ASSOCIATION

Mr. SPIEGEL. Thank you very much for allowing me to testify today. My name is Robert Spiegel. I'm the director of the Edison Wetlands Association, a group dedicated to the preservation of the environment in New Jersey.

I'm familiar with Superfund's highs and lows. New Jersey has 116 sites on the National Priorities List, more than any other State in the Nation. However, I'm here to tell you that I'm pleased about EPA's Superfund presence in Edison. I know that sounds a little strange and let me explain why.

Edison has 90 contaminated sites listed by the State of New Jersey. Of these, only three—Kin-Buc Landfill, The Chemical Insecticide Site and the Renora Site are on the Superfund List. I have been involved in both the identification and remediation of many of these sites, both EPA and State lead, and I must tell you EPA leads are far superior to the cleanups that the State does.

In looking at the difference between EPA and State-led cleanups, it breaks down to two major differences which are thoroughness of investigation and cleanup and the second is public participation.

EPA investigations and cleanups examine in detail onsite and offsite contamination and groundwater contamination. State-lead sites rely on the polluter to submit data and the State rarely if ever challenges the data. State-lead sites often ignore offsite contamination believing in the magic fence theory which states that the contamination stops at the fence line.

Only in extremely rare circumstances will the State force the polluter to investigate offsite contamination or groundwater pollution.

The EPA has also aggressively pursued public input and there is an outreach program for every site in Superfund. At State-lead sites, you're lucky if you can get one of the project managers on the phone and if you want to review documents they have, it will cost you $100.

I'm here today to talk about an EPA Superfund success story and how it might be affected by S. 8, the Superfund reauthorization bill. My involvement with Superfund started in 1989 with a site called the Chemical Insecticide Superfund Site, also known as CIC.

Chemical Insecticide manufactured pesticides, herbicides, and fungicides including the military defoliant, Agent Orange. The site operated from 1954 to 1971 and as a result of CIC operations, the site became contaminated.

After EPA confirmed that the runoff had indeed leached from the site, we decided to form a community working group. From 1991 to 1993, we had a very difficult time working with EPA. It quickly became an us against them attitude. We battled constantly in the press, the cleanup was stalled and it seemed as though we were getting nowhere fast.

In 1993, the EPA encouraged us to apply for a technical assistance grant, also known as a TAG. We applied and received the grant.

Since 1993, this site was turned from one of the biggest public relations disasters into a model EPA should use for all its cleanups. EPA has not just developed a community relations plan at the site, but has developed a community relationship. It was no small part due to the TAG Program.

It helped us understand the Superfund Program is a complicated answer to a complex problem. We found that most of the problems stem from the lack of understanding about the nature of environmental pollution and remediation and the unrealistic expectations that Superfund can be a quick fix to these problems.

I'm happy to say that the offsite cleanup of the residential neighborhoods around the site is complete and restoration work has begun. EPA has not only finished this ahead of schedule, but has also finished $2 million under budget.

What's interesting to note here about EPA cleanup is that by going through a full public process and by being responsive to our concerns, EPA probably ended up slowing down the pace of the cleanup but ultimately did a better job.

The contaminated offsite areas downstream from CIC could have been left under S. 8 because S. 8 does not protect highly exposed or unusually sensitive groups, given the way the bill tilts risk assessment by use of central estimates. S. 8 dumps toxic pollution on communities and is a bailout for the polluters

The Government should be looking for ways to strengthen the Superfund instead of weakening it. Provisions that will pierce the corporate veil need to be included in any new reauthorization bill. The owner of the CIC site has escaped liability behind the corporate veil and has contaminated four sites, two of which are Superfund.

In closing, I would like to say that we need a strong Superfund Program, one that goes after polluters, protects the public and identifies and cleans up contaminated sites. S. 8 is not this bill. The reality is, we know industry is necessary. Everything we do, use or have is due to industry in one form or another. However, we refuse to accept that we have to allow polluters to poison our water and land and allow them to walk away without liability.

I hope you will go back and revise the bill so that it does not protect the American people against what is perhaps the greatest threat to our national security, the poisoning of our citizens, their land and water and air. Superfund is not perfect, but it is the only game in town.

Thank you.

Senator SMITH. Thank you.

Mr. de Saillan.

STATEMENT OF CHARLES DE SAILLAN, ASSISTANT ATTORNEY GENERAL, NATURAL RESOURCES, ENVIRONMENTAL ENFORCEMENT DIVISION, STATE OF NEW MEXICO

Mr. DE SAILLAN. Thank you, Mr. Chairman and members of the committee.

I'm Charles de Saillan, assistant attorney general for the State of New Mexico. I'm testifying today on behalf of Attorney General Tom Udall who regrets that he was not able to be here today.

Attorney General Udall is the immediate past president of the National Association of Attorneys General and he is on the Association's Environment and Energy Committee.

We very much appreciate the opportunity to appear here today and present our testimony on S. 8, the proposed Superfund Cleanup and Restoration Act that would amend and reauthorize CERCLA. This legislation is extremely important to the State of New Mexico and to many of the State attorneys general.

In reviewing S. 8, we immediately recognized that many of our concerns had been addressed in this legislation. For example, the bar on preenforcement review of remedy decisions which is currently in section 113(h) of CERCLA would have been eliminated in the bill that was introduced in the last Congress. It has been retained in S. 8 and we're very pleased that it is. This provision has been very effective in limiting litigation and allowing cleanup to proceed expeditiously. We very much appreciate that the committee has taken into consideration our comments on this issue and others.

We view S. 8 as a significant improvement over S. 1285, the Superfund bill that was introduced in the last Congress and we very much appreciate the hard work that has gone into it. We, nevertheless, have very serious concerns with the bill.

One of our major, overall concerns with S. 8 is simply its length and complexity. It would completely rewrite CERCLA. The cleanup standards, the remedy selection process, the liability scheme, the natural resource damage provisions would all be changed drastically and in innumerable ways. Yet, every change in the law will need to be interpreted, first by the implementing agency and second, in too many instances, by the courts.

The result, we fear, will be the shifting of limited agency resources to writing new regulations and new guidances, the nullification of 15 years of hard-fought judicial precedent, new rounds of litigation, more transaction costs, and most distressingly, further delays in cleanup.

We strongly urge the committee to focus on those provisions of CERCLA that really need revision and to draft narrow, straightforward, concise legislation to make those revisions.

Let me now summarize some of our comments on the bill. More detailed comments are included in our written testimony.

First, in the State role title, we strongly support provisions to delegate the Superfund Program to qualified States. We appreciate the flexibility that the bill provides in allowing States to receive either comprehensive delegation or partial delegation.

We do strongly recommend that the bill be revised to clearly allow an authorization option in addition to delegation. Under the authorization approach, which is taken under RCRA and the Clean Water Act and other Federal environmental laws, EPA would authorize qualified States to implement their program in lieu of the Federal program.

Under this approach, the States would have the flexibility to apply requirements that are more stringent than the Federal re-

quirements without needing to pick up the tab for the cost differential.

Second, although NAAG has not taken an official position on remedy selection, we have a number of concerns regarding this title. We are very concerned that the relaxation of remedy selection standards will lead to less permanent remedies, and that the States will be left to deal with problems in years to come.

Further, we're particularly concerned that the bill does not adequately protect groundwater. We're also troubled by the new, completely revised remedy selection procedures which allow the responsible parties to select the remedy despite the obvious conflict of interest. We believe that remedy decisions should be made by EPA or State agencies that have a duty to protect human health and the environment.

Third, on the liability title, we are very pleased that the bill retains the liability for preenactment disposal activities or so-called "retroactive liability." This issue is a very important one to the State attorneys general.

We're concerned, however, that the various exemptions in the bill are too broad. We're particularly concerned about the co-disposal landfill exemption which would inequitably exempt generators and transporters of hazardous wastes simply because they sent their waste to a site that also received a substantial amount of municipal solid waste. We further question how these exemptions will be funded.

Fourth is the Federal Facilities Title. We generally support the concept of transfer of EPA's authority over Federal facilities to qualified States. We have some concerns about how the bill would do this, and we provide more detailed comments in our testimony.

We also strongly encourage the committee to adopt a clear and unambiguous waiver of Federal sovereign immunity in CERCLA.

Finally, we have numerous concerns about the natural resource damage title. These provisions would largely handicap the program in most States. The bill would substantially limit recovery for pre-1980 releases, it would eliminate recovery for passive use values, and it fails to clarify the ambiguous statute of limitations.

On the positive side, we're very pleased to see a record review provision in the title.

That concludes my prepared statement and I'll be happy to take any questions that you have.

Senator SMITH. Thank you.

Mr. Heig.

STATEMENT OF RICH A. HEIG, SENIOR VICE PRESIDENT, ENGINEERING AND ENVIRONMENT, KENNECOTT ENERGY COMPANY

Mr. HEIG. Thank you, Mr. Chairman, for this opportunity to testify. My name is Rich Heig. I'm senior vice president of Engineering Services, Kennecott Corporation.

Kennecott supports balanced Superfund reform which will accelerate cleanups based upon good science. Reform must also include changes to the natural resource damage provisions so that it clearly focuses on restoration of existing services. With these two points in mind, let me say there is a lot we like about this bill.

Kennecott has had firsthand experience with the inefficiencies of the current Superfund Program. At our Bingham Canyon copper mine in Utah, once a historic mining area, Kennecott has spent over $230 million for cleanup. This effort included cleaning up and relocating over 25 million tons of historic mining wastes. This is equivalent to over 1 million dump trucks of material. Over 5,500 acres have been reclaimed for wildlife habitat and recreational uses.

Thankfully after Administrator Browner visited Utah and recognized the depth of Kennecott's commitment to a successful cleanup program, she supported a memorandum of understanding in which Kennecott, EPA and the State of Utah agreed that placing the Kennecott sites on the NPL would be deferred if Kennecott completed certain cleanup programs, most of which were already underway.

In the midst of the Bingham Canyon cleanup, Utah's NRD trustee filed an NRD lawsuit for contaminated groundwater. Kennecott needed a resolution that would not require us to pay for a cleanup twice, once for a Superfund cleanup remedy and once for NRD. Ultimately, such a settlement was reached.

Kennecott's Superfund experiences have led us to believe that Superfund reform should No. 1, create a flexible mechanism to conduct responsible cleanup without the site becoming a proposed Superfund site; No. 2, require cleanups and remedies to be based on reasonable risk assumptions and reasonable land and water use designation; No. 3, restrict NRD recoveries to restoration and eliminate double cleanup requirements. Restoration should be cost effective and reasonable based upon what is needed for actual restoration with a reasonable cap on ultimate liability and no NRD retroactivity.

Mr. Chairman, Kennecott is pleased to see the efforts being made by the sponsors of S. 8 to reform Superfund. However, we respectfully ask the committee to consider the following comments.

Title 1 should include a voluntary Federal response program in addition to that which is proposed for the States. Kennecott generally supports the concepts of remedial action provisions of title 4 which No. 1, require the selection of remedies that are cost effective; No. 2, are based onsite-specific conditions and risk assessments; No. 3, consider reasonably anticipated future uses of land and water; No. 4, allow for the consideration of natural attenuation and biodegradation in groundwater remediation; No. 5, recognize institutional and engineering controls; and No. 6, eliminate the preference for permanence and treatment.

Kennecott supports the attempt in title V to fairly allocate response costs at non-Federal multiparty sites including mixed funding for orphan shares. We ask that an additional provision be included that would allow remining of historic mining sites for the economic recovery of metals or minerals without imposing Superfund liability for past releases. Remining may be the only practical approach to a cost effective cleanup and in virtually all cases, could be a boost to local economies.

We believe the changes to NRD included in title 7 are a good start. However, there are several areas that we believe could be clarified and we have discussed those in our written testimony.

The NRD Program should be modified to complement not duplicate cleanup remedies. The improvements to be gained from cleanup reforms will be lost if NRD trustees can require additional cleanup under the guise of restoration.

While Kennecott and Utah were able to reach a compromise that so far avoids a double cleanup, this type of result should be formalized for all NRD claims rather than left to an NRD trustee's discretion.

A more detailed analysis of S. 8 is included in our written testimony and I ask that it be included in the hearing record.

Mr. Chairman, thank you for this opportunity to testify.

Senator SMITH. Thank you. It will certainly be a part of the written record.

Mr. Garcia, let me start with you. Again, in the testimony regarding the Administration views, we continue to have what I consider to be rather strong statements. "The Administration believes that S. 8 does not represent an acceptable basis for achieving bipartisan consensus on Superfund reform," et cetera. How does this kind of rhetoric help the process?

The Senate puts together a bill that worked on for 2 years with the Administration and our colleagues on the other side. Granted, we didn't come to accommodation, I'd be the first to admit that, but there was no attempt here to write a bill without their input or to impose our will upon them and yet, you still continue to use these statements. What is an acceptable basis for achieving bipartisan agreement, your bill only, your position only?

Mr. GARCIA. Mr. Chairman, in my oral statement I indicated there were certain weaknesses which we had identified—non-use values, interim losses, the time payments. Those are real weaknesses and they're material weaknesses in terms of our ability to conduct natural resource damage assessments.

We are willing to engage in a bipartisan effort to achieve a consensus on Superfund reform and we've been working with the stakeholders for months now. We have worked with your staff, we'll continue to work with the staff. We welcome the opportunity to do so. We have submitted a proposal which we believe balances, in an appropriate manner, the legitimate interests of the stakeholders, of the responsible parties, and the Government's interest, the trustees' interest in restoring natural resources. As a member of the panel said, it's a restoration-based approach.

Senator SMITH. But you won't even give us this as a starting point. You're basically saying it's not even a starting point.

Mr. GARCIA. I don't believe that I said that in my statement. I would suggest, and the Administration would support, that we each come to the table with our proposals and we discuss them. I acknowledged in my testimony that S. 8 had incorporated certain provisions that acknowledge the concern of the trustees, but there are other provisions that are of very serious concerns to us. Again, I would suggest that we sit down with our proposal, the Administration's proposal, and S. 8 and begin that discussion.

Senator SMITH. In the heading of your testimony, you say that you speak on behalf of the U.S. Departments of Interior, Agriculture, Energy and Defense. Do they all agree with you? They to-

tally agree with your statement? There is no dissension among any of those?

Mr. GARCIA. The statement was cleared through the interagency process and my understanding is that we're in full agreement on these matters.

Senator SMITH. Mr. Lockner, I was somewhat interested in your comments regarding the taxes. As you know, when CERCLA was written, it's 101.14, there is an exclusion for petroleum, including crude oil or any fraction thereof as well as natural gas or liquified natural gas from being covered under Superfund.

Now, are you saying now that no taxes is your position, no taxes be collected whatsoever?

Mr. LOCKNER. No, I'm not saying that at all. Our position is that the program needs reform, not only of the programmatic issues but the tax base as well. The imbalance is clear. We're paying 50 percent of the taxes, yet only have 10 percent of the liability. That's the issue. It's an issue of fairness.

Senator SMITH. You don't suggest we eliminate the petroleum exclusion, do you?

Mr. LOCKNER. No, I wouldn't wish that CERCLA be placed on those petroleum issues at all. Let's be frank, let's talk about what that could do to the country. Our friend with the small business here could face a problem, farmers could face problems, the users of our products who would blame the complexity and bureaucracy of CERCLA on the users of petroleum and petroleum products would be a nightmare.

Senator SMITH. Aren't you somewhat frustrated or are you somewhat frustrated that the taxes that are collected from the petroleum industry in many cases are not used directly for cleanup?

Mr. LOCKNER. Indeed. We're 17 years now into a 5-year program and they seem to be without end and they're used for budget-balancing purposes, for nonrelated purposes and they just go on forever. We'd like to see some sort of finality to this, some sort of agreement we could reach conclusion with this and that's why we support turning a lot of the program over to the States. Let them manage the program. They seem to be well-equipped in a lot of instances.

Senator SMITH. Senator Baucus.

Senator BAUCUS. Thank you, Mr. Chairman.

Gentlemen, I'd like to explore the degree to which restoration should include extrinsic value or sometimes known as non-use value which is a big technical term, but basically it's extrinsic value or intrinsic value.

For example, the Grand Canyon, wilderness area, old growth forests, deep stream lakes, 30 or 40 feet down, I'd like you to tell us the degree to which, Mr. Heig, I'll start with you, the restoration should include intrinsic value as well as lost human use. Let me ask the first question, should it at all?

Mr. HEIG. I don't believe it should.

Senator BAUCUS. At all?

Mr. HEIG. The real focus on NRD should be for restoration. Paying for past lost use and non-use is surplus to restoration. It is punitive.

Senator BAUCUS. So it doesn't matter to you whether the Grand Canyon is destroyed, even though you've not visited it? It does not matter to you or the Washington Monument is destroyed or say a wilderness area is no longer wilderness, so long as the human use of that, if you can quantify the number of visitors and so forth is met, it doesn't matter to you or do you think it should not matter to the American public?

Mr. HEIG. Well, first of all, I'm dealing with this mining situation.

Senator BAUCUS. I'm talking about the basic principle of intrinsic value in an area that's been destroyed or substantially damaged.

Mr. HEIG. If restoration occurs——

Senator BAUCUS. Should restoration deal with intrinsic value?

Mr. HEIG. In my opinion, no.

Senator BAUCUS. Mr. de Saillan, your view on that?

Mr. DE SAILLAN. We definitely believe that non-use values or passive-use values should be considered in determining the value of natural resources. If you just consider natural resources based on the value of the board feet of the timber in the forest, or the market value of the fish in the stream, you wind up undervaluing the resources.

One of the difficult things in the natural resource damage program is how you put a value on the resources. By considering passive use values, it gives us an ability to comprehensively or more fully place a value on resources which are very hard to quantify because they are not traded in the market. That's what we're trying to get at with passive use values.

Senator BAUCUS. Your view is, even though they are hard to quantify, they should be valued and considered in determining their restoration?

Mr. DE SAILLAN. Absolutely. In our experience, even though it's not real easy to quantify it, most of these cases are negotiated, settlements are reached. The cases that are being litigated are really the exception.

In New Mexico's experience, we have not litigated a single natural resource damage claim. We sit down with the responsible parties, we give our arguments, they give their arguments, and we come to a settlement.

Senator BAUCUS. Mr. Lockner, your view on this?

Mr. LOCKNER. The problem with the issue is that there's no real way to quantify the losses, if indeed they are losses. Every citizen that might be questioned under a scheme such as contingent valuation, would have a different opinion.

Though I'm not an expert at NRD, these problems appear readily apparent. I think if you would turn your attention to the testimony that will be provided to the record by the Coalition of Legislative NRD Reform, I think they will be more explicit in those issues.

Senator BAUCUS. But as difficult as it is to value, should an attempt be made to try to value it?

Mr. LOCKNER. Again, I think if an attempt is made, the answer that is received is going to be completely without value. It's going to be based on esoteric values by individuals.

Senator BAUCUS. So you see no need to attempt to restore the lost intrinsic value of a resource, the beauty of a resource. That does not make any difference?

Mr. LOCKNER. Not based on the methods that are available.

Senator BAUCUS. That's not the question I asked. The question I asked is, should we make the attempt to try to deal with that or not even make the attempt?

Mr. LOCKNER. I don't see how you can.

Senator BAUCUS. So you don't think it's worth making an attempt to restore say the loss of the Grand Canyon?

Mr. LOCKNER. I think that's a hypothetical situation.

Senator BAUCUS. I'm asking a hypothetical. I'm asking you to address the hypothetical.

Mr. LOCKNER. I really don't see how you can arrive at those decisions based on the tools at hand today. I just don't know how.

Senator BAUCUS. Should we try to find better tools?

Mr. LOCKNER. I think that's very logical.

Senator BAUCUS. So you think maybe we should make the attempt?

Mr. LOCKNER. To find tools?

Senator BAUCUS. Yes. Should we make the attempt to find tools?

Mr. LOCKNER. To make a realistic assessment of what is really involved here.

Senator BAUCUS. So you do think we should make the attempt to find better tools to deal with this issue? I'm not trying to put words in your mouth, I'm trying to find out where you are.

Mr. LOCKNER. Let's try to focus on the loss of the services involved and I think that's where we really need to turn.

Senator BAUCUS. We're not dealing with that. That's a separate issue. I'm talking about lost intrinsic value.

Mr. LOCKNER. Again, I really haven't given this a lot of thought. I'm not an expert on those issues.

Senator BAUCUS. Mr. Garcia.

Mr. GARCIA. As my testimony indicated, absolutely, we believe that those are real values, real values the public should be compensated for. There are two issues when a resource is injured. One is primary restoration, bringing that resource back to baseline. The other is compensating the public for the lost use of those resources, both direct and indirect or non-use or passive use.

I grant you that it's difficult to quantify those values, but it is possible and has been done. I would also submit that the committee review the Administration's proposal for dealing with injuries to resources, including interim losses and the restoration-based approach that we have advanced in our proposal and which is contained in NOAA's regulations—which does not involve quantification or monetization of the injury. Rather, it focuses solely on how do you restore that injury; how do you restore the injured resource itself, as well as how do you compensate the public for their loss, whether it's a direct use or a passive use.

Senator BAUCUS. I appreciate that. I know it's an extremely difficult issue but in my personal opinion, it's an effort we should undertake, how we deal with this and quantify this.

Do you want to speak to that, Mr. Spiegel?

Mr. SPIEGEL. Yes. I'd like to make a quick comment.

One of the things this bill seems to do is engage in linguistic detoxification of chemical pollution.

Senator BAUCUS. What does that mean?

Mr. SPIEGEL. Linguistic detoxification means that you detoxify with words but we like to use that phrase basically because it seems like some of my colleagues here feel that allowing levels of contaminants in the environment is acceptable.

One of the things I always felt, and I know that the people in my community feel, is you really cannot put a price on clean air, clean water, and clean land. You really can't. It's necessary for our survival, it's necessary for our children's survival.

One of the things I've learned is the Indians use a seventh generation ideology which means they look at everything, how it's going to affect seven generations down the road, how it's going to affect not only their children, but all the way down, how it's going to affect the future.

I think that when we look at natural resource restoration, and we look at natural resource damages, we should look at it not in terms of is it strictly economics. Would it cost more to clean it up than leave it dirty? Of course. What is reasonable? Is it reasonable to leave elevated levels of contaminants because we don't think we're going to use the natural resource? What about our great, great grandchildren, may they use the resource?

Senator BAUCUS. I appreciate that. My personal view, and I believe this very strongly, that we have a duty to our country to try to find some way to solve this question. Otherwise, a wilderness area, for example, is destroyed or a portion of it is destroyed, the solution will be to try to find alternate hiking days somewhere else and not restore that wilderness or not try to do what we can do reasonably to try to restore it.

This is a tough issue. We're getting into nonlogical matters here, but yet very, very important. It's analogous to what is beauty, how do we define beauty? It's very hard to define.

Justice Potter Stewart, when asked to define something else, pornography, he said, I don't know but I know it when I see it and beauty is somewhat the same.

I think there is some basic, spiritual, something to do with one's soul. It's very valuable when some special natural resources are destroyed—a Glacier Park in Montana. That's a hypothetical but there are some wonderful rivers and streams in this country which have been seriously damaged.

Sure, we can measure damage by the lost use, people don't fish or hunt as much or what not but there is another value too, particularly because that river was so beautiful. It's hard to describe and we have to find some way to reasonably deal with that issue. Otherwise, we're not serving our people as well as we can or should. It's hard, I grant you it's hard but I think we have an obligation to do whatever we can to try to address it in the most reasonable way.

As I read this bill, it essentially says those areas are off limits. It cannot be compensated, it cannot include those intrinsic values attempting to restore a damaged or lost natural resource. I think that is wrong.

Senator SMITH. Let me just pick up on that point, Senator Baucus. The whole premise, I believe, of NRD is that we can reduce these things to a dollar amount. Your comment, Mr. Lockner, was right on target, I think in terms of quantification.

The premise is that we can quantify it. The truth of the matter is we can't.

Senator BAUCUS. Can or cannot?

Senator SMITH. We cannot.

Senator BAUCUS. I think we can. There are ways to do it. In fact, right now there are techniques being used by trustees to try to answer that question. I might say too that as we sit at this very moment, the State of Montana is in litigation and has techniques and measurements and so forth to try to answer that question.

I grant you it's a hard matter to measure, but I submit ever so strongly, we should try to do our very best to try to find a way and maybe devote our time in a hearing to all the various different techniques and different tools to try to find the best way rather than to categorically dismiss it.

Senator SMITH. I hear you but again, we're using double standards on quantification. For example, in the area of eminent domain, when you go take granddad's farmhouse and you decide it's worth $50,000, you're going to build a new highway, do you quantify that? Do you get into the loss use, non-use of those people, what's the aesthetic value of that farm? We don't do that. We don't do that at all.

So suddenly we come up with this NRD concept here and in the case of natural resource damages, we now fly this quantification standard that we don't apply anywhere else. That's what is wrong with it.

When you come out and fully support when we take the old farmhouse and we can say, these people are entitled, there are a lot of people that like to look at that farmhouse, they like to walk on that land, they like to hunt, they like to fish and when you reimburse those people for all of that, then OK, I'll talk to you, but that's not happening.

We're applying this standard one way and you cannot quantify it. We've argued about this, we've discussed this. This is the problem. Meanwhile, while we argue it, we're not restoring which is what Mr. Heig said we want to do, to restore these properties to their use where we can all enjoy them.

You said, Mr. Garcia, that you can put a real value and I think you mean that. But all right, I want to use the Grand Canyon, what's that real value to me? Who much is it, give me a dollar amount?

Mr. GARCIA. As I said, it's difficult to quantify. Let me make a point.

Senator SMITH. That's the point, isn't it, it is difficult. We're trying to quantify it, that's my point here. That's what is so frustrating.

Mr. GARCIA. We have quantified those values in a number of cases. What I wanted to suggest is that there is an alternative. There is an alternative to rejecting the concept of passive use values, but there is a way of capturing those values.

The alternative, again, I submit is embodied in the Administration's proposal. It is a restoration-based proposal. It focuses not on the quantification or the monetization of the injury which leads to litigation, is complicated but can be done, but rather it focuses on how do you restore the injury so the entire inquiry is not what is the value of that resource. Rather, it is how do you compensate the public for the loss of that resource, how do you compensate the public for the loss of the use of that resource without getting into the quantification issue?

You develop a restoration plan as we've done a number of times in accordance with NOAA's regulations, in our damage assessment process. We have laid out a proposal for the staff which I think allows the trustees to fulfill their obligation to make the public and the environment whole as a result of an injury—by compensating the public both for the loss of the resource as well as the loss of the use of that resource and to do it without having to monetize the injury.

The measure of damage under our proposal is the cost of the restoration project, not the value of the resource.

Senator SMITH. I don't disagree with you on the restoration. We should restore it and there is some argument about how much certain entities would have to spend to do that, but when you start going beyond that, that's where you get lost use, non-use, that's where you start getting into the dollars. You say it isn't, but it's the money. There are numbers put on these NRD lawsuits, huge numbers, but hundreds of millions of dollars in some of these cases and I don't know where they come up with the figures on lost use and non-use.

As I said, somebody on the panel, tell me what is the dollar amount for me not being able to see the Grand Canyon?

Mr. SPIEGEL. Senator, I think the way the argument is being framed here is not exactly the best way to frame it. I think that to sit there and ask people to spit out a dollar amount, to put on a specific resource, I think is the wrong way to frame the argument.

Senator SMITH. That's what we do.

Mr. SPIEGEL. The way you're framing the argument right now I think it is not positive. I think a positive way to look at the argument and frame it where you can get real debate as to which way we should frame this in the bill is to look at potential use, there are people who are experts in the field. How much would it cost to restore this property, how much would it cost reasonably to safeguard against how people use it?

Where I live in Edison, about 70 sites are located right in my general area, and they all drain into the river. There are fishing advisories—you can't fish because the fish have high levels of PCPs. The river is gorgeous, teeming with life. You can't eat the crabs, you can't eat the fish. They don't want you to come in contact with the water. How do you put a number on that?

Senator SMITH. What about Barbara Williams' lost use, non-use? We're not applying any lost use, non-use to her. What about all the aggravation she's had and the dollars that she's spent in litigation on a Superfund site where everybody admits she shouldn't even be in?

Mr. SPIEGEL. I'm not going to comment on that because I don't know anything about it.

Senator SMITH. But I'm just using it as an example. The point is we isolate these NRD cases and we say we're somehow going to put a specific number and we do put specific numbers and that's my point. If you look at these cases, they are very specific dollar amounts and nobody can tell me where they come from.

I can understand the restoration. We may disagree on the amount but I understand that, that's specific because it cost x number of dollars to be restored.

Senator BAUCUS. Mr. Chairman, I think what we ought to do is use your analogy and give it to a jury because right now when we are trying to wrestle with this issue, first, as you well know, we're only talking about those sites that are on the NPL, a certain threshold has to be met before that's triggered.

Then we begin to grapple with what the restoration should be. In this case, it's in the public interest and the trustees here are trustees for the public. So the intrinsic value of a national resource that is destroyed is valued by the public not just a single individual, it's by the public and that I think means the trustees should be held to a very high standard and it also means any determination they come up with is necessarily going to be perhaps a little bit higher in amount of value because we're trying to protect the public interest here as opposed to the private interest.

Take the case of a taking, first of all, as a threshold what is not a taking. Once that decision is made, then it goes to the jury usually for damages. The jury is going to sit down and try to figure out what is the damage when the taking has been triggered. They're going to probably take intrinsic value into account.

They're going to take a farmhouse, for example, the person can't use his farm anymore, it's not there. What is the economic loss and so on. I'll bet you dollars to doughnuts that jury is also going to think in the back of its mind, the lost intrinsic value to that individual, that is the beauty of the countryside, the value of working the land and so forth.

Maybe the answer here is to just turn it over to a jury. People have common sense. They know things pretty well. They can't quantify to the decimal point but they've got a sense here so maybe the answer is let's turn it over to a jury and the jury will determine what the restoration plan will be.

I don't think most people want to do that but at least people do include intrinsic values into their conclusions as to what damages should be and we just have to do our best, as difficult as it is, to try to find some way apart from giving it to a jury, for us to develop some process to do the same.

Mr. GARCIA. I just wanted to make one point and that is we, under our current approach, are restoring injuries to resources including the lost services, use and non-use, without monetizing the injury, so we are doing it without presenting a bill to the responsible party that says here is the value that has been damaged or destroyed.

Rather, we are presenting a bill that is for the cost of the restoration project and that restoration project compensates not only

for the lost resource but for the lost services, both use and passive and it can be done. We have done it, we're doing it every day.

I would submit we would be happy to sit down with your staff and discuss how we have done it. It's embodied in our proposal. You do not necessarily have to monetize the injury; there is another way to do it and you can still capture those passive use values which are true losses and must be preserved.

Senator SMITH. Truthfully, it is a tough issue and we've all been willing to take it on. It's been basically ducked in the past in this reauthorization, so we're going to try to deal with it, but it's tough.

Did anybody else have a final comment?

Mr. SPIEGEL. I just to want to say that EPA currently is already doing this. In my community, they have restored areas that have been damaged by environmental destruction at the three sites. They are engaged in restoration activities to try to minimize the amount of damage to the environment, so it's something that is already occurring.

I think if you can somehow strengthen it or quantify it, that's good, but it's already occurring, so it's not something you're talking about an abstract in the future. They're already doing it.

Senator SMITH. Let me thank you all for coming.

Senator BAUCUS. If I might say, Mr. Chairman, I think it's been a very good hearing and I compliment you on it. In this wonderful form of government we have called democracy, everybody is entitled to their point of view and I want to thank everybody here for vigorously expressing his or her point of view.

I think it shows, Mr. Chairman, that we've got some work ahead of us and there are very real differences on this bill, but I think in reading between the lines, it's clear that people do want to resolve it and find some solutions.

Thank you.

Senator SMITH. If members have questions they want to submit, additional questions, they can do that by Monday and you'd have until the following Monday to respond to those questions.

The hearing is adjourned.

[Whereupon, at 1:01 p.m., the subcommittee was adjourned, to reconvene at the call of the Chair.]

[Additional material submitted for the record follow:]

II

105TH CONGRESS
1ST SESSION

S. 8

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

IN THE SENATE OF THE UNITED STATES

JANUARY 21, 1997

Mr. SMITH of New Hampshire (for himself, Mr. CHAFEE, Mr. LOTT, Mr. ABRAHAM, Mr. ALLARD, Mr. COVERDELL, Mr. CRAIG, Mr. DEWINE, Mr. DOMENICI, Mr. GORTON, Mr. GRAMS, Mr. HAGEL, Mr. HATCH, Mr. HELMS, Mr. HUTCHINSON, Mr. KYL, Mr. LUGAR, Mr. MURKOWSKI, Mr. ROBERTS, Mr. SESSIONS, Mr. THURMOND, and Mr. WARNER) introduced the following bill; which was read twice and referred to the Committee on Environment and Public Works

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A BILL

To reauthorize and amend the Comprehensive Environmental Response, Liability, and Compensation 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; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "Superfund Cleanup Acceleration Act of 1997."

(b) TABLE OF CONTENTS.—The table of contents of this Act is as follows:

TITLE I—BROWNFIELDS REVITALIZATION

SEC. 101. BROWNFIELDS.

(a) IN GENERAL.—Title I of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601 et seq.) is amended by adding at the end the following:

"SEC. 127. BROWNFIELDS.

"(a) DEFINITIONS.—In this section:

"(1) ADMINISTRATIVE COST.—The term 'administrative cost' does not include the cost of—

"(A) investigation and identification of the extent of contamination;

"(B) design and performance of a response action; or

"(C) monitoring of natural resources.

"(2) BROWNFIELD FACILITY.—The term 'brownfield facility' means—

"(A) a parcel of land that contains an abandoned, idled, or underused commercial or industrial facility, the expansion or redevelopment of which is complicated by the presence or potential presence of a hazardous substance; but

"(B) does not include—

"(i) a facility that is the subject of a removal or planned removal under title I;

"(ii) a facility that is listed or has been proposed for listing on the National Priorities List or that has been delisted under section 134(d)(5);

"(iii) a facility that is subject to corrective action under section 3004(u) or 3008(h) of the Solid Waste Disposal Act (42 U.S.C. 6924(u) or 6928(h)) at the time at which an application for a grant concerning the facility is submitted under this section;

"(iv) a land disposal unit with respect to which—

"(I) a closure notification under subtitle C of the Solid Waste Disposal Act (42 U.S.C. 6921 et seq.) has been submitted; and

"(II) closure requirements have been specified in a closure plan or permit;

"(v) a facility with respect to which an administrative order on consent or judicial consent decree requiring cleanup has been entered into by the United States under this Act, 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 the Safe Drinking Water Act (42 U.S.C. 300f et seq.);

"(vi) a facility that is owned or operated by a department, agency, or instrumentality of the United States; or

"(vii) a portion of a facility, for which portion, assistance for response activity has been 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) ELIGIBLE ENTITY.—The term 'eligible entity' means—

"(A) a general purpose unit of local government;

"(B) a land clearance authority or other quasi-governmental entity that operates under the supervision and control of or as an agent of a general purpose unit of local government;

"(C) a regional council or group of general purpose units of local government;

"(D) a redevelopment agency that is chartered or otherwise sanctioned by a State; and

"(E) an Indian tribe.

"(b) BROWNFIELD CHARACTERIZATION GRANT PROGRAM.—

"(1) ESTABLISHMENT OF PROGRAM.—The Administrator shall establish a program to provide grants for the site characterization and assessment of brownfield facilities.

"(2) ASSISTANCE FOR SITE CHARACTERIZATION AND ASSESSMENT.—

"(A) IN GENERAL.—On approval of an application made by an eligible entity, the Administrator may make grants out of the Fund to the eligible entity to be used for the site characterization and assessment of 1 or more brownfield facilities or to capitalize a revolving loan fund.

"(B) APPROPRIATE INQUIRY.—A site characterization and assessment carried out with the use of a grant under subparagraph (A) shall be performed in accordance with section 101(35)(B).

"(3) MAXIMUM GRANT AMOUNT.—A grant under subparagraph (A) shall not exceed, with respect to any individual brownfield facility covered by the grant, $100,000 for any fiscal year or $200,000 in total.

"(c) BROWNFIELD REMEDIATION GRANT PROGRAM.—

"(1) ESTABLISHMENT OF PROGRAM.—The Administrator shall establish a program to provide grants to be used for capitalization of revolving loan funds for response actions (excluding site characterization and assessment) at brownfield facilities.

"(2) ASSISTANCE FOR SITE CHARACTERIZATION AND ASSESSMENT.—

"(A) IN GENERAL.—On approval of an application made by a State or an eligible entity, the Administrator may make grants out of the Fund to the State or eligible entity to capitalize a revolving loan fund to be used for response actions (excluding site characterization and assessment) at 1 or more brownfield facilities.

"(B) APPROPRIATE INQUIRY.—A site characterization and assessment carried out with the use of a grant under subparagraph (A) shall be performed in accordance with section 101(35)(B).

"(3) MAXIMUM GRANT AMOUNT.—A grant under subparagraph (A) shall not exceed, with respect to any individual brownfield facility covered by the grant, $150,000 for any fiscal year or $300,000 in total.

"(d) GENERAL PROVISIONS.—

"(1) SUNSET.—No amount shall be available from the Fund for purposes of this section after the fifth fiscal year after the date of enactment of this section.

"(2) PROHIBITION.—No part of a grant under this section may be used for payment of penalties, fines, or administrative costs.

"(3) AUDITS.—The Inspector General of the Environmental Protection Agency shall audit an appropriate number of grants made under subsections (b)(2) and (c)(2) to ensure that funds are used for the purposes described in this section.

"(4) AGREEMENTS.—Each grant made under this section shall be subject to an agreement that—

"(A) requires the eligible entity to comply with all applicable State laws (including regulations);

"(B) requires that the eligible entity shall use the grant exclusively for purposes specified in subsection (b)(2) or (c)(2);

"(C) in the case of an application by a State under subsection (c)(2), payment by the State of a matching share of at least 50 percent of the costs of the response action for which the grant is made, from other sources of State funding; and

"(D) contains such other terms and conditions as the Administrator determines to be

necessary to carry out the purposes of this section.

"(5) LEVERAGING.—An eligible entity that receives a grant under paragraph (1) may use the funds for part of a project at a brownfield facility for which funding is received from other sources, but the grant shall be used only for the purposes described in subsection (b)(2) or (c)(2).

"(e) GRANT APPLICATIONS.—

"(1) IN GENERAL.—Any eligible entity may submit an application to the Administrator, through a regional office of the Environmental Protection Agency and in such form as the Administrator may require, for a grant under this section for 1 or more brownfield facilities.

"(2) APPLICATION REQUIREMENTS.—An application for a grant under this section shall include—

"(A) an identification of each brownfield facility for which the grant is sought and a description of the redevelopment plan for the area or areas in which the brownfield facilities are located, including a description of the nature and extent of any known or suspected environmental contamination within the area;

"(B) an analysis that demonstrates the potential of the grant to stimulate economic development on completion of the planned response action, including a projection of the number of jobs expected to be created at each facility after remediation and redevelopment and, to the extent feasible, a description of the type and skill level of the jobs and a projection of the increases in revenues accruing to Federal, State, and local governments from the jobs; and

"(C) information relevant to the ranking criteria stated in paragraph (4).

"(3) APPROVAL.—

"(A) INITIAL GRANT.—On or about March 30 and September 30 of the first fiscal year following the date of enactment of this section, the Administrator shall make grants under this section to eligible entities that submit applications before those dates that the Administrator determines have the highest rankings under ranking criteria established under paragraph (4).

"(B) SUBSEQUENT GRANTS.—Beginning with the second fiscal year following the date of enactment of this section, the Administrator

shall make an annual evaluation of each application received during the prior fiscal year and make grants under this section to eligible entities that submit applications during the prior year that the Administrator determines have the highest rankings under the ranking criteria established under paragraph (4).

"(4) RANKING CRITERIA.—The Administrator shall establish a system for ranking grant applications that includes the following criteria:

"(A) The extent to which a grant will stimulate the availability of other funds for environmental remediation and subsequent redevelopment of the area in which the brownfield facilities are located.

"(B) The potential of the development plan for the area in which the brownfield facilities are located to stimulate economic development of the area on completion of the cleanup, such as the following:

"(i) The relative increase in the estimated fair market value of the area as a result of any necessary response action.

"(ii) The potential of a grant to create new or expand existing business and

employment opportunities (particularly full-time employment opportunities) on completion of any necessary response action.

"(iii) The estimated additional tax revenues expected to be generated by economic redevelopment in the area in which a brownfield facility is located.

"(iv) The estimated extent to which a grant would facilitate the identification of or facilitate a reduction of health and environmental risks.

"(v) The financial involvement of the State and local government in any response action planned for a brownfield facility and the extent to which the response action and the proposed redevelopment is consistent with any applicable State or local community economic development plan.

"(vi) The extent to which the site characterization and assessment or response action and subsequent development of a brownfield facility involves the active

participation and support of the local community.

"(vii) Such other factors as the Administrator considers appropriate to carry out the purposes of this section.".

(b) FUNDING.—Section 111 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9611) is amended by adding at the end the following:

"(q) BROWNFIELD CHARACTERIZATION GRANT PROGRAM.—For each of fiscal years 1998 through 2002, not more than $15,000,000 of the amounts available in the Fund may be used to carry out section 127(b).

"(r) BROWNFIELD REMEDIATION GRANT PROGRAM.—For each of fiscal years 1998 through 2002, not more than $25,000,000 of the amounts available in the Fund may be used to carry out section 127(c).".

SEC. 102. ASSISTANCE FOR QUALIFYING STATE VOLUNTARY RESPONSE PROGRAMS.

(a) DEFINITION.—Section 101 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601) is amended by adding at the end the following:

"(39) QUALIFYING STATE VOLUNTARY RESPONSE PROGRAM.—The term 'qualifying State voluntary response program' means a State program that includes the elements described in section 128(b).".

(b) QUALIFYING STATE VOLUNTARY RESPONSE PROGRAMS.—Title I of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601 et seq.) (as amended by section 101(a)) is amended by adding at the end the following:

"SEC. 128. QUALIFYING STATE VOLUNTARY RESPONSE PROGRAMS.

"(a) ASSISTANCE TO STATES.—The Administrator shall provide technical and other assistance to States to establish and expand qualifying State voluntary response programs that include the elements listed in subsection (b).

"(b) ELEMENTS.—The elements of a qualifying State voluntary response program are the following:

"(1) Opportunities for technical assistance for voluntary response actions.

"(2) Adequate opportunities for public participation, including prior notice and opportunity for comment in appropriate circumstances, in selecting response actions.

"(3) Streamlined procedures to ensure expeditious voluntary response actions.

"(4) Oversight and enforcement authorities or other mechanisms that are adequate to ensure that—

"(A) voluntary response actions will protect human health and the environment and be conducted in accordance with applicable Federal and State law; and

"(B) if the person conducting the voluntary response action fails to complete the necessary response activities, including operation and maintenance or long-term monitoring activities, the necessary response activities are completed.

"(5) Mechanisms for approval of a voluntary response action plan.

"(6) A requirement for certification or similar documentation from the State to the person conducting the voluntary response action indicating that the response is complete.

"(c) COMPLIANCE WITH ACT.—A person that conducts a voluntary response action under this section at a facility that is listed or proposed for listing on the National Priorities List shall implement applicable provisions

of this Act or of similar provisions of State law in a manner comporting with State policy, so long as the remedial action that is selected protects human health and the environment to the same extent as would a remedial action selected by the Administrator under section 121(a).".

(c) FUNDING.—Section 111 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9611) (as amended by section 101(b)) is amended by adding at the end the following:

"(s) QUALIFYING STATE VOLUNTARY RESPONSE PROGRAM.—For each of fiscal years 1998 through 2002, not more than $25,000,000 of the amounts available in the Fund may be used for assistance to States to establish and administer qualifying State voluntary response programs, during the first 5 full fiscal years following the date of enactment of this subparagraph, distributed among each of the States that notifies the Administrator of the State's intent to establish a qualifying State voluntary response program and each of the States with a qualifying State voluntary response program. For each fiscal year there shall be available to each eligible entity a grant in the amount of at least $250,000.".

SEC. 103. ENFORCEMENT IN CASES OF A RELEASE SUBJECT TO A STATE PLAN.

Title I of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601 et seq.) is amended by adding at the end the following:

"SEC. 129. ENFORCEMENT IN CASES OF A RELEASE SUBJECT TO A STATE PLAN.

"(a) IN GENERAL.—In the case of a facility at which there is a release or threatened release of a hazardous substance subject to a State remedial action plan or with respect to which the State has provided certification or similar documentation that response action has been completed under a State remedial action plan, neither the President nor any other person may use any authority under this Act to take an administrative or judicial enforcement action or to bring a private civil action against any person regarding any matter that is within the scope of the plan.

"(b) RELEASES NOT SUBJECT TO STATE PLANS.—For any facility at which there is a release or threatened release of hazardous substances that is not subject to a State remedial action plan, the President shall provide notice to the State within 48 hours after issuing an order under section 106(a) addressing a release or threatened release. Such an order shall cease to have force or effect

on the date that is 90 days after issuance unless the State concurs in the continuation of the order.

"(c) COST OR DAMAGE RECOVERY ACTIONS.—Subsection (a) does not apply to an action brought by a State or Indian tribe for the recovery of costs or damages under section 107.".

SEC. 104. CONTIGUOUS PROPERTIES.

(a) IN GENERAL.—Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9607(a)) is amended by adding at the end the following:

"(o) CONTIGUOUS PROPERTIES.—

"(1) NOT CONSIDERED TO BE AN OWNER OR OPERATOR.—A person that owns or operates real property that is contiguous to or otherwise similarly situated with respect to real property on which there has been a release or threatened release of a hazardous substance and that is or may be contaminated by the release shall not be considered to be an owner or operator of a vessel or facility under subsection (a) (1) or (2) solely by reason of the contamination if—

"(A) the person did not cause, contribute, or consent to the release or threatened release; and

"(B) the person is not liable, and is not affiliated with any other person that is liable, for any 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.

"(2) COOPERATION, ASSISTANCE, AND ACCESS.—Notwithstanding paragraph (1), a person described in paragraph (1) shall provide full cooperation, assistance, and facility access to the persons that are 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.

"(3) ASSURANCES.—The Administrator may—

"(A) issue an assurance that no enforcement action under this Act will be initiated against a person described in paragraph (1); and

"(B) grant a person described in paragraph (1) protection against a cost recovery or contribution action under section 113(f).".

(b) CONFORMING AMENDMENT.—Section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9607) is amended by striking "of this section" and inserting "and the exemptions and limitations stated in this section".

SEC. 105. PROSPECTIVE PURCHASERS AND WINDFALL LIENS.

(a) DEFINITION.—Section 101 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601) (as amended by section 102(a)) is amended by adding at the end the following:

"(40) BONA FIDE PROSPECTIVE PURCHASER.—The term 'bona fide prospective purchaser' means a person that acquires ownership of a facility after the date of enactment of this paragraph, or a tenant of such a person, that establishes each of the following by a preponderance of the evidence:

"(A) DISPOSAL PRIOR TO ACQUISITION.—All active disposal of hazardous substances at the facility occurred before the person acquired the facility.

"(B) INQUIRIES.—

"(i) IN GENERAL.—The person made all appropriate inquiries into the previous ownership and uses of the facility and the

facility's real property in accordance with generally accepted good commercial and customary standards and practices.

"(ii) STANDARDS AND PRACTICES.—The standards and practices referred to in paragraph (35)(B)(ii) or those issued or adopted by the Administrator under that paragraph shall be considered to satisfy the requirements of this subparagraph.

"(iii) RESIDENTIAL USE.—In the case of property for residential or other similar use purchased by a nongovernmental or noncommercial entity, a facility inspection and title search that reveal no basis for further investigation shall be considered to satisfy the requirements of this subparagraph.

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

"(D) CARE.—The person exercised appropriate care with respect to each hazardous substance found at the facility by taking reasonable steps to stop any continuing release, prevent

any threatened future release and prevent or limit human or natural resource exposure to any previously released hazardous substance.

"(E) COOPERATION, ASSISTANCE, AND ACCESS.—The person provides full cooperation, assistance, and facility access to the persons that are 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.

"(F) RELATIONSHIP.—The person is not liable, and is not affiliated with any other person that is liable, for any 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.".

(b) AMENDMENT.—Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9607) (as amended by section 104) is amended by adding at the end the following:

"(p) PROSPECTIVE PURCHASER AND WINDFALL LIEN.—

"(1) LIMITATION ON LIABILITY.—Notwithstanding subsection (a), a bona fide prospective purchaser whose potential liability for a release or threatened release is based solely on the purchaser's being considered to be an owner or operator of a facility shall not be liable as long as the bona fide prospective purchaser does not impede the performance of a response action or natural resource restoration.

"(2) LIEN.—If there are unrecovered response costs at a facility for which an owner of the facility is not liable by reason of section 101(20)(G)(iii) and each of the conditions described in paragraph (3) is met, the United States shall have a lien on the facility, or may obtain from appropriate responsible party a lien on any other property or other assurances of payment satisfactory to the Administrator, for such unrecovered costs.

"(3) CONDITIONS.—The conditions referred to in paragraph (1) are the following:

"(A) RESPONSE ACTION.—A response action for which there are unrecovered costs is carried out at the facility.

"(B) FAIR MARKET VALUE.—The response action increases the fair market value of the facility above the fair market value of the facility

that existed 180 days before the response action was initiated.

"(C) SALE.—A sale or other disposition of all or a portion of the facility has occurred.

"(4) AMOUNT.—A lien under paragraph (2)—

"(A) 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 the property;

"(B) shall arise at the time at which costs are first incurred by the United States with respect to a response action at the facility;

"(C) shall be subject to the requirements of subsection (l)(3); and

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

SEC. 106. SAFE HARBOR INNOCENT LANDHOLDERS.

(a) AMENDMENT.—Section 101(35) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601(35)) is amended by striking subparagraph (B) and inserting the following:

"(B) KNOWLEDGE OF INQUIRY REQUIREMENT.—

"(i) ALL APPROPRIATE INQUIRIES.—To establish that the defendant had no reason to know of the matter described in subparagraph (A)(i), the defendant must show that, at or prior to the date on which the defendant acquired the facility, the defendant undertook all appropriate inquiries into the previous ownership and uses of the facility in accordance with generally accepted good commercial and customary standards and practices.

"(ii) STANDARDS AND PRACTICES.—The Administrator shall by regulation establish as standards and practices for the purpose of clause (i)—

"(I) the American Society for Testing and Materials (ASTM) Standard E1527–94, entitled 'Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process'; or

"(II) alternative standards and practices under clause (iii).

"(iii) ALTERNATIVE STANDARDS AND PRACTICES.—

"(I) IN GENERAL.—The Administrator may by regulation issue alternative standards and practices or designate standards developed by other organizations than the American Society for Testing and Materials after conducting a study of commercial and industrial practices concerning the transfer of real property in the United States.

"(II) CONSIDERATIONS.—In issuing or designating alternative standards and practices under subclause (I), the Administrator shall consider including each of the following:

"(aa) The results of an inquiry by an environmental professional.

"(bb) Interviews with past and present owners, operators, and occupants of the facility and the facility's real property for the purpose of gathering information

regarding the potential for contamination at the facility and the facility's real property.

"(cc) Reviews of historical sources, such as chain of title documents, aerial photographs, building department records, and land use records to determine previous uses and occupancies of the real property since the property was first developed.

"(dd) Searches for recorded environmental cleanup liens, filed under Federal, State, or local law, against the facility or the facility's real property.

"(ee) Reviews of Federal, State, and local government records (such as waste disposal records), underground storage tank records, and hazardous waste handling, generation, treatment, disposal, and spill records, concerning contamination at or

near the facility or the facility's real property.

"(ff) Visual inspections of the facility and facility's real property and of adjoining properties.

"(gg) Specialized knowledge or experience on the part of the defendant.

"(hh) The relationship of the purchase price to the value of the property if the property was uncontaminated.

"(ii) Commonly known or reasonably ascertainable information about the property.

"(jj) The degree of obviousness of the presence or likely presence of contamination at the property, and the ability to detect such contamination by appropriate investigation.

"(iv) SITE INSPECTION AND TITLE SEARCH.—In the case of property for residential use or other similar use purchased

by a nongovernmental or noncommercial entity, a facility inspection and title search that reveal no basis for further investigation shall be considered to satisfy the requirements of this subparagraph.".

(b) STANDARDS AND PRACTICES.—

(1) ESTABLISHMENT BY REGULATION.—The Administrator of the Environmental Protection Agency shall issue the regulation required by section 101(35)(B)(ii) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (as added by subsection (a)) not later than 1 year after the date of enactment of this Act.

(2) INTERIM STANDARDS AND PRACTICES.—Until the Administrator issues the regulation described in paragraph (1), in making a determination under section 101(35)(B)(i) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (as added by subsection (a)), there shall be taken into account—

(A) any specialized knowledge or experience on the part of the defendant;

(B) the relationship of the purchase price to the value of the property if the property was uncontaminated;

(C) commonly known or reasonably ascertainable information about the property;

(D) the degree of obviousness of the presence or likely presence of contamination at the property; and

(E) the ability to detect the contamination by appropriate investigation.

TITLE II—STATE ROLE

SEC. 201. DELEGATION TO THE STATES OF AUTHORITIES WITH RESPECT TO NATIONAL PRIORITIES LIST FACILITIES.

(a) IN GENERAL.—Title I of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601 et seq.) (as amended by section 103) is amended by adding at the end the following:

"SEC. 130. DELEGATION TO THE STATES OF AUTHORITIES WITH RESPECT TO NATIONAL PRIORITIES LIST FACILITIES.

"(a) DEFINITIONS.—In this section:

"(1) COMPREHENSIVE DELEGATION STATE.—The term 'comprehensive delegation State', with respect to a facility, means a State to which the Administrator has delegated authority to perform all of the categories of delegable authority.

"(2) DELEGABLE AUTHORITY.—The term 'delegable authority' means authority to perform (or ensure performance of) all of the authorities included in any 1 or more of the categories of authority:

"(A) CATEGORY A.—All authorities necessary to perform technical investigations, evaluations, and risk analyses, including—

"(i) a preliminary assessment or facility evaluation under section 104;

"(ii) facility characterization under section 104;

"(iii) a remedial investigation under section 104;

"(iv) a facility-specific risk evaluation under section 131;

"(v) enforcement authority related to the authorities described in clauses (i) through (iv); and

"(vi) any other authority identified by the Administrator under subsection (b).

"(B) CATEGORY B.—All authorities necessary to perform alternatives development and remedy selection, including—

"(i) a feasibility study under section 104; and

"(ii)(I) remedial action selection under section 121 (including issuance of a record of decision); or

"(II) remedial action planning under section 133(b)(5);

"(iii) enforcement authority related to the authorities described in clauses (i) and (ii); and

"(iv) any other authority identified by the Administrator under subsection (b).

"(C) CATEGORY C.—All authorities necessary to perform remedial design, including—

"(i) remedial design under section 121;

"(ii) enforcement authority related to the authority described in clause (i); and

"(iii) any other authority identified by the Administrator under subsection (b).

"(D) CATEGORY D.—All authorities necessary to perform remedial action and operation and maintenance, including—

"(i) a removal under section 104;

"(ii) a remedial action under section 104 or section 10 (a) or (b);

"(iii) operation and maintenance under section 104(c);

"(iv) enforcement authority related to the authorities described in clauses (i) through (iii); and

"(v) any other authority identified by the Administrator under subsection (b).

"(E) CATEGORY E.—All authorities necessary to perform information collection and allocation of liability, including—

"(i) information collection activity under section 104(e);

"(ii) allocation of liability under section 136;

"(iii) a search for potentially responsible parties under section 104 or 107;

"(iv) settlement under section 122;

"(v) enforcement authority related to the authorities described in clauses (i) through (iv); and

"(vi) any other authority identified by the Administrator under subsection (b).

"(3) DELEGATED STATE.—The term 'delegated State' means a State to which delegable authority has been delegated under subsection (c), except as

may be provided in a delegation agreement in the case of a limited delegation of authority under subsection (c)(5).

"(4) DELEGATED AUTHORITY.—The term 'delegated authority' means a delegable authority that has been delegated to a delegated State under this section.

"(5) DELEGATED FACILITY.—The term 'delegated facility' means a non-federal listed facility with respect to which a delegable authority has been delegated to a State under this section.

"(6) ENFORCEMENT AUTHORITY.—The term "enforcement authority" means all authorities necessary to recover response costs, require potentially responsible parties to perform response actions, and otherwise compel implementation of a response action, including—

"(A) issuance of an order under section 106(a);

"(B) a response action cost recovery under section 107;

"(C) imposition of a civil penalty or award under section 109 (a)(1)(D) or (b)(4);

"(D) settlement under section 122; and

"(E) any other authority identified by the Administrator under subsection (b).

"(7) NONCOMPREHENSIVE DELEGATION STATE.—The term 'noncomprehensive delegation State', with respect to a facility, means a State to which the Administrator has delegated authority to perform fewer than all of the categories of delegable authority.

"(8) NONDELEGABLE AUTHORITY.—The term 'nondelegable authority' means authority to—

"(A) make grants to community response organizations under section 117; and

"(B) conduct research and development activities under any provision of this Act.

"(9) NON-FEDERAL LISTED FACILITY.—The term 'non-federal listed facility' means a facility that—

"(A) is not owned or operated by a department, agency, or instrumentality of the United States in any branch of the Government; and

"(B) is listed on the National Priorities List.

"(b) IDENTIFICATION OF DELEGABLE AUTHORITIES.—

"(1) IN GENERAL.—The President shall by regulation identify all of the authorities of the Administrator that shall be included in a delegation of any category of delegable authority described in subsection (a)(2).

"(2) LIMITATION.—The Administrator shall not identify a nondelegable authority for inclusion in a delegation of any category of delegable authority.

"(c) DELEGATION OF AUTHORITY.—

"(1) IN GENERAL.—Pursuant to an approved State application, the Administrator shall delegate authority to perform 1 or more delegable authorities with respect to 1 or more non-Federal listed facilities in the State.

"(2) APPLICATION.—An application under paragraph (1) shall—

"(A) identify each non-Federal listed facility for which delegation is requested;

"(B) identify each delegable authority that is requested to be delegated for each non-Federal listed facility for which delegation is requested; and

"(C) certify that the State, supported by such documentation as the State, in consultation with the Administrator, considers to be appropriate—

"(i) has statutory and regulatory authority (including appropriate enforcement authority) to perform the requested delegable authorities in a manner that is protective of human health and the environment;

"(ii) has resources in place to adequately administer and enforce the authorities;

"(iii) has procedures to ensure public notice and, as appropriate, opportunity for comment on remedial action plans, consistent with sections 117 and 133; and

"(iv) agrees to exercise its enforcement authorities to require that persons that are potentially liable under section 107(a), to the extent practicable, perform and pay for the response actions set forth in each category described in subsection (a)(2).

"(3) APPROVAL OF APPLICATION.—

"(A) IN GENERAL.—Not later than 60 days after receiving an application under paragraph (2) by a State that is authorized to administer and enforce the corrective action requirements of a hazardous waste program under section 3006 of the Solid Waste Disposal Act (42 U.S.C. 6926), and not later than 120 days after receiving an application from a State that is not authorized to administer and enforce the corrective action requirements of a hazardous waste program under section 3006 of the Solid Waste Disposal Act (42 U.S.C. 6926), unless the State agrees to a greater length of time for the Administrator to make a determination, the Administrator shall—

"(i) issue a notice of approval of the application (including approval or disapproval regarding any or all of the facilities with respect to which a delegation of authority is requested or with respect to any or all of the authorities that are requested to be delegated); or

"(ii) if the Administrator determines that the State does not have adequate legal

authority, financial and personnel resources, organization, or expertise to administer and enforce any of the requested delegable authority, issue a notice of disapproval, including an explanation of the basis for the determination.

"(B) FAILURE TO ACT.—If the Administrator does not issue a notice of approval or notice of disapproval of all or any portion of an application within the applicable time period under subparagraph (A), the application shall be deemed to have been granted.

"(C) RESUBMISSION OF APPLICATION.—

"(i) IN GENERAL.—If the Administrator disapproves an application under paragraph (1), the State may resubmit the application at any time after receiving the notice of disapproval.

"(ii) FAILURE TO ACT.—If the Administrator does not issue a notice of approval or notice of disapproval of a resubmitted application within the applicable time period under subparagraph (A), the resubmitted application shall be deemed to have been granted.

"(D) NO ADDITIONAL TERMS OR CONDITIONS.—The Administrator shall not impose any term or condition on the approval of an application that meets the requirements stated in paragraph (2) (except that any technical deficiencies in the application be corrected).

"(E) JUDICIAL REVIEW.—The State (but no other person) shall be entitled to judicial review under section 113(b) of a disapproval of a resubmitted application.

"(4) DELEGATION AGREEMENT.—On approval of a delegation of authority under this section, the Administrator and the delegated State shall enter into a delegation agreement that identifies each category of delegable authority that is delegated with respect to each delegated facility.

"(5) LIMITED DELEGATION.—

"(A) IN GENERAL.—In the case of a State that does not meet the requirements of paragraph (2)(C) the Administrator may delegate to the State limited authority to perform, ensure the performance of, or supervise or otherwise participate in the performance of 1 or more delegable authorities, as appropriate in view of the extent to which the State has the required legal

authority, financial and personnel resources, organization, and expertise.

"(B) SPECIAL PROVISIONS.—In the case of a limited delegation of authority to a State under subparagraph (A), the Administrator shall specify the extent to which the State shall be considered to be a delegated State for the purposes of this Act.

"(d) PERFORMANCE OF DELEGATED AUTHORITIES.—

"(1) IN GENERAL.—A delegated State shall have sole authority (except as provided in paragraph (6)(B), subsection (e)(4), and subsection (g)) to perform a delegated authority with respect to a delegated facility.

"(2) AGREEMENTS FOR PERFORMANCE OF DELEGATED AUTHORITIES.—

"(A) IN GENERAL.—Except as provided in subparagraph (B), a delegated State may enter into an agreement with a political subdivision of the State, an interstate body comprised of that State and another delegated State or States, or a combination of such subdivisions or interstate bodies, providing for the performance of any category of delegated authority with respect to

a delegated facility in the State if the parties to the agreement agree in the agreement to undertake response actions that are consistent with this Act.

"(B) NO AGREEMENT WITH POTENTIALLY RESPONSIBLE PARTY.—A delegated State shall not enter into an agreement under subparagraph (A) with a political subdivision or interstate body that is, or includes as a component an entity that is, a potentially responsible party with respect to a delegated facility covered by the agreement.

"(C) CONTINUING RESPONSIBILITY.—A delegated State that enters into an agreement under subparagraph (A)—

"(i) shall exercise supervision over and approve the activities of the parties to the agreement; and

"(ii) shall remain responsible for ensuring performance of the delegated authority.

"(3) COMPLIANCE WITH ACT.—

"(A) NONCOMPREHENSIVE DELEGATION STATES.—A noncomprehensive delegation State shall implement each applicable provision of

this Act (including regulations and guidance issued by the Administrator) so as to perform each delegated authority with respect to a delegated facility in the same manner as would the Administrator with respect to a facility that is not a delegated facility.

"(B) COMPREHENSIVE DELEGATION STATES.—

"(i) IN GENERAL.—A comprehensive delegation State shall implement applicable provisions of this Act or of similar provisions of State law in a manner comporting with State policy, so long as the remedial action that is selected protects human health and the environment to the same extent as would a remedial action selected by the Administrator under section 121.

"(ii) COSTLIER REMEDIAL ACTION.—

"(I) IN GENERAL.—A delegated State may select a remedial action for a delegated facility that has a greater response cost (including operation and maintenance costs) than the response cost for a remedial action that would be selected by the Administrator

under section 121, if the State pays for the difference in cost.

"(II) NO COST RECOVERY.—If a delegated State selects a more costly remedial action under subclause (I), the State shall not be entitled to seek cost recovery under this Act or any other Federal or State law from any other person for the difference in cost.

"(4) JUDICIAL REVIEW.—An order that is issued under section 106 by a delegated State with respect to a delegated facility shall be reviewable only in United States district court under section 113.

"(5) DELISTING OF NATIONAL PRIORITIES LIST FACILITIES.—

"(A) DELISTING.—After notice and an opportunity for public comment, a delegated State may remove from the National Priorities List all or part of a delegated facility—

"(i) if the State makes a finding that no further action is needed to be taken at the facility (or part of the facility) under any applicable law to protect human health and the environment consistent with section 121(a) (1) and (2);

"(ii) with the concurrence of the potentially responsible parties, if the State has an enforceable agreement to perform all required remedial action and operation and maintenance for the facility or if the cleanup will proceed at the facility under section 3004 (u) or (v) of the Solid Waste Disposal Act (42 U.S.C. 6924 (u), (v)); or

"(iii) if the State is a comprehensive delegation State with respect to the facility.

"(B) EFFECT OF DELISTING.—A delisting under subparagraph (A) (ii) or (iii) shall not affect—

"(i) the authority or responsibility of the State to complete remedial action and operation and maintenance;

"(ii) the eligibility of the State for funding under this Act;

"(iii) notwithstanding the limitation on section 104(c)(1), the authority of the Administrator to make expenditures from the Fund relating to the facility; or

"(iv) the enforceability of any consent order or decree relating to the facility.

"(C) NO RELISTING.—

"(i) IN GENERAL.—Except as provided in clause (ii), the Administrator shall not relist on the National Priorities List a facility or part of a facility that has been removed from the National Priorities List under subparagraph (A).

"(ii) CLEANUP NOT COMPLETED.—The Administrator may relist a facility or part of a facility that has been removed from the National Priorities List under subparagraph (A) if cleanup is not completed in accordance with the enforceable agreement under subparagraph (A)(ii).

"(6) COST RECOVERY.—

"(A) RECOVERY BY A DELEGATED STATE.—Of the amount of any response costs recovered from a responsible party by a delegated State for a delegated facility under section 107—

"(i) 25 percent of the amount of any Federal response cost recovered with respect to a facility, plus an amount equal to the amount of response costs incurred by

the State with respect to the facility, may be retained by the State; and

"(ii) the remainder shall be deposited in the Hazardous Substances Superfund established under subchapter A of chapter 98 of the Internal Revenue Code of 1986.

"(B) RECOVERY BY THE ADMINISTRATOR.—

"(i) IN GENERAL.—The Administrator may take action under section 107 to recover response costs from a responsible party for a delegated facility if—

"(I) the delegated State notifies the Administrator in writing that the delegated State does not intend to pursue action for recovery of response costs under section 107 against the responsible party; or

"(II) the delegated State fails to take action to recover response costs within a reasonable time in light of applicable statutes of limitation.

"(ii) NOTICE.—If the Administrator proposes to commence an action for recovery of response costs under section 107,

the Administrator shall give the State written notice and allow the State at least 90 days after receipt of the notice to commence the action.

"(iii) NO FURTHER ACTION.—If the Administrator takes action against a potentially responsible party under section 107 relating to a release from a delegated facility, the delegated State may not take any other action for recovery of response costs relating to that release under this Act or any other Federal or State law.

"(e) FEDERAL RESPONSIBILITIES AND AUTHORITIES.—

"(1) REVIEW USE OF FUNDS.—

"(A) IN GENERAL.—The Administrator shall review the certification submitted by the Governor under subsection (f)(8) not later than 120 days after the date of its submission.

"(B) FINDING OF USE OF FUNDS INCONSISTENT WITH THIS ACT.—If the Administrator finds that funds were used in a manner that is inconsistent with this Act, the Administrator shall notify the Governor in writing not later

than 120 days after receiving the Governor's certification.

"(C) EXPLANATION.—Not later than 30 days after receiving a notice under subparagraph (B), the Governor shall—

"(i) explain why the Administrator's finding is in error; or

"(ii) explain to the Administrator's satisfaction how any misapplication or misuse of funds will be corrected.

"(D) FAILURE TO EXPLAIN.—If the Governor fails to make an explanation under subparagraph (C) to the Administrator's satisfaction, the Administrator may request reimbursement of such amount of funds as the Administrator finds was misapplied or misused.

"(E) REPAYMENT OF FUNDS.—If the Administrator fails to obtain reimbursement from the State within a reasonable period of time, the Administrator may, after 30 days' notice to the State, bring a civil action in United States district court to recover from the delegated State any funds that were advanced for a purpose or were used for a purpose or in a manner that is inconsistent with this Act.

"(2) WITHDRAWAL OF DELEGATION OF AUTHORITY.—

"(A) DELEGATED STATES.—If at any time the Administrator finds that contrary to a certification made under subsection (c)(2), a delegated State—

"(i) lacks the required financial and personnel resources, organization, or expertise to administer and enforce the requested delegated authorities;

"(ii) does not have adequate legal authority to request and accept delegation; or

"(iii) is failing to materially carry out the State's delegated authorities,

the Administrator may withdraw a delegation of authority with respect to a delegated facility after providing notice and opportunity to correct deficiencies under subparagraph (D).

"(B) STATES WITH LIMITED DELEGATIONS OF AUTHORITY.—If the Administrator finds that a State to which a limited delegation of authority was made under subsection (c)(5) has materially breached the delegation agreement, the Administrator may withdraw the delegation

after providing notice and opportunity to correct deficiencies under subparagraph (D).

"(C) NOTICE AND OPPORTUNITY TO CORRECT.—If the Administrator proposes to withdraw a delegation of authority for any or all delegated facilities, the Administrator shall give the State written notice and allow the State at least 90 days after the date of receipt of the notice to correct the deficiencies cited in the notice.

"(D) FAILURE TO CORRECT.—If the Administrator finds that the deficiencies have not been corrected within the time specified in a notice under subparagraph (C), the Administrator may withdraw delegation of authority after providing public notice and opportunity for comment.

"(E) JUDICIAL REVIEW.—A decision of the Administrator to withdraw a delegation of authority shall be subject to judicial review under section 113(b).

"(3) RULE OF CONSTRUCTION.—Nothing in this section shall be construed to affect the authority of the Administrator under this Act to—

"(A) take a response action at a facility listed on the National Priorities List in a State to which a delegation of authority has not been made under this section or at a facility not included in a delegation of authority; or

"(B) perform a delegable authority with respect to a facility that is not included among the authorities delegated to a State with respect to the facility.

"(4) RETAINED AUTHORITY.—

"(A) NOTICE.—Before performing an emergency removal action under section 104 at a delegated facility, the Administrator shall notify the delegated States of the Administrator's intention to perform the removal.

"(B) STATE ACTION.—If, after receiving a notice under subparagraph (A), the delegated State notifies the Administrator within 48 hours that the State intends to take action to perform an emergency removal at the delegated facility, the Administrator shall not perform the emergency removal action unless the Administrator determines that the delegated State has failed to act within a reasonable period of time to perform the emergency removal.

"(C) IMMEDIATE AND SIGNIFICANT DANGER.—If the Administrator finds that an emergency at a delegated facility poses an immediate and significant danger to human health or the environment, the Administrator shall not be required to provide notice under subparagraph (A).

"(5) PROHIBITED ACTIONS.—Except as provided in subsections (d)(6)(B), (e)(4), and (g) or except with the concurrence of the delegated State, the President, the Administrator, and the Attorney General shall not take any action under section 104, 106, 107, 109, 121, or 122 in performance of a delegable authority that has been delegated to a State with respect to a delegated facility.

"(f) FUNDING.—

"(1) IN GENERAL.—The Administrator shall provide grants to or enter into contracts or cooperative agreements with delegated States to carry out this section.

"(2) NO CLAIM AGAINST FUND.—Notwithstanding any other law, funds to be granted under this subsection shall not constitute a claim against the Fund or the United States.

"(3) INSUFFICIENT FUNDS AVAILABLE.—If funds are unavailable in any fiscal year to satisfy all commitments made under this section by the Administrator, the Administrator shall have sole authority and discretion to establish priorities and to delay payments until funds are available.

"(4) DETERMINATION OF COSTS ON A FACILITY-SPECIFIC BASIS.—The Administrator shall—

"(A) determine—

"(i) the delegable authorities the costs of performing which it is practicable to determine on a facility-specific basis; and

"(ii) the delegable authorities the costs of performing which it is not practicable to determine on a facility-specific basis; and

"(B) publish a list describing the delegable authorities in each category.

"(5) FACILITY-SPECIFIC GRANTS.—The costs described in paragraph (4)(A)(ii) shall be funded as such costs arise with respect to each delegated facility.

"(6) NONFACILITY-SPECIFIC GRANTS.—

"(A) IN GENERAL.—The costs described in paragraph (4)(A)(ii) shall be funded through nonfacility-specific grants under this paragraph.

"(B) FORMULA.—The Administrator shall establish a formula under which funds available for nonfacility-specific grants shall be allocated among the delegated States, taking into consideration—

"(i) the cost of administering the delegated authority;

"(ii) the number of sites for which the State has been delegated authority;

"(iii) the types of activities for which the State has been delegated authority;

"(iv) the number of facilities within the State that are listed on the National Priorities List or are delegated facilities under section 130(d)(5);

"(v) the number of other high priority facilities within the State;

"(vi) the need for the development of the State program;

"(vii) the need for additional personnel;

"(viii) the amount of resources available through State programs for the cleanup of contaminated sites; and

"(ix) the benefit to human health and the environment of providing the funding.

"(7) PERMITTED USE OF GRANT FUNDS.—A delegated State may use grant funds, in accordance with this Act and the National Contingency Plan, to take any action or perform any duty necessary to implement the authority delegated to the State under this section.

"(8) COST SHARE.—

"(A) ASSURANCE.—A delegated State to which a grant is made under this subsection shall provide an assurance that the State will pay any amount required under section 104(c)(3).

"(B) PROHIBITED USE OF GRANT FUNDS.—A delegated State to which a grant is made under this subsection may not use grant funds to pay any amount required under section 104(c)(3).

"(9) CERTIFICATION OF USE OF FUNDS.—

"(A) IN GENERAL.—Not later than 1 year after the date on which a delegated State receives funds under this subsection, and annually thereafter, the Governor of the State shall submit to the Administrator—

"(i) a certification that the State has used the funds in accordance with the requirements of this Act and the National Contingency Plan; and

"(ii) information describing the manner in which the State used the funds.

"(B) REGULATIONS.—Not later than 1 year after the date of enactment of this section, the Administrator shall issue a regulation describing with particularity the information that a State shall be required to provide under subparagraph (A)(ii).

"(g) COOPERATIVE AGREEMENTS.—Nothing in this section shall affect the authority of the Administrator under section 104(d)(1) to enter into a cooperative agreement with a State, a political subdivision of a State, or an Indian tribe to carry out actions under section 104.".

(b) STATE COST SHARE.—Section 104(c) of the Comprehensive Environmental Response, Compensation,

and Liability Act of 1980 (42 U.S.C. 9604(c)) is amended—

(1) by striking "(c)(1) Unless" and inserting the following:

"(c) MISCELLANEOUS LIMITATIONS AND REQUIREMENTS.—

"(1) CONTINUANCE OF OBLIGATIONS FROM FUND.—Unless";

(2) by striking "(2) The President" and inserting the following:

"(2) CONSULTATION.—The President"; and

(3) by striking paragraph (3) and inserting the following:

"(3) STATE COST SHARE.—

"(A) IN GENERAL.—The Administrator shall not provide any remedial action under this section unless the State in which the release occurs first enters into a contract or cooperative agreement with the Administrator providing assurances deemed adequate by the Administrator that the State will pay, in cash or through in-kind contributions, a specified percentage of the costs of the remedial action and operation and maintenance costs.

"(B) ACTIVITIES WITH RESPECT TO WHICH STATE COST SHARE IS REQUIRED.—No State cost share shall be required except for remedial actions under section 104.

"(C) SPECIFIED PERCENTAGE.—

"(i) IN GENERAL.—The specified percentage of costs that a State shall be required to share shall be the lower of 10 percent or the percentage determined under clause (ii).

"(ii) MAXIMUM IN ACCORDANCE WITH LAW PRIOR TO 1996 AMENDMENTS.—

"(I) On petition by a State, the Director of the Office of Management and Budget (referred to in this clause as the 'Director'), after providing public notice and opportunity for comment, shall establish a cost share percentage, which shall be uniform for all facilities in the State, at the percentage rate at which the total amount of anticipated payments by the State under the cost share for all facilities in the State for which a cost share is required most closely approximates

the total amount of estimated cost share payments by the State for facilities that would have been required under cost share requirements that were applicable prior to the date of enactment of this subparagraph, adjusted to reflect the extent to which the State's ability to recover costs under this Act were reduced by reason of enactment of amendments to this Act by the Superfund Cleanup Acceleration Act of 1997.

"(II) The Director may adjust a State's cost share under this clause not more frequently than every 3 years.

"(D) INDIAN TRIBES.—In the case of remedial action to be taken on land or water held by an Indian Tribe, held by the United States in trust for Indians, held by a member of an Indian Tribe (if the land or water is subject to a trust restriction on alienation), or otherwise within the borders of an Indian reservation, the requirements of this paragraph shall not apply.".

(c) USES OF FUND.—Section 111(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9611(a)) is amended by inserting after paragraph (6) the following:

"(7) GRANTS TO DELEGATED STATES.—Making a grant to a delegated State under section 130(f).".

(d) RELATIONSHIP TO OTHER LAWS.—

(1) IN GENERAL.—Section 114(b) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9614(b)) is amended by striking "removal" each place it appears and inserting "response".

(2) CONFORMING AMENDMENT.—Section 101(37)(B) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601(37)(B)) is amended by striking "section 114(c)" and inserting "section 114(b)".

TITLE III—COMMUNITY PARTICIPATION

SEC. 301. COMMUNITY RESPONSE ORGANIZATIONS; TECHNICAL ASSISTANCE GRANTS; IMPROVEMENT OF PUBLIC PARTICIPATION IN THE SUPERFUND DECISIONMAKING PROCESS.

(a) AMENDMENT.—Section 117 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9617) is amended by striking subsection (e) and inserting the following:

"(e) COMMUNITY RESPONSE ORGANIZATIONS.—

"(1) ESTABLISHMENT.—The Administrator shall create a community response organization for a facility that is listed or proposed for listing on the National Priorities List—

"(A) if the Administrator determines that a representative public forum will be helpful in promoting direct, regular, and meaningful consultation among persons interested in remedial action at the facility; or

"(B) at the request of—

"(i) 50 individuals residing in, or at least 20 percent of the population of, the area in which the facility is located;

"(ii) a representative group of the potentially responsible parties; or

"(iii) any local governmental entity with jurisdiction over the facility.

"(2) RESPONSIBILITIES.—A community response organization shall—

"(A) solicit the views of the local community on various issues affecting the development and implementation of remedial actions at the facility;

"(B) serve as a conduit of information to and from the community to appropriate Federal, State, and local agencies and potentially responsible parties;

"(C) serve as a representative of the local community during the remedial action planning and implementation process; and

"(D) provide reasonable notice of and opportunities to participate in the meetings and other activities of the community response organization.

"(3) ACCESS TO DOCUMENTS.—The Administrator shall provide a community response organization access to documents in possession of the Federal Government regarding response actions at the

facility that do not relate to liability and are not protected from disclosure as confidential business information.

"(4) COMMUNITY RESPONSE ORGANIZATION INPUT.—

"(A) CONSULTATION.—The Administrator (or if the remedial action plan is being prepared or implemented by a party other than the Administrator, the other party) shall—

"(i) consult with the community response organization in developing and implementing the remedial action plan; and

"(ii) keep the community response organization informed of progress in the development and implementation of the remedial action plan.

"(B) TIMELY SUBMISSION OF COMMENTS.—The community response organization shall provide its comments, information, and recommendations in a timely manner to the Administrator (and other party).

"(C) CONSENSUS.—The community response organization shall attempt to achieve consensus among its members before providing

comments and recommendations to the Administrator (and other party), but if consensus cannot be reached, the community response organization shall report or allow presentation of divergent views.

"(5) TECHNICAL ASSISTANCE GRANTS.—

"(A) PREFERRED RECIPIENT.—If a community response organization exists for a facility, the community response organization shall be the preferred recipient of a technical assistance grant under subsection (f).

"(B) PRIOR AWARD.—If a technical assistance grant concerning a facility has been awarded prior to establishment of a community response organization—

"(i) the recipient of the grant shall coordinate its activities and share information and technical expertise with the community response organization; and

"(ii) 1 person representing the grant recipient shall serve on the community response organization.

"(6) MEMBERSHIP.—

"(A) NUMBER.—The Administrator shall select not less than 15 nor more than 20 persons to serve on a community response organization.

"(B) NOTICE.—Before selecting members of the community response organization, the Administrator shall provide a notice of intent to establish a community response organization to persons who reside in the local community.

"(C) REPRESENTED GROUPS.—The Administrator shall, to the extent practicable, appoint members to the community response organization from each of the following groups of persons:

"(i) Persons who reside or own residential property near the facility;

"(ii) Persons who, although they may not reside or own property near the facility, may be adversely affected by a release from the facility.

"(iii) Persons who are members of the local public health or medical community and are practicing in the community.

"(iv) Representatives of Indian tribes or Indian communities that reside or own

property near the facility or that may be adversely affected by a release from the facility.

"(v) Local representatives of citizen, environmental, or public interest groups with members residing in the community.

"(vi) Representatives of local governments, such as city or county governments, or both, and any other governmental unit that regulates land use or land use planning in the vicinity of the facility.

"(vii) Members of the local business community.

"(D) PROPORTION.—Local residents shall comprise not less than 60 percent of the membership of a community response organization.

"(E) PAY.—Members of a community response organization shall serve without pay.

"(7) PARTICIPATION BY GOVERNMENT REPRESENTATIVES.—Representatives of the Administrator, the Administrator of the Agency for Toxic Substances and Disease Registry, other Federal agencies, and the State, as appropriate, shall participate in community response organization meetings to provide information and technical expertise, but

shall not be members of the community response organization.

"(8) ADMINISTRATIVE SUPPORT.—The Administrator, to the extent practicable, shall provide administrative services and meeting facilities for community response organizations.

"(9) FACA.—The Federal Advisory Committee Act (5 U.S.C. App.) shall not apply to a community response organization.

"(f) TECHNICAL ASSISTANCE GRANTS.—

"(1) DEFINITIONS.—In this subsection:

"(A) AFFECTED CITIZEN GROUP.—The term 'affected citizen group' means a group of 2 or more individuals who may be affected by the release or threatened release of a hazardous substance, pollutant, or contaminant at any facility on the State Registry or the National Priorities List.

"(B) TECHNICAL ASSISTANCE GRANT.—The term 'technical assistance grant' means a grant made under paragraph (2).

"(2) AUTHORITY.—

"(A) IN GENERAL.—In accordance with a regulation issued by the Administrator, the Administrator may make grants available to affected citizen groups.

"(B) AVAILABILITY OF APPLICATION PROCESS.—To ensure that the application process for a technical assistance grant is available to all affected citizen groups, the Administrator shall periodically review the process and, based on the review, implement appropriate changes to improve availability.

"(3) SPECIAL RULES.—

"(A) NO MATCHING CONTRIBUTION.—No matching contribution shall be required for a technical assistance grant.

"(B) AVAILABILITY IN ADVANCE.—The Administrator shall make all or a portion (but not less than $5,000 or 10 percent of the grant amount, whichever is greater) of the grant amount available to a grant recipient in advance of the total expenditures to be covered by the grant.

"(4) LIMIT PER FACILITY.—

"(A) 1 GRANT PER FACILITY.—Not more than 1 technical assistance grant may be made

with respect to a single facility, but the grant may be renewed to facilitate public participation at all stages of response action.

"(B) DURATION.—The Administrator shall set a limit by regulation on the number of years for which a technical assistance grant may be made available based on the duration, type, and extent of response action at a facility.

"(5) AVAILABILITY FOR FACILITIES NOT YET LISTED.—Subject to paragraph (6), 1 or more technical assistance grants shall be made available to affected citizen groups in communities containing facilities on the State Registry as of the date on which the grant is awarded.

"(6) FUNDING LIMIT.—

"(A) PERCENTAGE OF TOTAL APPROPRIATIONS.—Not more than 2 percent of the funds made available to carry out this Act for a fiscal year may be used to make technical assistance grants.

"(B) ALLOCATION BETWEEN LISTED AND UNLISTED FACILITIES.—Not more than the portion of funds equal to ⅛ of the total amount of funds used to make technical assistance

grants for a fiscal year may be used for technical assistance grants with respect to facilities not listed on the National Priorities List.

"(7) FUNDING AMOUNT.—

"(A) IN GENERAL.—Except as provided in subparagraph (B), the amount of a technical assistance grant may not exceed $50,000 for a single grant recipient.

"(B) INCREASE.—The Administrator may increase the amount of a technical assistance grant, or renew a previous technical assistance grant, up to a total grant amount not exceeding $100,000, to reflect the complexity of the response action, the nature and extent of contamination at the facility, the level of facility activity, projected total needs as requested by the grant recipient, the size and diversity of the affected population, and the ability of the grant recipient to identify and raise funds from other non-Federal sources.

"(8) USE OF TECHNICAL ASSISTANCE GRANTS.—

"(A) PERMITTED USE.—A technical assistance grant may be used to obtain technical assistance in interpreting information with regard to—

"(i) the nature of the hazardous substances located at a facility;

"(ii) the work plan;

"(iii) the facility evaluation;

"(iv) a proposed remedial action plan, a remedial action plan, and a final remedial design for a facility;

"(v) response actions carried out at the facility; and

"(vi) operation and maintenance activities at the facility.

"(B) PROHIBITED USE.—A technical assistance grant may not be used for the purpose of collecting field sampling data.

"(9) GRANT GUIDELINES.—

"(A) IN GENERAL.—Not later than 90 days after the date of enactment of this paragraph, the Administrator shall develop and publish guidelines concerning the management of technical assistance grants by grant recipients.

"(B) HIRING OF EXPERTS.—A recipient of a technical assistance grant that hires technical experts and other experts shall act in accordance with the guidelines under subparagraph (A).

"(g) IMPROVEMENT OF PUBLIC PARTICIPATION IN THE SUPERFUND DECISIONMAKING PROCESS.—

"(1) IN GENERAL.—

"(A) MEETINGS AND NOTICE.—In order to provide an opportunity for meaningful public participation in every significant phase of response activities under this Act, the Administrator shall provide the opportunity for, and publish notice of, public meetings before or during performance of—

"(i) a facility evaluation, as appropriate;

"(ii) announcement of a proposed remedial action plan; and

"(iii) completion of a final remedial design.

"(B) INFORMATION.—A public meeting under subparagraph (A) shall be designed to obtain information from the community, and disseminate information to the community, with

respect to a facility concerning the Administrator's facility activities and pending decisions.

"(2) PARTICIPANTS AND SUBJECT.—The Administrator shall provide reasonable notice of an opportunity for public participation in meetings in which—

"(A) the participants include Federal officials (or State officials, if the State is conducting response actions under a delegated or authorized program or through facility referral) with authority to make significant decisions affecting a response action, and other persons (unless all of such other persons are coregulators that are not potentially responsible parties or are government contractors); and

"(B) the subject of the meeting involves discussions directly affecting—

"(i) a legally enforceable work plan document, or any significant amendment to the document, for a removal, facility evaluation, proposed remedial action plan, final remedial design, or remedial action for a facility on the National Priorities List; or

"(ii) the final record of information on which the Administrator will base a hazard ranking system score for a facility.

"(3) LIMITATION.—Nothing in this subsection shall be construed—

"(A) to provide for public participation in or otherwise affect any negotiation, meeting, or other discussion that concerns only the potential liability or settlement of potential liability of any person, whether prior to or following the commencement of litigation or administrative enforcement action;

"(B) to provide for public participation in or otherwise affect any negotiation, meeting, or other discussion that is attended only by representatives of the United States (or of a department, agency, or instrumentality of the United States) with attorneys representing the United States (or of a department, agency, or instrumentality of the United States); or

"(C) to waive, compromise, or affect any privilege that may be applicable to a communication related to an activity described in subparagraph (A) or (B).

"(4) EVALUATION.—

"(A) IN GENERAL.—To the extent practicable, before and during the facility evaluation, the Administrator shall solicit and evaluate concerns, interests, and information from the community.

"(B) PROCEDURE.—An evaluation under subparagraph (A) shall include, as appropriate—

"(i) face-to-face community surveys to identify the location of private drinking water wells, historic and current or potential use of water, and other environmental resources in the community;

"(ii) a public meeting;

"(iii) written responses to significant concerns; and

"(iv) other appropriate participatory activities.

"(5) VIEWS AND PREFERENCES.—

"(A) SOLICITATION.—During the facility evaluation, the Administrator (or other person performing the facility evaluation) shall solicit the views and preferences of the community on the remediation and disposition of hazardous

substances or pollutants or contaminants at the facility.

"(B) CONSIDERATION.—The views and preferences of the community shall be described in the facility evaluation and considered in the screening of remedial alternatives for the facility.

"(6) ALTERNATIVES.—Members of the community may propose remedial action alternatives, and the Administrator shall consider such alternatives in the same manner as the Administrator considers alternatives proposed by potentially responsible parties.

"(7) INFORMATION.—

"(A) THE COMMUNITY.—The Administrator, with the assistance of the community response organization under subsection (g) if there is one, shall provide information to the community and seek comment from the community throughout all significant phases of the response action at the facility.

"(B) TECHNICAL STAFF.—The Administrator shall ensure that information gathered

from the community during community outreach efforts reaches appropriate technical staff in a timely and effective manner.

"(C) RESPONSES.—The Administrator shall ensure that reasonable written or other appropriate responses will be made to such information.

"(8) NONPRIVILEGED INFORMATION.—Throughout all phases of response action at a facility, the Administrator shall make all nonprivileged information relating to a facility available to the public for inspection and copying without the need to file a formal request, subject to reasonable service charges as appropriate.

"(9) PRESENTATION.—

"(A) DOCUMENTS.—

"(i) IN GENERAL.—The Administrator, in carrying out responsibilities under this Act, shall ensure that the presentation of information on risk is complete and informative.

"(ii) RISK.—To the extent feasible, documents prepared by the Administrator and made available to the public that purport to describe the degree of risk to

human health shall be consistent with the risk communication principles outlined in section 131(c).

"(B) COMPARISONS.—The Administrator, in carrying out responsibilities under this Act, shall provide comparisons of the level of risk from hazardous substances found at the facility to comparable levels of risk from those hazardous substances ordinarily encountered by the general public through other sources of exposure.

"(10) REQUIREMENTS.—

"(A) LENGTHY REMOVAL ACTIONS.—Notwithstanding any other provision of this subsection, in the case of a removal action taken in accordance with section 104 that is expected to require more than 180 days to complete, and in any case in which implementation of a removal action is expected to obviate or that in fact obviates the need to conduct a long-term remedial action—

"(i) the Administrator shall, to the maximum extent practicable, allow for public participation consistent with paragraph (1); and

"(ii) the removal action shall achieve the goals of protecting human health and the environment in accordance with section 121(a)(1).

"(B) OTHER REMOVAL ACTIONS.—In the case of all other removal actions, the Administrator may provide the community with notice of the anticipated removal action and a public comment period, as appropriate.".

(b) ISSUANCE OF GUIDELINES.—The Administrator of the Environmental Protection Agency shall issue guidelines under section 117(e)(9) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as added by subsection (a), not later than 90 days after the date of enactment of this Act.

TITLE IV—SELECTION OF REMEDIAL ACTIONS

SEC. 401. DEFINITIONS.

Section 101 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601) (as amended by section 105(a)) is amended by adding at the end the following:

"(41) ACTUAL OR PLANNED OR REASONABLY ANTICIPATED FUTURE USE OF THE LAND AND WATER RESOURCES.—The term 'actual or planned

or reasonably anticipated future use of the land and water resources' means—

"(A) the actual use of the land, surface water, and ground water at a facility on the date of submittal of the proposed remedial action plan; and

"(B)(i) with respect to land—

"(I) the use of land that is authorized by the zoning or land use decisions formally adopted, at or prior to the time of the initiation of the facility evaluation, by the local land use planning authority for a facility and the land immediately adjacent to the facility; and

"(II) any other reasonably anticipated use that the local land use authority, in consultation with the community response organization (if any), determines to have a substantial probability of occurring based on recent (as of the time of the determination) development patterns in the area in which the facility is located and on population projections for the area; and

"(ii) with respect to water resources, the future use of the surface water and ground

water that is potentially affected by releases from a facility that is reasonably anticipated, by the governmental unit that regulates surface or ground water use or surface or ground water use planning in the vicinity of the facility, on the date of submission of the proposed remedial action plan.

"(42) SUSTAINABILITY.—The term 'sustainability', for the purpose of section 121(a)(1)(B)(ii), means the ability of an ecosystem to continue to function within the normal range of its variability absent the effects of a release of a hazardous substance.".

SEC. 402. SELECTION AND IMPLEMENTATION OF REMEDIAL ACTIONS.

Section 121 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9621) is amended—

(1) by striking the section heading and subsections (a) and (b) and inserting the following:

"SEC. 121. SELECTION AND IMPLEMENTATION OF REMEDIAL ACTIONS.

"(a) GENERAL RULES.—

"(1) SELECTION OF COST-EFFECTIVE REMEDIAL ACTION THAT PROTECTS HUMAN HEALTH AND THE ENVIRONMENT.—

"(A) IN GENERAL.—The Administrator shall select a cost-effective remedial action that achieves the goals of protecting human health and the environment as stated in subparagraph (B), and complies with other applicable Federal and State laws in accordance with subparagraph (C) on the basis of a facility-specific risk evaluation in accordance with section 131 and in accordance with the criteria stated in subparagraph (D) and the requirements of paragraph (2).

"(B) GOALS OF PROTECTING HUMAN HEALTH AND THE ENVIRONMENT.—

"(i) PROTECTION OF HUMAN HEALTH.—A remedial action shall be considered to protect human health if, considering the expected exposures associated with the actual or planned or reasonably anticipated future use of the land and water resources and on the basis of a facility-specific risk evaluation in accordance

with section 131, the remedial action achieves a residual risk—

"(I) from exposure to nonthreshold carcinogenic hazardous substances, pollutants, or contaminants such that cumulative lifetime additional cancer from exposure to hazardous substances from releases at the facility range from 10^{-4} to 10^{-6} for the affected population; and

"(II) from exposure to threshold carcinogenic and noncarcinogenic hazardous substances, pollutants, or contaminants at the facility, that does not exceed a hazard index of 1.

"(ii) PROTECTION OF THE ENVIRONMENT.—A remedial action shall be considered to be protective of the environment if the remedial action—

"(I) protects ecosystems from significant threats to their sustainability arising from exposure to releases of hazardous substances at a site; and

"(II) does not cause a greater threat to the sustainability of ecosystems than a release of a hazardous substance.

"(iii) PROTECTION OF GROUND WATER.—A remedial action shall prevent or eliminate any actual human ingestion of drinking water containing any hazardous substance from the release at levels—

"(I) in excess of the maximum contaminant level established under the Safe Drinking Water Act (42 U.S.C. 300f et seq.); or

"(II) if no such maximum contaminant level has been established for the hazardous substance, at levels that meet the goals for protection of human health under clause (i).

"(C) COMPLIANCE WITH FEDERAL AND STATE LAWS.—

"(i) SUBSTANTIVE REQUIREMENTS.—

"(I) IN GENERAL.—Subject to clause (iii) and subparagraphs (A) and (D) and paragraph (2), a remedial action shall—

"(aa) comply with the substantive requirements of all promulgated standards, requirements, criteria, and limitations under each Federal law and each State law relating to the environment or to the siting of facilities (including a State law that imposes a more stringent standard, requirement, criterion, or limitation than Federal law) that is applicable to the conduct or operation of the remedial action or to determination of the level of cleanup for remedial actions; and

"(bb) comply with or attain any other promulgated standard, requirement, criterion, or limitation under any State law relating to the environment or siting of facilities, as determined by the State, after the date of enactment of the Superfund Cleanup Acceleration Act of 1997, through a rulemaking procedure

that includes public notice, comment, and written response comment, and opportunity for judicial review, but only if the State demonstrates that the standard, requirement, criterion, or limitation is of general applicability and is consistently applied to remedial actions under State law.

"(II) IDENTIFICATION OF FACILITIES.—Compliance with a State standard, requirement, criterion, or limitation described in subclause (I) shall be required at a facility only if the standard, requirement, criterion, or limitation has been identified by the State to the Administrator in a timely manner as being applicable to the facility.

"(III) PUBLISHED LISTS.—Each State shall publish a comprehensive list of the standards, requirements, criteria, and limitations that the State may apply to remedial actions under

this Act, and shall revise the list periodically, as requested by the Administrator.

"(IV) CONTAMINATED MEDIA.—Compliance with this clause shall not be required with respect to return, replacement, or disposal of contaminated media or residuals of contaminated media into the same media in or very near then-existing areas of contamination onsite at a facility.

"(ii) PROCEDURAL REQUIREMENTS.—Procedural requirements of Federal and State standards, requirements, criteria, and limitations (including permitting requirements) shall not apply to response actions conducted onsite at a facility.

"(iii) WAIVER PROVISIONS.—

"(I) DETERMINATION BY THE PRESIDENT.—The Administrator shall evaluate and determine if it is not appropriate for a remedial action to attain a Federal or State standard, requirement, criterion, or limitation as required by clause (i).

"(II) SELECTION OF REMEDIAL ACTION THAT DOES NOT COMPLY.—The Administrator may select a remedial action at a facility that meets the requirements of subparagraph (B) but does not comply with or attain a Federal or State standard, requirement, criterion, or limitation described in clause (i) if the Administrator makes any of the following findings:

"(aa) IMPROPER IDENTIFICATION.—The standard, requirement, criterion, or limitation, which was improperly identified as an applicable requirement under clause (i)(I)(aa), fails to comply with the rulemaking requirements of clause (i)(I)(bb).

"(bb) PART OF REMEDIAL ACTION.—The selected remedial action is only part of a total remedial action that will comply with or attain the applicable requirements of clause (i) when the

total remedial action is completed.

"(cc) GREATER RISK.—Compliance with or attainment of the standard, requirement, criterion, or limitation at the facility will result in greater risk to human health or the environment than alternative options.

"(dd) TECHNICALLY IMPRACTICABILITY.—Compliance with or attainment of the standard, requirement, criterion, or limitation is technically impracticable.

"(ee) EQUIVALENT TO STANDARD OF PERFORMANCE.—The selected remedial action will attain a standard of performance that is equivalent to that required under a standard, requirement, criterion, or limitation described in clause (i) through use of another approach.

"(ff) INCONSISTENT APPLICATION.—With respect to a State standard, requirement, criterion, limitation, or level, the State has not consistently applied (or demonstrated the intention to apply consistently) the standard, requirement, criterion, or limitation or level in similar circumstances to other remedial actions in the State.

"(gg) BALANCE.—In the case of a remedial action to be undertaken under section 104 or 136 using amounts from the Fund, a selection of a remedial action that complies with or attains a standard, requirement, criterion, or limitation described in clause (i) will not provide a balance between the need for protection of public health and welfare and the environment at the facility, and the need to make amounts from the Fund available

to respond to other facilities that may present a threat to public health or welfare or the environment, taking into consideration the relative immediacy of the threats presented by the various facilities.

"(III) PUBLICATION.—The Administrator shall publish any findings made under subclause (II), including an explanation and appropriate documentation.

"(D) REMEDY SELECTION CRITERIA.—In selecting a remedial action from among alternatives that achieve the goals stated in subparagraph (B) pursuant to a facility-specific risk evaluation in accordance with section 131, the Administrator shall balance the following factors, ensuring that no single factor predominates over the others:

"(i) The effectiveness of the remedy in protecting human health and the environment.

"(ii) The reliability of the remedial action in achieving the protectiveness standards over the long term.

"(iii) Any short-term risk to the affected community, those engaged in the remedial action effort, and to the environment posed by the implementation of the remedial action.

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

"(v) The implementability and technical feasibility of the remedial action from an engineering perspective.

"(vi) The reasonableness of the cost.

"(2) TECHNICAL IMPRACTICABILITY.—

"(A) MINIMIZATION OF RISK.—If the Administrator, after reviewing the remedy selection criteria stated in paragraph (1)(D), finds that achieving the goals stated in paragraph (1)(B) is technically impracticable, the Administrator shall evaluate remedial measures that mitigate the risks to human health and the environment and select a technically practicable remedial action that will most closely achieve

the goals stated in paragraph (1) through cost-effective means.

"(B) BASIS FOR FINDING.—A finding of technical impracticability may be made on the basis of a determination, supported by appropriate documentation, that, at the time at which the finding is made—

"(i) there is no known reliable means of achieving at a reasonable cost the goals stated in paragraph (1)(B); and

"(ii) it has not been shown that such a means is likely to be developed within a reasonable period of time.

"(3) PRESUMPTIVE REMEDIAL ACTIONS.—A remedial action that implements a presumptive remedial action issued under section 132 shall be considered to achieve the goals stated in paragraph (1)(B) and balance adequately the factors stated in paragraph (1)(D).

"(4) GROUND WATER.—

"(A) IN GENERAL.—The Administrator or the preparer of the remedial action plan shall select a cost effective remedial action for

ground water that achieves the goals of protecting human health and the environment as stated in paragraph (1)(B) and with the requirements of this paragraph, and complies with other applicable Federal and State laws in accordance with subparagraph (C) on the basis of a facility-specific risk evaluation in accordance with section 131 and in accordance with the criteria stated in subparagraph (D) and the requirements of paragraph (2). If appropriate, a remedial action for ground water shall be phased, allowing collection of sufficient data to evaluate the effect of any other remedial action taken at the site and to determine the appropriate scope of the remedial action.

"(B) CONSIDERATIONS FOR GROUND WATER REMEDIAL ACTION.—A decision regarding a remedial action for ground water shall take into consideration—

"(i) the actual or planned or reasonably anticipated future use of ground water and the timing of that use; and

"(ii) any attenuation or biodegradation that would occur if no remedial action were taken.

"(C) UNCONTAMINATED GROUND WATER.—A remedial action shall protect uncontaminated ground water that is suitable for use as drinking water by humans or livestock if the water is uncontaminated and suitable for such use at the time of submission of the proposed remedial action plan. A remedial action to protect uncontaminated ground water may utilize natural attenuation (which may include dilution or dispersion, but in conjunction with biodegradation or other levels of attenuation necessary to facilitate the remediation of contaminated ground water) so long as the remedial action does not interfere with the actual or planned or reasonably anticipated future use of the uncontaminated ground water.

"(D) CONTAMINATED GROUND WATER.—

"(i) IN GENERAL.—In the case of contaminated ground water for which the actual or planned or reasonably anticipated future use of the resource is as drinking water for humans or livestock, if the Administrator determines that restoration of some portion of the contaminated ground water to a condition suitable for the use is

technically practicable, the Administrator shall seek to restore the ground water to a condition suitable for the use.

"(ii) DETERMINATION OF RESTORATION PRACTICABILITY.—In making a determination regarding the technical practicability of ground water restoration—

"(I) there shall be no presumption of the technical practicability; and

"(II) the determination of technical practicability shall, to the extent practicable, be made on the basis of projections, modeling, or other analysis on a site-specific basis without a requirement for the construction or installation and operation of a remedial action.

"(iii) DETERMINATION OF NEED FOR AND METHODS OF RESTORATION.—In making a determination and selecting a remedial action regarding restoration of contaminated ground water the Administrator shall take into account—

"(I) the ability to substantially accelerate the availability of ground water for use as drinking water beyond the rate achievable by natural attenuation; and

"(II) the nature and timing of the actual or planned or reasonably anticipated use of such ground water.

"(iv) RESTORATION TECHNICALLY IMPRACTICABLE.—

"(I) IN GENERAL.—A remedial action for contaminated ground water having an actual or planned or reasonably anticipated future use as a drinking water source for humans or livestock for which attainment of the levels described in paragraph (1)(B)(iii) is technically impracticable shall be selected in accordance with paragraph (1)(D)(2).

"(II) NO INGESTION.—Selected remedies may rely on point-of-use treatment or other measures to ensure that there will be no ingestion of drinking water at levels exceeding the

requirement of paragraph (1)(B)(iii) (I) or (II).

"(III) INCLUSION AS PART OF OPERATION AND MAINTENANCE.—The operation and maintenance of any treatment device installed at the point of use shall be included as part of the operation and maintenance of the remedy.

"(E) GROUND WATER NOT SUITABLE FOR USE AS DRINKING WATER.—Notwithstanding any other evaluation or determination of the potential suitability of ground water for drinking water use, ground water that is not suitable for use as drinking water by humans or livestock because of naturally occurring conditions, or is so contaminated by the effects of broad-scale human activity unrelated to a specific facility or release that restoration of drinking water quality is technically impracticable or is physically incapable of yielding a quantity of 150 gallons per day of water to a well or spring, shall be considered to be not suitable for use as drinking water.

"(F) OTHER GROUND WATER.—Remedial action for contaminated ground water (other than ground water having an actual or planned or reasonably anticipated future use as a drinking water source for humans or livestock) shall attain levels appropriate for the then-current or reasonably anticipated future use of the ground water, or levels appropriate considering the then-current use of any ground water or surface water to which the contaminated ground water discharges.

"(5) OTHER CONSIDERATIONS APPLICABLE TO REMEDIAL ACTIONS.—A remedial action that uses institutional and engineering controls shall be considered to be on an equal basis with all other remedial action alternatives.";

(2) by redesignating subsection (c) as subsection (b);

(3) by striking subsection (d); and

(4) by redesignating subsections (e) and (f) as subsections (c) and (d), respectively.

SEC. 403. REMEDY SELECTION METHODOLOGY.

Title I of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42

U.S.C. 9601 et seq.) (as amended by section 201(a)) is amended by adding at the end the following:

"SEC. 131. FACILITY-SPECIFIC RISK EVALUATIONS.

"(a) USES.—

"(1) IN GENERAL.—A facility-specific risk evaluation shall be used to—

"(A) identify the significant components of potential risk posed by a facility;

"(B) screen out potential contaminants, areas, or exposure pathways from further study at a facility;

"(C) compare the relative protectiveness of alternative potential remedies proposed for a facility; and

"(D) demonstrate that the remedial action selected for a facility is capable of protecting human health and the environment considering the actual or planned or reasonably anticipated future use of the land and water resources.

"(2) COMPLIANCE WITH PRINCIPLES.—A facility-specific risk evaluation shall comply with the principles stated in this section to ensure that—

"(A) actual or planned or reasonably anticipated future use of the land and water resources is given appropriate consideration; and

"(B) all of the components of the evaluation are, to the maximum extent practicable, scientifically objective and inclusive of all relevant data.

"(b) RISK EVALUATION PRINCIPLES.—A facility-specific risk evaluation shall—

"(1) be based on actual information or scientific estimates of exposure considering the actual or planned or reasonably anticipated future use of the land and water resources to the extent that substituting such estimates for those made using standard assumptions alters the basis for decisions to be made;

"(2) be comprised of components each of which is, to the maximum extent practicable, scientifically objective, and inclusive of all relevant data;

"(3) use chemical and facility-specific data and analysis (such as bioavailability, exposure, and fate and transport evaluations) in preference to default assumptions when—

"(A) such data and analysis are likely to vary by facility; and

"(B) facility-specific risks are to be communicated to the public or the use of such data

and analysis alters the basis for decisions to be made; and

"(4) use a range and distribution of realistic and scientifically supportable assumptions when chemical and facility-specific data are not available, if the use of such assumptions would communicate more accurately the consequences of the various decision options.

"(c) RISK COMMUNICATION PRINCIPLES.—The document reporting the results of a facility-specific risk evaluation shall—

"(1) contain an explanation that clearly communicates the risks at the facility;

"(2) identify and explain all assumptions used in the evaluation, any alternative assumptions that, if made, could materially affect the outcome of the evaluation, the policy or value judgments used in choosing the assumptions, and whether empirical data conflict with or validate the assumptions;

"(3) present—

"(A) a range and distribution of exposure and risk estimates, including, if numerical estimates are provided, central estimates of exposure and risk using—

"(i) the most scientifically supportable assumptions or a weighted combination of multiple assumptions based on different scenarios; or

"(ii) any other methodology designed to characterize the most scientifically supportable estimate of risk given the information that is available at the time of the facility-specific risk evaluation; and

"(B) a statement of the nature and magnitude of the scientific and other uncertainties associated with those estimates;

"(4) state the size of the population potentially at risk from releases from the facility and the likelihood that potential exposures will occur based on the actual or planned or reasonably anticipated future use of the land and water resources; and

"(5) compare the risks from the facility to other risks commonly experienced by members of the local community in their daily lives and similar risks regulated by the Federal Government.

"(d) REGULATIONS.—Not later than 18 months after the date of enactment of this section, the Administrator shall issue a final regulation implementing this section

that promotes a realistic characterization of risk that neither minimizes nor exaggerates the risks and potential risks posed by a facility or a proposed remedial action.

"SEC. 132. PRESUMPTIVE REMEDIAL ACTIONS.

"(a) IN GENERAL.—Not later than 1 year after the date of enactment of this section, the Administrator shall issue a final regulation establishing presumptive remedial actions for commonly encountered types of facilities with reasonably well understood contamination problems and exposure potential.

"(b) PRACTICABILITY AND COST-EFFECTIVENESS.—Such presumptive remedies must have been demonstrated to be technically practicable and cost-effective methods of achieving the goals of protecting human health and the environment stated in section 121(a)(1)(B).

"(c) VARIATIONS.—The Administrator may issue various presumptive remedial actions based on various uses of land and water resources, various environmental media, and various types of hazardous substances, pollutants, or contaminants.

"(d) ENGINEERING CONTROLS.—Presumptive remedial actions are not limited to treatment remedies, but may be based on, or include, institutional and standard engineering controls.".

SEC. 404. REMEDY SELECTION PROCEDURES.

Title I of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601 et seq.) (as amended by section 403) is amended by adding at the end the following:

"SEC. 133. REMEDIAL ACTION PLANNING AND IMPLEMENTATION.

"(a) IN GENERAL.—

"(1) BASIC RULES.—

"(A) PROCEDURES.—A remedial action with respect to a facility that is listed or proposed for listing on the National Priorities List shall be developed and selected in accordance with the procedures set forth in this section.

"(B) NO OTHER PROCEDURES OR REQUIREMENTS.—The procedures stated in this section are in lieu of any procedures or requirements under any other law to conduct remedial investigations, feasibility studies, record of decisions, remedial designs, or remedial actions.

"(C) LIMITED REVIEW.—In a case in which the potentially responsible parties prepare a remedial action plan, only the work plan, facility evaluation, proposed remedial action plan, and final remedial design shall be subject

to review, comment, and approval by the Administrator.

"(D) DESIGNATION OF POTENTIALLY RESPONSIBLE PARTIES TO PREPARE WORK PLAN, FACILITY EVALUATION, PROPOSED REMEDIAL ACTION, AND REMEDIAL DESIGN AND TO IMPLEMENT THE REMEDIAL ACTION PLAN.—In the case of a facility for which the Administrator is not required to prepare a work plan, facility evaluation, proposed remedial action, and remedial design and implement the remedial action plan—

"(i) if a potentially responsible party or group of potentially responsible parties—

"(I) expresses an intention to prepare a work plan, facility evaluation, proposed remedial action plan, and remedial design and to implement the remedial action plan (not including any such expression of intention that the Administrator finds is not made in good faith); and

"(II) demonstrates that the potentially responsible party or group of

potentially responsible parties has the financial resources and the expertise to perform those functions,

the Administrator shall designate the potentially responsible party or group of potentially responsible parties to perform those functions; and

"(ii) if more than 1 potentially responsible party or group of potentially responsible parties—

"(I) expresses an intention to prepare a work plan, facility evaluation, proposed remedial action plan, and remedial design and to implement the remedial action plan (not including any such expression of intention that the Administrator finds is not made in good faith); and

"(II) demonstrates that the potentially responsible parties or group of potentially responsible parties has the financial resources and the expertise to perform those functions,

the Administrator, based on an assessment of the various parties' comparative financial resources, technical expertise, and histories of cooperation with respect to facilities that are listed on the National Priorities List, shall designate 1 potentially responsible party or group of potentially responsible parties to perform those functions.

"(E) APPROVAL REQUIRED AT EACH STEP OF PROCEDURE.—No action shall be taken with respect to a facility evaluation, proposed remedial action plan, remedial action plan, or remedial design, respectively, until a work plan, facility evaluation, proposed remedial action plan, and remedial action plan, respectively, have been approved by the Administrator.

"(F) NATIONAL CONTINGENCY PLAN.—The Administrator shall conform the National Contingency Plan regulations to reflect the procedures stated in this section.

"(2) USE OF PRESUMPTIVE REMEDIAL ACTIONS.—

"(A) PROPOSAL TO USE.—In a case in which a presumptive remedial action applies,

the Administrator (if the Administrator is conducting the remedial action) or the preparer of the remedial action plan may, after conducting a facility evaluation, propose a presumptive remedial action for the facility, if the Administrator or preparer shows with appropriate documentation that the facility fits the generic classification for which a presumptive remedial action has been issued and performs an engineering evaluation to demonstrate that the presumptive remedial action can be applied at the facility.

"(B) LIMITATION.—The Administrator may not require a potentially responsible party to implement a presumptive remedial action.

"(b) REMEDIAL ACTION PLANNING PROCESS.—

"(1) IN GENERAL.—The Administrator or a potentially responsible party shall prepare and implement a remedial action plan for a facility.

"(2) CONTENTS.—A remedial action plan shall consist of—

"(A) the results of a facility evaluation, including any screening analysis performed at the facility;

"(B) a discussion of the potentially viable remedies that are considered to be reasonable under section 121(a), the respective capital costs, operation and maintenance costs, and estimated present worth costs of the remedies, and how the remedies balance the factors stated in section 121(a)(1)(D);

"(C) a description of the remedial action to be taken;

"(D) a description of the facility-specific risk-based evaluation under section 131 and a demonstration that the selected remedial action will satisfy sections 121(a) and 132; and

"(E) a realistic schedule for conducting the remedial action, taking into consideration facility-specific factors.

"(3) WORK PLAN.—

"(A) IN GENERAL.—Prior to preparation of a remedial action plan, the preparer shall develop a work plan, including a community information and participation plan, which generally describes how the remedial action plan will be developed.

"(B) SUBMISSION.—A work plan shall be submitted to the Administrator, the State, the

community response organization, the local library, and any other public facility designated by the Administrator.

"(C) PUBLICATION.—The Administrator or other person that prepares a work plan shall publish in a newspaper of general circulation in the area where the facility is located, and post in conspicuous places in the local community, a notice announcing that the work plan is available for review at the local library and that comments concerning the work plan can be submitted to the preparer of the work plan, the Administrator, the State, or the local community response organization.

"(D) FORWARDING OF COMMENTS.—If comments are submitted to the Administrator, the State, or the community response organization, the Administrator, State, or community response organization shall forward the comments to the preparer of the work plan.

"(E) NOTICE OF DISAPPROVAL.—If the Administrator does not approve a work plan, the Administrator shall—

"(i) identify to the preparer of the work plan, with specificity, any deficiencies in the submission; and

"(ii) require that the preparer submit a revised work plan within a reasonable period of time, which shall not exceed 90 days except in unusual circumstances, as determined by the Administrator.

"(4) FACILITY EVALUATION.—

"(A) IN GENERAL.—The Administrator (or the preparer of the facility evaluation) shall conduct a facility evaluation at each facility to characterize the risk posed by the facility by gathering enough information necessary to—

"(i) assess potential remedial alternatives, including ascertaining, to the degree appropriate, the volume and nature of the contaminants, their location, potential exposure pathways and receptors;

"(ii) discern the actual or planned or reasonably anticipated future use of the land and water resources; and

"(iii) screen out any uncontaminated areas, contaminants, and potential pathways from further consideration.

"(B) SUBMISSION.—A draft facility evaluation shall be submitted to the Administrator for approval.

"(C) PUBLICATION.—Not later than 30 days after submission, or in a case in which the Administrator is preparing the remedial action plan, after the completion of the draft facility evaluation, the Administrator shall publish in a newspaper of general circulation in the area where the facility is located, and post in conspicuous places in the local community, a notice announcing that the draft facility evaluation is available for review and that comments concerning the evaluation can be submitted to the Administrator, the State, and the community response organization.

"(D) AVAILABILITY OF COMMENTS.—If comments are submitted to the Administrator, the State, or the community response organization, the Administrator, State, or community response organization shall make the comments available to the preparer of the facility evaluation.

"(E) NOTICE OF APPROVAL.—If the Administrator approves a facility evaluation, the Administrator shall—

"(i) notify the community response organization; and

"(ii) publish in a newspaper of general circulation in the area where the facility is located, and post in conspicuous places in the local community, a notice of approval.

"(F) NOTICE OF DISAPPROVAL.—If the Administrator does not approve a facility evaluation, the Administrator shall—

"(i) identify to the preparer of the facility evaluation, with specificity, any deficiencies in the submission; and

"(ii) require that the preparer submit a revised facility evaluation within a reasonable period of time, which shall not exceed 90 days except in unusual circumstances, as determined by the Administrator.

"(5) PROPOSED REMEDIAL ACTION PLAN.—

"(A) SUBMISSION.—In a case in which a potentially responsible party prepares a remedial action plan, the preparer shall submit the

remedial action plan to the Administrator for approval and provide a copy to the local library.

"(B) PUBLICATION.—After receipt of the proposed remedial action plan, or in a case in which the Administrator is preparing the remedial action plan, after the completion of the remedial action plan, the Administrator shall cause to be published in a newspaper of general circulation in the area where the facility is located and posted in other conspicuous places in the local community a notice announcing that the proposed remedial action plan is available for review at the local library and that comments concerning the remedial action plan can be submitted to the Administrator, the State, and the community response organization.

"(C) AVAILABILITY OF COMMENTS.—If comments are submitted to a State or the community response organization, the State or community response organization shall make the comments available to the preparer of the proposed remedial action plan.

"(D) HEARING.—The Administrator shall hold a public hearing at which the proposed remedial action plan shall be presented and public comment received.

"(E) REMEDY REVIEW BOARDS.—

"(i) ESTABLISHMENT.—Not later than 60 days after the date of enactment of this section, the Administrator shall establish and appoint the members of 1 or more remedy review boards (referred to in this subparagraph as a "remedy review board"), each consisting of independent technical experts within Federal and State agencies with responsibility for remediating contaminated facilities.

"(ii) SUBMISSION OF REMEDIAL ACTION PLANS FOR REVIEW.—Subject to clause (iii), a proposed remedial action plan prepared by a potentially responsible party or the Administrator may be submitted to a remedy review board at the request of the person responsible for preparing or implementing the remedial action plan.

"(iii) NO REVIEW.—The Administrator may preclude submission of a proposed remedial action plan to a remedy review board if the Administrator determines that review by a remedy review board would result in an unreasonably long delay that would threaten human health or the environment.

"(iv) RECOMMENDATIONS.—Not later than 180 days after receipt of a request for review (unless the Administrator, for good cause, grants additional time), a remedy review board shall provide recommendations to the Administrator regarding whether the proposed remedial action plan is—

"(I) consistent with the requirements and standards of section 121(a);

"(II) technically feasible or infeasible from an engineering perspective; and

"(III) reasonable or unreasonable in cost.

"(v) REVIEW BY THE ADMINISTRATOR.—

"(I) CONSIDERATION OF COMMENTS.—In reviewing a proposed remedial action plan, a remedy review board shall consider any comments submitted under subparagraphs (B) and (D) and shall provide an opportunity for a meeting, if requested, with the person responsible for preparing or implementing the remedial action plan.

"(II) STANDARD OF REVIEW.—In determining whether to approve or disapprove a proposed remedial action plan, the Administrator shall give substantial weight to the recommendations of the remedy review board.

"(F) APPROVAL.—

"(i) IN GENERAL.—The Administrator shall approve a proposed remedial action plan if the plan—

"(I) contains the information described in section 131(b); and

"(II) satisfies section 121(a).

"(ii) DEFAULT.—If the Administrator fails to issue a notice of disapproval of a proposed remedial action plan in accordance with subparagraph (G) within 180 days after the proposed plan is submitted, the plan shall be considered to be approved and its implementation fully authorized.

"(G) NOTICE OF APPROVAL.—If the Administrator approves a proposed remedial action plan, the Administrator shall—

"(i) notify the community response organization; and

"(ii) publish in a newspaper of general circulation in the area where the facility is located, and post in conspicuous places in the local community, a notice of approval.

"(H) NOTICE OF DISAPPROVAL.—If the Administrator does not approve a proposed remedial action plan, the Administrator shall—

"(i) inform the preparer of the proposed remedial action plan, with specificity, of any deficiencies in the submission; and

"(ii) request that the preparer submit a revised proposed remedial action plan

within a reasonable time, which shall not exceed 90 days except in unusual circumstances, as determined by the Administrator.

"(I) JUDICIAL REVIEW.—A recommendation under subparagraph (E)(iv) and the Administrator's review of such a recommendation shall be subject to the limitations on judicial review under section 113(h).

"(6) IMPLEMENTATION OF REMEDIAL ACTION PLAN.—A remedial action plan that has been approved or is considered to be approved under paragraph (5) shall be implemented in accordance with the schedule set forth in the remedial action plan.

"(7) REMEDIAL DESIGN.—

"(A) SUBMISSION.—A remedial design shall be submitted to the Administrator, or in a case in which the Administrator is preparing the remedial action plan, shall be completed by the Administrator.

"(B) PUBLICATION.—After receipt by the Administrator of (or completion by the Administrator of) the remedial design, the Administrator shall—

"(i) notify the community response organization; and

"(ii) cause a notice of submission or completion of the remedial design to be published in a newspaper of general circulation and posted in conspicuous places in the area where the facility is located.

"(C) COMMENT.—The Administrator shall provide an opportunity to the public to submit written comments on the remedial design.

"(D) APPROVAL.—Not later than 90 days after the submission to the Administrator of (or completion by the Administrator of) the remedial design, the Administrator shall approve or disapprove the remedial design.

"(E) NOTICE OF APPROVAL.—If the Administrator approves a remedial design, the Administrator shall—

"(i) notify the community response organization; and

"(ii) publish in a newspaper of general circulation in the area where the facility is located, and post in conspicuous places in the local community, a notice of approval.

"(F) NOTICE OF DISAPPROVAL.—If the Administrator disapproves the remedial design, the Administrator shall—

"(i) identify with specificity any deficiencies in the submission; and

"(ii) allow the preparer submitting a remedial design a reasonable time (which shall not exceed 90 days except in unusual circumstances, as determined by the Administrator) in which to submit a revised remedial design.

"(c) ENFORCEMENT OF REMEDIAL ACTION PLAN.—

"(1) NOTICE OF SIGNIFICANT DEVIATION.—If the Administrator determines that the implementation of the remedial action plan has deviated significantly from the plan, the Administrator shall provide the implementing party a notice that requires the implementing party, within a reasonable period of time specified by the Administrator, to—

"(A) comply with the terms of the remedial action plan; or

"(B) submit a notice for modifying the plan.

"(2) FAILURE TO COMPLY.—

"(A) CLASS ONE ADMINISTRATIVE PENALTY.—In issuing a notice under paragraph (1), the Administrator may impose a class one administrative penalty consistent with section 109(a).

"(B) ADDITIONAL ENFORCEMENT MEASURES.—If the implementing party fails to either comply with the plan or submit a proposed modification, the Administrator may pursue all additional appropriate enforcement measures pursuant to this Act.

"(d) MODIFICATIONS TO REMEDIAL ACTION.—

"(1) DEFINITION.—In this subsection, the term 'major modification' means a modification that—

"(A) fundamentally alters the interpretation of site conditions at the facility;

"(B) fundamentally alters the interpretation of sources of risk at the facility;

"(C) fundamentally alters the scope of protection to be achieved by the selected remedial action;

"(D) fundamentally alters the performance of the selected remedial action; or

"(E) delays the completion of the remedy by more than 180 days.

"(2) MAJOR MODIFICATIONS.—

"(A) IN GENERAL.—If the Administrator or other implementing party proposes a major modification to the plan, the Administrator or other implementing party shall demonstrate that—

"(i) the major modification constitutes the most cost-effective remedial alternative that is technologically feasible and is not unreasonably costly; and

"(ii) that the revised remedy will continue to satisfy section 121(a).

"(B) NOTICE AND COMMENT.—The Administrator shall provide the implementing party, the community response organization, and the local community notice of the proposed major modification and at least 30 days' opportunity to comment on any such proposed modification.

"(C) PROMPT ACTION.—At the end of the comment period, the Administrator shall promptly approve or disapprove the proposed modification and order implementation of the modification in accordance with any reasonable

and relevant requirements that the Administrator may specify.

"(3) MINOR MODIFICATIONS.—Nothing in this section modifies the discretionary authority of the Administrator to make a minor modification of a record of decision or remedial action plan to conform to the best science and engineering, the requirements of this Act, or changing conditions at a facility.".

SEC. 405. COMPLETION OF PHYSICAL CONSTRUCTION AND DELISTING.

Title I of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601 et seq.) (as amended by section 404) is amended by adding at the end the following:

"SEC. 124. COMPLETION OF PHYSICAL CONSTRUCTION AND DELISTING.

"(a) IN GENERAL.—

"(1) PROPOSED NOTICE OF COMPLETION AND PROPOSED DELISTING.—Not later than 180 days after the completion by the Administrator of physical construction necessary to implement a response action at a facility, or not later than 180 days after receipt of a notice of such completion from the implementing party, the Administrator shall publish a

notice of completion and proposed delisting of the facility from the National Priorities List in the Federal Register and in a newspaper of general circulation in the area where the facility is located.

"(2) PHYSICAL CONSTRUCTION.—For the purposes of paragraph (1), physical construction necessary to implement a response action at a facility shall be considered to be complete when—

"(A) construction of all systems, structures, devices, and other components necessary to implement a response action for the entire facility has been completed in accordance with the remedial design plan; or

"(B) no construction, or no further construction, is expected to be undertaken.

"(3) COMMENTS.—The public shall be provided 30 days in which to submit comments on the notice of completion and proposed delisting.

"(4) FINAL NOTICE.—Not later than 60 days after the end of the comment period, the Administrator shall—

"(A) issue a final notice of completion and delisting or a notice of withdrawal of the proposed notice until the implementation of the remedial action is determined to be complete; and

"(B) publish the notice in the Federal Register and in a newspaper of general circulation in the area where the facility is located.

"(5) FAILURE TO ACT.—If the Administrator fails to publish a notice of withdrawal within the 60-day period described in paragraph (4)—

"(A) the remedial action plan shall be deemed to have been completed; and

"(B) the facility shall be delisted by operation of law.

"(6) EFFECT OF DELISTING.—The delisting of a facility shall have no effect on—

"(A) liability allocation requirements or cost-recovery provisions otherwise provided in this Act;

"(B) any liability of a potentially responsible party or the obligation of any person to provide continued operation and maintenance;

"(C) the authority of the Administrator to make expenditures from the Fund relating to the facility; or

"(D) the enforceability of any consent order or decree relating to the facility.

"(7) FAILURE TO MAKE TIMELY DISAPPROVAL.—The issuance of a final notice of completion and delisting or of a notice of withdrawal within the time required by subsection (a)(3) constitutes a nondiscretionary duty within the meaning of section 310(a)(2).

"(b) CERTIFICATION.—A final notice of completion and delisting shall include a certification by the Administrator that the facility has met all of the requirements of the remedial action plan (except requirements for continued operation and maintenance).

"(c) FUTURE USE OF A FACILITY.—

"(1) FACILITY AVAILABLE FOR UNRESTRICTED USE.—If, after completion of physical construction, a facility is available for unrestricted use and there is no need for continued operation and maintenance, the potentially responsible parties shall have no further liability under any Federal, State, or local law (including any regulation) for remediation at the facility, unless the Administrator determines, based on new and reliable factual information about the facility, that the facility does not satisfy section 121(a).

"(2) FACILITY NOT AVAILABLE FOR ANY USE.—If, after completion of physical construction, a facility is not available for any use or there are

continued operation and maintenance requirements that preclude use of the facility, the Administrator shall—

"(A) review the status of the facility every 5 years; and

"(B) require additional remedial action at the facility if the Administrator determines, after notice and opportunity for hearing, that the facility does not satisfy section 121(a).

"(3) FACILITIES AVAILABLE FOR RESTRICTED USE.—The Administrator may determine that a facility or portion of a facility is available for restricted use while a response action is under way or after physical construction has been completed. The Administrator shall make a determination that uncontaminated portions of the facility are available for unrestricted use when such use would not interfere with ongoing operations and maintenance activities or endanger human health or the environment.

"(d) OPERATION AND MAINTENANCE.—The need to perform continued operation and maintenance at a facility shall not delay delisting of the facility or issuance of the certification if performance of operation and maintenance is subject to a legally enforceable agreement, order, or decree.

"(e) CHANGE OF USE OF FACILITY.—

"(1) PETITION.—Any person may petition the Administrator to change the use of a facility described in subsection (c) (2) or (3) from that which was the basis of the remedial action plan.

"(2) GRANT.—The Administrator may grant a petition under paragraph (1) if the petitioner agrees to implement any additional remedial actions that the Administrator determines are necessary to continue to satisfy section 121(a), considering the different use of the facility.

"(3) RESPONSIBILITY FOR RISK.—When a petition has been granted under paragraph (2), the person requesting the change in use of the facility shall be responsible for all risk associated with altering the facility and all costs of implementing any necessary additional remedial actions.".

SEC. 406. TRANSITION RULES FOR FACILITIES CURRENTLY INVOLVED IN REMEDY SELECTION.

Title I of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601 et seq.) (as amended by section 405) is amended by adding at the end the following:

"SEC. 135. TRANSITION RULES FOR FACILITIES INVOLVED IN REMEDY SELECTION ON DATE OF ENACTMENT.

"(a) NO RECORD OF DECISION.—

"(1) OPTION.—In the case of a facility or operable unit that, as of the date of enactment of this section, is the subject of a remedial investigation and feasibility study (whether completed or incomplete), the potentially responsible parties or the Administrator may elect to follow the remedial action plan process stated in section 133 rather than the remedial investigation and feasibility study and record of decision process under regulations in effect on the date of enactment of this section that would otherwise apply if the requesting party notifies the Administrator and other potentially responsible parties of the election not later than 90 days after the date of enactment of this section.

"(2) SUBMISSION OF FACILITY EVALUATION.—In a case in which the potentially responsible parties have or the Administrator has made an election under subsection (a), the potentially responsible parties shall submit the proposed facility evaluation within 180 days after the date on which notice of the election is given.

"(b) REMEDY REVIEW BOARDS.—

"(1) AUTHORITY.—A remedy review board established under section 133(b)(5)(E) (referred to in this subsection as a 'remedy review board') shall have authority to consider a petition under paragraph (3) or (4) of this subsection.

"(2) GENERAL PROCEDURE.—

"(A) COMPLETION OF REVIEW.—The review of a petition submitted to a remedy review board under this subsection shall be completed not later than 180 days after the receipt of the petition unless the Administrator, for good cause, grants additional time.

"(B) COSTS OF REVIEW.—All reasonable costs incurred by a remedy review board, the Administrator, or a State in conducting a review or evaluating a petition for possible objection shall be borne by the petitioner.

"(C) DECISIONS.—At the completion of the 180-day review period, a remedy review board shall issue a written decision including responses to all comments submitted during the review process with regard to a petition.

"(D) OPPORTUNITY FOR COMMENT AND MEETINGS.—In reviewing a petition under this subsection, a remedy review board shall provide

an opportunity for all interested parties, including representatives of the State and local community in which the facility is located, to comment on the petition and, if requested, to meet with the remedy review board under this subsection.

"(E) REVIEW BY THE ADMINISTRATOR.—

"(i) IN GENERAL.—The Administrator shall have final review of any decision of a remedy review board under this subsection.

"(ii) STANDARD OF REVIEW.—In conducting a review of a decision of a remedy review board under this subsection, the Administrator shall accord substantial weight to the remedy review board's decision.

"(iii) REJECTION OF DECISION.—Any determination to reject a remedy review board's decision under this subsection must be approved by the Administrator or the Assistant Administrator for Solid Waste and Emergency Response.

"(F) JUDICIAL REVIEW.—A decision of a remedy review board under subparagraph (C)

and the Administrator's review of such a decision shall be subject to the limitations on judicial review under section 113(h).

"(G) CALCULATIONS OF COST SAVINGS.—

"(i) IN GENERAL.—A determination with respect to relative cost savings and whether construction has begun shall be based on operable units or distinct elements or phases of remediation and not on the entire record of decision.

"(ii) ITEMS NOT TO BE CONSIDERED.—In determining the amount of cost savings—

"(I) there shall not be taken into account any administrative, demobilization, remobilization, or additional investigation costs of the review or modification of the remedy associated with the alternative remedy; and

"(II) only the estimated cost savings of expenditures avoided by undertaking the alternative remedy shall be considered as cost savings.

"(3) CONSTRUCTION NOT BEGUN.—

"(A) PETITION.—In the case of a facility or operable unit with respect to which a record of decision has been signed but construction has not yet begun prior to the date of enactment of this section and which meet the criteria of subparagraph (B), the implementor of the record of decision may file a petition with a remedy review board not later than 90 days after the date of enactment of this section to determine whether an alternate remedy under section 133 should apply to the facility or operable unit.

"(B) CRITERIA FOR APPROVAL.—Subject to subparagraph (C), a remedy review board shall approve a petition described in subparagraph (A) if—

"(i) the alternative remedial action proposed in the petition satisfies section 121(a);

"(ii)(I) in the case of a record of decision with an estimated implementation cost of between $5,000,000 and $10,000,000, the alternative remedial action achieves cost savings of at least 25 percent of the total costs of the record of decision; or

"(II) in the case of a record of decision valued at a total cost greater than $10,000,000, the alternative remedial action achieves cost savings of $2,500,000 or more;

"(iii) in the case of a record of decision involving ground water extraction and treatment remedies for substances other than dense, nonaqueous phase liquids, the alternative remedial action achieves cost savings of $2,000,000 or more; or

"(iv) in the case of a record of decision intended primarily for the remediation of dense, nonaqueous phase liquids, the alternative remedial action achieves cost savings of $1,000,000 or more.

"(C) CONTENTS OF PETITION.—For the purposes of facility-specific risk assessment under section 131, a petition described in subparagraph (A) shall rely on risk assessment data that were available prior to issuance of the record of decision but shall consider the actual or planned or reasonably anticipated future use of the land and water resources.

"(D) INCORRECT DATA.—Notwithstanding subparagraph (B) and (C), a remedy review board may approve a petition if the petitioner demonstrates that technical data generated subsequent to the issuance of the record of decision indicates that the decision was based on faulty or incorrect information.

"(4) ADDITIONAL CONSTRUCTION.—

"(A) PETITION.—In the case of a facility or operable unit with respect to which a record of decision has been signed and construction has begun prior to the date of enactment of this section and which meets the criteria of subparagraph (B), but for which additional construction or long-term operation and maintenance activities are anticipated, the implementor of the record of decision may file a petition with a remedy review board within 90 days after the date of enactment of this section to determine whether an alternative remedial action should apply to the facility or operable unit.

"(B) CRITERIA FOR APPROVAL.—Subject to subparagraph (C), a remedy review board shall approve a petition described in subparagraph (A) if—

"(i) the alternative remedial action proposed in the petition satisfies section 121(a); and

"(ii)(I) in the case of a record of decision valued at a total cost between $5,000,000 and $10,000,000, the alternative remedial action achieves cost savings of at least 50 percent of the total costs of the record of decision;

"(II) in the case of a record of decision valued at a total cost greater than $10,000,000, the alternative remedial action achieves cost savings of $5,000,000 or more; or

"(III) in the case of a record of decision involving monitoring, operations, and maintenance obligations where construction is completed, the alternative remedial action achieves cost savings of $1,000,000 or more.

"(C) INCORRECT DATA.—Notwithstanding subparagraph (B), a remedy review board may approve a petition if the petitioner demonstrates that technical data generated subsequent to the issuance of the record of decision

indicates that the decision was based on faulty or incorrect information, and the alternative remedial action achieves cost savings of at least $2,000,000.

"(D) MANDATORY REVIEW.—A remedy review board shall not be required to entertain more than 1 petition under subparagraph (B)(ii)(III) or (C) with respect to a remedial action plan.

"(5) DELAY.—In determining whether an alternative remedial action will substantially delay the implementation of a remedial action of a facility, no consideration shall be given to the time necessary to review a petition under paragraph (3) or (4) by a remedy review board or the Administrator.

"(6) OBJECTION BY THE GOVERNOR.—

"(A) NOTIFICATION.—Not later than 7 days after receipt of a petition under this subsection, a remedy review board shall notify the Governor of the State in which the facility is located and provide the Governor a copy of the petition.

"(B) OBJECTION.—The Governor may object to the petition or the modification of the remedy, if not later than 90 days after receiving

a notification under subparagraph (A) the Governor demonstrates to the remedy review board that the selection of the proposed alternative remedy would cause an unreasonably long delay that would be likely to result in significant adverse human health impacts, environmental risks, disruption of planned future use, or economic hardship.

"(C) DENIAL.—On receipt of an objection and demonstration under subparagraph (C), the remedy review board shall—

"(i) deny the petition; or

"(ii) consider any other action that the Governor may recommend.

"(7) SAVINGS CLAUSE.—Notwithstanding any other provision of this subsection, in the case of a remedial action plan for which a final record of decision under section 121 has been published, if remedial action was not completed pursuant to the remedial action plan before the date of enactment of this section, the Administrator or a State exercising authority under section 130(d) may modify the remedial action plan in order to conform the plan to the requirements of this Act, as in effect on the date of enactment of this section.".

SEC. 407. NATIONAL PRIORITIES LIST.

(a) AMENDMENTS.—Section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9605) is amended—

(1) in subsection (a)(8) by adding at the end the following:

"(C) provision that in listing a facility on the National Priorities List, the Administrator shall not include any parcel of real property at which no release has actually occurred, but to which a released hazardous substance, pollutant, or contaminant has migrated in ground water that has moved through subsurface strata from another parcel of real estate at which the release actually occurred, unless—

"(i) the ground water is in use as a public drinking water supply or was in such use at the time of the release; and

"(ii) the owner or operator of the facility is liable, or is affiliated with any other person that is liable, for any 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."; and

(2) by adding at the end the following:

"(h) LISTING OF PARTICULAR PARCELS.—

"(1) DEFINITION.—In subsection (a)(8)(C) and paragraph (2) of this subsection, the term 'parcel of real property' means a parcel, lot, or tract of land that has a separate legal description from that of any other parcel, lot, or tract of land the legal description and ownership of which has been recorded in accordance with the law of the State in which it is located.

"(2) STATUTORY CONSTRUCTION.—Nothing in subsection (a)(8)(C) shall be construed to limit the Administrator's authority under section 104 to obtain access to and undertake response actions at any parcel of real property to which a released hazardous substance, pollutant, or contaminant has migrated in the ground water.".

(b) REVISION OF NATIONAL PRIORITIES LIST.—The President shall revise the National Priorities List to conform with the amendments made by subsection (a) not later that 180 days of the date of enactment of this Act.

TITLE V—LIABILITY

SEC. 501. LIABILITY EXCEPTIONS AND LIMITATIONS.

(a) DEFINITIONS.—Section 101 of the Comprehensive Environmental Response, Liability, and Compensation Act of 1980 (42 U.S.C. 9601) (as amended by section 401) is amended by adding at the end of the following:

"(43) CODISPOSAL LANDFILLS.—The 'term codisposal landfill' means a landfill that—

"(A) was listed on the National Priorities List as of January 1, 1997;

"(B) received for disposal municipal solid waste or sewage sludge; and

"(C) may also have received, before the effective date of requirements under subtitle C of the Solid Waste Disposal Act (42 U.S.C. 6921 et seq.), any hazardous waste, if a substantial portion of the total volume of waste disposed of at the landfill consisted of municipal solid waste or sewage sludge that was transported to the landfill from outside the facility.

"(44) MUNICIPAL SOLID WASTE.—The term 'municipal solid waste'—

"(A) means waste material generated by—

"(i) a household (such as a single- or multi-family residence) or a public lodging (such as a hotel or motel); or

"(ii) a commercial, institutional, or industrial source, to the extent that—

"(I) the waste material is essentially the same as waste normally generated by a household or public lodging; or

"(II) the waste material is 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 conditionally exempt small quantity generator waste under the regulation issued under section 3001(d) of the Solid Waste Disposal Act (42 U.S.C. 6921(d)); and

"(B) includes 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; but

"(C) does not include combustion ash generated by resource recovery facilities or municipal incinerators or waste from manufacturing or processing (including pollution control) operations that is not essentially the same as waste normally generated by a household or public lodging.

"(45) MUNICIPALITY.—The term 'municipality' means—

"(A) means a political subdivision of a State (including a city, county, village, town, township, borough, parish, school district, sanitation district, water district, or other public entity performing local governmental functions); and

"(B) includes a natural person acting in the capacity of an official, employee, or agent of any entity described in subparagraph (A) in the performance of a governmental function.

"(46) 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 treatment works.".

(b) EXCEPTIONS AND LIMITATIONS.—Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9607) (as amended by section 306(b)) is amended by adding at the end the following:

"(q) LIABILITY EXEMPTION FOR MUNICIPAL SOLID WASTE AND SEWAGE SLUDGE.—No person (other than the United States or a department, agency, or instrumentality of the United States) shall be liable to the United States or to any other person (including liability for contribution) under this section for any response costs at a facility listed on the National Priorities List to the extent that—

"(1) the person is liable solely under subparagraph (C) or (D) of subsection (a)(1); and

"(2) 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 or sewage sludge.

"(r) DE MINIMIS CONTRIBUTOR EXEMPTION.—

"(1) IN GENERAL.—In the case of a vessel or facility that is not owned by the United States and is listed on the National Priorities List, no person

described in subparagraph (C) or (D) of subsection (a)(1) (other than the United States or any department, agency, or instrumentality of the United States) shall be liable to the United States or to any other person (including liability for contribution) for any response costs under this section incurred after the date of enactment of this subsection, if no activity specifically attributable to the person resulted in—

"(A) the disposal or treatment of more than 1 percent of the volume of material containing a hazardous substance at the vessel or facility before January 1, 1997; or

"(B) the disposal or treatment of not more than 200 pounds or 110 gallons of material containing hazardous substances at the vessel or facility before January 1, 1997, or such greater amount as the Administrator may determine by regulation.

"(2) EXCEPTION.—Paragraph (1) shall not apply in a case in which the Administrator determines that material described in paragraph (1)(A) or (B) has contributed or may contribute significantly to the amount of response costs at the facility.

"(s) SMALL BUSINESS EXEMPTION.—No person (other than the United States or a department, agency, or instrumentality of the United States) shall be liable to the United States or to any person (including liability for contribution) under this section for any response costs at a facility listed on the National Priorities List incurred after the date of enactment of this subsection if the person is a business that, during the taxable year preceding the date of transmittal of notification that the business is a potentially responsible party, had on average fewer than 30 employees or for that taxable year reported $3,000,000 or less in annual gross revenues.

"(t) CODISPOSAL LANDFILL EXEMPTION AND LIMITATIONS.—

"(1) EXEMPTION.—No person shall be liable to the United States or to any person (including liability for contribution) under this section for any response costs at a facility listed on the National Priorities List incurred after the date of enactment of this subsection to the extent that—

"(A) the person is liable under subparagraph (C) or (D) of subsection (a)(1); and

"(B) the arrangement for disposal, treatment, or transport for disposal or treatment or

the acceptance for disposal or treatment occurred with respect to a codisposal landfill.

"(2) LIMITATIONS.—

"(A) DEFINITIONS.—In this paragraph:

"(i) LARGE MUNICIPALITY.—The term 'large municipality' means a municipality with a population of 100,000 or more according to the 1990 census.

"(ii) SMALL MUNICIPALITY.—The term 'small municipality' means a municipality with a population of less than 100,000 according to the 1990 census.

"(B) AGGREGATE LIABILITY OF SMALL MUNICIPALITIES.—With respect to a codisposal landfill listed on the National Priorities List that is owned or operated only by small municipalities and that is not subject to the criteria for solid waste landfills published under subtitle D of the Solid Waste Disposal Act (42 U.S.C. 6941 et seq.) at part 258 of title 40, Code of Federal Regulations (or a successor regulation), the aggregate liability of all small municipalities for response costs incurred on or after the date of enactment of this subsection shall be the lesser of—

"(i) 10 percent of the total amount of response costs at the facility; or

"(ii) the costs of compliance with the requirements of subtitle D of the Solid Waste Disposal Act (42 U.S.C. 6941 et seq.) for the facility (as if the facility had continued to accept municipal solid waste through January 1, 1997);.

"(C) AGGREGATE LIABILITY OF LARGE MUNICIPALITIES.—With respect to a codisposal landfill listed on the National Priorities List that is owned or operated only by large municipalities and that is not subject to the criteria for solid waste landfills published under subtitle D of the Solid Waste Disposal Act (42 U.S.C. 6941 et seq.) at part 258 of title 40, Code of Federal Regulations (or a successor regulation), the aggregate liability of all large municipalities for response costs incurred on or after the date of enactment of this subsection shall be the lesser of—

"(i) 20 percent of the proportion of the total amount of response costs at the facility; or

"(ii) the costs of compliance with the requirements of subtitle D of the Solid Waste Disposal Act (42 U.S.C. 6941 et seq.) for the facility (as if the facility had continued to accept municipal solid waste through January 1, 1997).

"(D) AGGREGATE PERSONS OTHER THAN MUNICIPALITIES.—With respect to a codisposal landfill listed on the National Priorities List that is owned or operated in whole or in part by persons other than municipalities and that is not subject to the criteria for solid waste landfills published under subtitle D of the Solid Waste Disposal Act (42 U.S.C. 6941 et seq.) at part 258 of title 40, Code of Federal Regulations (or a successor regulation), the aggregate liability of all persons other than municipalities shall be the lesser of—

"(i) 30 percent of the proportion of the total amount of response costs at the facility; or

"(ii) the costs of compliance with the requirements of subtitle D of the Solid Waste Disposal Act (42 U.S.C. 6941 et seq.) for the facility (as if the facility had

continued to accept municipal solid waste through January 1, 1997).

"(E) AGGREGATE LIABILITY FOR MUNICIPALITIES AND NON-MUNICIPALITIES.—With respect to a codisposal landfill listed on the National Priorities List that is owned and operated by a combination of small and large municipalities or persons other than municipalities and that is subject to the criteria for solid waste landfills published under subtitle D of the Solid Waste Disposal Act (42 U.S.C. 6941 et seq.) at part 258 of title 40, Code of Federal Regulations (or a successor regulation)—

"(i) the allocator shall determine the proportion of the use of the landfill that was made by small and large municipalities and persons other than municipalities during the time the facility was in operation; and

"(ii) shall allocate among the parties an appropriate percentage of total liability not exceeding the aggregate liability percentages stated in (B)(ii), (C)(ii), (D)(ii), respectively.

"(F) LIABILITY AT SUBTITLE D FACILITIES.—With respect to a codisposal landfill listed on the National Priorities List that is owned and operated by a small municipality, large municipality, or person other than municipalities, or a combination of thereof, and that is subject to the criteria for solid waste landfills published under subtitle D of the Solid Waste Disposal Act (42 U.S.C. 6941 et seq.) at part 258 of title 40, Code of Federal Regulations (or a successor regulation), the aggregate liability of such municipalities and persons shall be no greater than the costs of compliance with the requirements of subtitle D of the Solid Waste Disposal Act (42 U.S.C. 6941 et seq.) for the facility.

"(3) APPLICABILITY.—This subsection shall not apply to—

"(A) a person that acted in violation of subtitle C of the Solid Waste Disposal Act (42 U.S.C. Sec. 6921 et seq.);

"(B) a person that owned or operated a codisposal landfill in violation of the applicable requirements for municipal solid waste landfill

units under subtitle D of the Solid Waste Disposal Act (42 U.S.C. Sec. 6941 et seq.) after October 9, 1991;

"(C) a facility that was not operated pursuant to and in substantial compliance with any other applicable permit, license, or other approval or authorization relating to municipal solid waste or sewage sludge disposal issued by an appropriate State, Indian tribe, or local government authority;

"(D) a person described in section 136(t); or

"(E) a person that impedes the performance of a response action.".

(c) EFFECTIVE DATE AND TRANSITION RULES.—The amendments made by this section—

(1) shall take effect with respect to an action under section 106, 107, or 113 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9606, 9607, and 9613) that becomes final on or after the date of enactment of this Act; but

(2) shall not apply to an action brought by any person under section 107 or 113 of that Act (42

U.S.C. 9607 and 9613) for costs or damages incurred by the person before the date of enactment of this Act.

SEC. 502. CONTRIBUTION FROM THE FUND.

Section 112 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9612) is amended by adding at the end the following:

"(g) CONTRIBUTION FROM THE FUND.—

"(1) COMPLETION OF OBLIGATIONS.—A person that is subject to an administrative order issued under section 106 or has entered into a settlement decree with the United States or a State as of the date of enactment of this subsection shall complete the person's obligations under the order or settlement decree.

"(2) CONTRIBUTION.—A person described in paragraph (1) shall receive contribution from the Fund for any portion of the costs (excluding attorneys' fees) incurred for the performance of the response action after the date of enactment of this subsection if the person is not liable for such costs by reason of a liability exemption or limitation under this section.

"(3) APPLICATION FOR CONTRIBUTION.—

"(A) IN GENERAL.—Contribution under this section shall be made upon receipt by the Administrator of an application requesting contribution.

"(B) PERIODIC APPLICATIONS.—Beginning with the 7th month after the date of enactment of this subsection, 1 application for each facility shall be submitted every 6 months for all persons with contribution rights (as determined under subparagraph (2)).

"(4) REGULATIONS.—Contribution shall be made in accordance with such regulations as the Administrator shall issue within 180 days after the date of enactment of this section.

"(5) DOCUMENTATION.—The regulations under paragraph (4) shall, at a minimum, require that an application for contribution contain such documentation of costs and expenditures as the Administrator considers necessary to ensure compliance with this subsection.

"(6) EXPEDITION.—The Administrator shall develop and implement such procedures as may be necessary to provide contribution to such persons in

an expeditious manner, but in no case shall a contribution be made later than 1 year after submission of an application under this subsection.

"(7) CONSISTENCY WITH NATIONAL CONTINGENCY PLAN.—No contribution shall be made under this subsection unless the Administrator determines that such costs are consistent with the National Contingency Plan.".

SEC. 503. ALLOCATION OF LIABILITY FOR CERTAIN FACILITIES.

Title I of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601 et seq.), as amended by section 406, is amended by adding at the end the following:

"SEC. 136. ALLOCATION OF LIABILITY FOR CERTAIN FACILITIES.

"(a) DEFINITIONS.—In this section:

"(1) ALLOCATED SHARE.—The term 'allocated share' means the percentage of liability assigned to a potentially responsible party by the allocator in an allocation report under subsection (f)(4).

"(2) ALLOCATION PARTY.—The term 'allocation party'—

"(A) means a party, named on a list of parties that will be subject to the allocation

process under this section, issued by an allocator; and

"(B) with respect to a facility described in subparagraph (4)(C), includes only parties that are, by virtue of section 107(t)(3), not entitled to the exemption under section 107(t)(1) or the limitation under section 107(t)(2).

"(3) ALLOCATOR.—The term 'allocator' means an allocator retained to conduct an allocation for a facility.

"(4) MANDATORY ALLOCATION FACILITY.—The term 'mandatory allocation facility' means—

"(A) a non-federally owned vessel or facility listed on the National Priorities List with respect to which response costs are incurred after the date of enactment of this section and at which there are 2 or more potentially responsive persons (including 1 or more persons that are qualified for an exemption under section 107 (q), (r), or (s)), if at least 1 potentially responsible person is viable and not entitled to an exemption under section 107 (q), (r), or (s);

"(B) a federally owned vessel or facility listed on the National Priorities List with respect to which response costs are incurred after

the date of enactment of this section, and with respect to which 1 or more potentially responsible parties (other that a department, agency, or instrumentality of the United States) are liable or potentially liable if at least 1 potentially liable party is liable and not entitled to an exemption under section 107 (q), (r), or (s); and

"(C) a codisposal landfill listed on the National Priorities List with respect to which—

"(i) costs are incurred after the date of enactment of this section; and

(ii) by virtue of section 107(t)(3), 1 or more persons are not entitled to the exemption under section 107(t)(1) or the limitation under section 107(t)(2).

"(5) ORPHAN SHARE.—The term 'orphan share' means the total of the allocated shares determined by the allocator under subsection (h).

"(b) ALLOCATIONS OF LIABILITY.—

"(1) MANDATORY ALLOCATIONS.—For each mandatory allocation facility involving 2 or more potentially responsible parties (including 1 or more potentially responsible parties that are qualified for an exemption under section 107 (q), (r), or (s)), the

Administrator shall conduct the allocation process under this section.

"(2) REQUESTED ALLOCATIONS.—For a facility (other than a mandatory allocation facility) involving 2 or more potentially responsible parties, the Administrator shall conduct the allocation process under this section if the allocation is requested in writing by a potentially responsible party that has—

"(A) incurred response costs with respect to a response action; or

"(B) resolved any liability to the United States with respect to a response action in order to assist in allocating shares among potentially responsible parties.

"(3) PERMISSIVE ALLOCATIONS.—For any facility (other than a mandatory allocation facility or a facility with respect to which a request is made under paragraph (2)) involving 2 or more potentially responsible parties, the Administrator may conduct the allocation process under this section if the Administrator considers it to be appropriate to do so.

"(4) ORPHAN SHARE.—An allocation performed at a vessel or facility identified under subsection (b)(2) or (3) shall not require payment of an orphan

share under subsection (h) or contribution under subsection (p).

"(5) EXCLUDED FACILITIES.—

"(A) IN GENERAL.—A codisposal landfill listed on the Natural Priorities List at which costs are incurred after January 1, 1997, and at which all potentially responsible persons are entitled to the liability exemption under section 107(t)(1). This section does not apply to a response action at a mandatory allocation facility for which there was in effect as of the date of enactment of this section, a settlement, decree, or order that determines the liability and allocated shares of all potentially responsible parties with respect to the response action.

"(B) AVAILABILITY OF ORPHAN SHARE.—For any mandatory allocation facility that is otherwise excluded by subparagraph (A) and for which there was not in effect as of the date of enactment of this section a final judicial order that determined the liability of all parties to the action for response costs incurred after the date of enactment of this section, an allocation shall be conducted for the sole purpose of determining the availability of orphan share funding

pursuant to subsection (h)(2) for any response costs incurred after the date of enactment of this section.

"(6) SCOPE OF ALLOCATIONS.—An allocation under this section shall apply to—

"(A) response costs incurred after the date of enactment of this section, with respect to a mandatory allocation facility described in subsection (a)(4) (A), (B), or (C); and

"(B) response costs incurred at a facility that is the subject of a requested or permissive allocation under subsection (b) (2) or (3).

"(8) OTHER MATTERS.—This section shall not limit or affect—

"(A) the obligation of the Administrator to conduct the allocation process for a response action at a facility that has been the subject of a partial or expedited settlement with respect to a response action that is not within the scope of the allocation;

"(B) the ability of any person to resolve any liability at a facility to any other person at any time before initiation or completion of the allocation process, subject to subsection (h)(3);

"(C) the validity, enforceability, finality, or merits of any judicial or administrative order, judgment, or decree, issued prior to the date of enactment of this section with respect to liability under this Act; or

"(D) the validity, enforceability, finality, or merits of any preexisting contract or agreement relating to any allocation of responsibility or any indemnity for, or sharing of, any response costs under this Act.

"(c) MORATORIUM ON LITIGATION AND ENFORCEMENT.—

"(1) IN GENERAL.—No person may assert a claim for recovery of a response cost or contribution toward a response cost (including a claim for insurance proceeds) under this Act or any other Federal or State law in connection with a response action—

"(A) for which an allocation is required to be performed under subsection (b)(1); or

"(B) for which the Administrator has initiated the allocation process under this section,

until the date that is 120 days after the date of issuance of a report by the allocator under subsection (f)(4) or, if a second or subsequent report is issued

under subsection (m), the date of issuance of the second or subsequent report.

"(2) PENDING ACTIONS OR CLAIMS.—If a claim described in paragraph (1) is pending on the date of enactment of this section or on initiation of an allocation under this section, the portion of the claim pertaining to response costs that are the subject of the allocation shall be stayed until the date that is 120 days after the date of issuance of a report by the allocator under subsection (f)(4) or, if a second or subsequent report is issued under subsection (m), the date of issuance of the second or subsequent report, unless the court determines that a stay would result in manifest injustice.

"(3) TOLLING OF PERIOD OF LIMITATION.—

"(A) BEGINNING OF TOLLING.—Any applicable period of limitation with respect to a claim subject to paragraph (1) shall be tolled beginning on the earlier of—

"(i) the date of listing of the facility on the National Priorities List if the listing occurs after the date of enactment of this section; or

"(ii) the date of initiation of the allocation process under this section.

"(B) END OF TOLLING.—A period of limitation shall be tolled under subparagraph (A) until the date that is 180 days after the date of issuance of a report by the allocator under subsection (f)(4), or of a second or subsequent report under subsection (m).

"(4) RETAINED AUTHORITY.—Except as specifically provided in this section, this section does not affect the authority of the Administrator to—

"(A) exercise the powers conferred by section 103, 104, 105, 106, or 122;

"(B) commence an action against a party if there is a contemporaneous filing of a judicial consent decree resolving the liability of the party;

"(C) file a proof of claim or take other action in a proceeding under title 11, United States Code; or

"(D) require implementation of a response action at an allocation facility during the conduct of the allocation process.

"(d) ALLOCATION PROCESS.—

"(1) ESTABLISHMENT.—Not later than 180 days after the date of enactment of this section, the Administrator shall establish by regulation a process

for conduct of mandatory, requested, and permissive allocations.

"(2) REQUIREMENTS.—In developing the allocation process under paragraph (1), the Administrator shall—

"(A) ensure that parties that are eligible for an exemption from liability under section 107 (q), (r), (s), (t), (v), and (w)—

"(i) are identified by the Administrator (before selection of an allocator or by an allocator);

"(ii) at the earliest practicable opportunity, are notified of their status; and

"(iii) are provided with appropriate written assurances that they are not liable for response costs under this Act;

"(B) establish an expedited process for the selection, appointment, and retention by contract of a impartial allocator, acceptable to both potentially responsible parties and a representative of the Fund, to conduct the allocation process in a fair, efficient, and impartial manner;

"(C) permit any person to propose to name additional potentially responsible parties as allocation parties, the costs of any such nominated

party's costs (including reasonable attorney's fees) to be borne by the party that proposes the addition of the party to the allocation process if the allocator determines that there is no adequate basis in law or fact to conclude that a party is liable based on the information presented by the nominating party or otherwise available to the allocator; and

"(D) require that the allocator adopt any settlement that allocates 100 percent of the recoverable costs of a response action at a facility to the signatories to the settlement, if the settlement contains a waiver of—

"(i) a right of recovery from any other party of any response cost that is the subject of the allocation; and

"(ii) a right to contribution under this Act,

with respect to any response action that is within the scope of allocation process.

"(3) TIME LIMIT.—The Administrator shall initiate the allocation process for a facility not later than the earlier of—

"(A) the date of completion of the facility evaluation or remedial investigation for the facility; or

"(B) the date that is 60 days after the date of selection of a removal action.

"(4) NO JUDICIAL REVIEW.—There shall be no judicial review of any action regarding selection of an allocator under the regulation issued under this subsection.

"(5) RECOVERY OF CONTRACT COSTS.—The costs of the Administrator in retaining an allocator shall be considered to be a response cost for all purposes of this Act.

"(e) FEDERAL, STATE, AND LOCAL AGENCIES.—

"(1) IN GENERAL.—Other than as set forth in this Act, any Federal, State, or local governmental department, agency, or instrumentality that is named as a potentially responsible party or an allocation party shall be subject to, and be entitled to the benefits of, the allocation process and allocation determination under this section to the same extent as any other party.

"(2) ORPHAN SHARE.—The Administrator or the Attorney General shall participate in the allocation proceeding as the representative of the Fund from which any orphan share shall be paid.

"(f) ALLOCATION AUTHORITY.—

"(1) INFORMATION-GATHERING AUTHORITIES.—

"(A) IN GENERAL.—An allocator may request information from any person in order to assist in the efficient completion of the allocation process.

"(B) REQUESTS.—Any person may request that an allocator request information under this paragraph.

"(C) AUTHORITY.—An allocator may exercise the information-gathering authority of the Administrator under section 104(e), including issuing an administrative subpoena to compel the production of a document or the appearance of a witness.

"(D) DISCLOSURE.—Notwithstanding any other law, any information submitted to the allocator in response to a subpoena issued under

subparagraph (C) shall be exempt from disclosure to any person under section 552 of title 5, United States Code.

"(E) ORDERS.—In a case of contumacy or failure of a person to obey a subpoena issued under subparagraph (C), an allocator may request the Attorney General to—

"(i) bring a civil action to enforce the subpoena; or

"(ii) if the person moves to quash the subpoena, to defend the motion.

"(F) FAILURE OF ATTORNEY GENERAL TO RESPOND.—If the Attorney General fails to provide any response to the allocator within 30 days of a request for enforcement of a subpoena or information request, the allocator may retain counsel to commence a civil action to enforce the subpoena or information request.

"(2) ADDITIONAL AUTHORITY.—An allocator may—

"(A) schedule a meeting or hearing and require the attendance of allocation parties at the meeting or hearing;

"(B) sanction an allocation party for failing to cooperate with the orderly conduct of the allocation process;

"(C) require that allocation parties wishing to present similar legal or factual positions consolidate the presentation of the positions;

"(D) obtain or employ support services, including secretarial, clerical, computer support, legal, and investigative services; and

"(E) take any other action necessary to conduct a fair, efficient, and impartial allocation process.

"(3) CONDUCT OF ALLOCATION PROCESS.—

"(A) IN GENERAL.—The allocator shall conduct the allocation process and render a decision based solely on the provisions of this section, including the allocation factors described in subsection (g).

"(B) OPPORTUNITY TO BE HEARD.—Each allocation party shall be afforded an opportunity to be heard (orally or in writing, at the option of an allocation party) and an opportunity to comment on a draft allocation report.

"(C) RESPONSES.—The allocator shall not be required to respond to comments.

"(D) STREAMLINING.—The allocator shall make every effort to streamline the allocation process and minimize the cost of conducting the allocation.

"(4) ALLOCATION REPORT.—The allocator shall provide a written allocation report to the Administrator and the allocation parties that specifies the allocation share of each allocation party and any orphan shares, as determined by the allocator.

"(g) EQUITABLE FACTORS FOR ALLOCATION.—The allocator shall prepare a nonbinding allocation of percentage shares of responsibility to each allocation party and to the orphan share, in accordance with this section and without regard to any theory of joint and several liability, based on—

"(1) the amount of hazardous substances contributed by each allocation party;

"(2) the degree of toxicity of hazardous substances contributed by each allocation party;

"(3) the mobility of hazardous substances contributed by each allocation party;

"(4) the degree of involvement of each allocation party in the generation, transportation, treatment, storage, or disposal of hazardous substances;

"(5) the degree of care exercised by each allocation party with respect to hazardous substances, taking into account the characteristics of the hazardous substances;

"(6) the cooperation of each allocation party in contributing to any response action and in providing complete and timely information to the allocator; and

"(7) such other equitable factors as the allocator determines are appropriate.

"(h) ORPHAN SHARES.—

"(1) IN GENERAL.—The allocator shall determine whether any percentage of responsibility for the response action shall be allocable to the orphan share.

"(2) MAKEUP OF ORPHAN SHARE.—The orphan share shall consist of—

"(A) any share that the allocator determines is attributable to an allocation party that is insolvent or defunct and that is not affiliated with any financially viable allocation party;

"(B) the difference between the aggregate share that the allocator determines is attributable to a person and the aggregate share actually assumed by the person in a settlement with the United States otherwise if—

"(i) the person is eligible for an expedited settlement with the United States under section 122 based on limited ability to pay response costs;

"(ii) the liability of the person is eliminated, limited, or reduced by any provision of this Act; or

"(iii) the person settled with the United States before the completion of the allocation; and

"(C) all response costs at a codisposal landfill listed on the National Priorities incurred after the date of enactment of this section attributable to any person or group of persons entitled to an exemption or limitation under section 107 (q), (r), (s), or (t).

"(4) UNATTRIBUTABLE SHARES.—A share attributable to a hazardous substance that the allocator determines was disposed at the facility that cannot be attributed to any identifiable party shall

be distributed among the allocation parties and the orphan share in accordance with the allocated share assigned to each.

"(i) INFORMATION REQUESTS.—

"(1) DUTY TO ANSWER.—Each person that receives an information request or subpoena from the allocator shall provide a full and timely response to the request.

"(2) CERTIFICATION.—An answer to an information request by an allocator shall include a certification by a representative that meets the criteria established in section 270.11(a) of title 40, Code of Federal Regulations (or any successor regulation), that—

"(A) the answer is correct to the best of the representative's knowledge;

"(B) the answer is based on a diligent good faith search of records in the possession or control of the person to whom the request was directed;

"(C) the answer is based on a reasonable inquiry of the current (as of the date of the answer) officers, directors, employees, and agents of the person to whom the request was directed;

"(D) the answer accurately reflects information obtained in the course of conducting the search and the inquiry;

"(E) the person executing the certification understands that there is a duty to supplement any answer if, during the allocation process, any significant additional, new, or different information becomes known or available to the person; and

"(F) the person executing the certification understands that there are significant penalties for submitting false information, including the possibility of a fine or imprisonment for a knowing violation.

"(j) PENALTIES.—

"(1) CIVIL.—

"(A) IN GENERAL.—A person that fails to submit a complete and timely answer to an information request, a request for the production of a document, or a summons from an allocator, submits a response that lacks the certification required under subsection (i)(2), or knowingly makes a false or misleading material statement or representation in any statement, submission, or testimony during the allocation

process (including a statement or representation in connection with the nomination of another potentially responsible party) shall be subject to a civil penalty of not more than $10,000 per day of violation.

"(B) ASSESSMENT OF PENALTY.—A penalty may be assessed by the Administrator in accordance with section 109 or by any allocation party in a citizen suit brought under section 310.

"(2) CRIMINAL.—A person that knowingly and willfully makes a false material statement or representation in the response to an information request or subpoena issued by the allocator under subsection (i) shall be considered to have made a false statement on a matter within the jurisdiction of the United States within the meaning of section 1001 of title 18, United States Code.

"(k) DOCUMENT REPOSITORY; CONFIDENTIALITY.—

"(1) DOCUMENT REPOSITORY.—

"(A) IN GENERAL.—The allocator shall establish and maintain a document repository

containing copies of all documents and information provided by the Administrator or any allocation party under this section or generated by the allocator during the allocation process.

"(B) AVAILABILITY.—Subject to paragraph (2), the documents and information in the document repository shall be available only to an allocation party for review and copying at the expense of the allocation party.

"(2) CONFIDENTIALITY.—

"(A) IN GENERAL.—Each document or material submitted to the allocator or placed in the document repository and the record of any information generated or obtained during the allocation process shall be confidential.

"(B) MAINTENANCE.—The allocator, each allocation party, the Administrator, and the Attorney General—

"(i) shall maintain the documents, materials, and records of any depositions or testimony adduced during the allocation as confidential; and

"(ii) shall not use any such document or material or the record in any other matter or proceeding or for any purpose other than the allocation process.

"(C) DISCLOSURE.—Notwithstanding any other law, the documents and materials and the record shall not be subject to disclosure to any person under section 552 of title 5, United States Code.

"(D) DISCOVERY AND ADMISSIBILITY.—

"(i) IN GENERAL.—Subject to clause (ii), the documents and materials and the record shall not be subject to discovery or admissible in any other Federal, State, or local judicial or administrative proceeding, except—

"(I) a new allocation under subsection (m) or (r) for the same response action; or

"(II) an initial allocation under this section for a different response action at the same facility.

"(ii) OTHERWISE DISCOVERABLE OR ADMISSIBLE.—

"(I) DOCUMENT OR MATERIAL.—If the original of any document or material submitted to the allocator or placed in the document repository was otherwise discoverable or admissible from a party, the original document, if subsequently sought from the party, shall remain discoverable or admissible.

"(II) FACTS.—If a fact generated or obtained during the allocation was otherwise discoverable or admissible from a witness, testimony concerning the fact, if subsequently sought from the witness, shall remain discoverable or admissible.

"(3) NO WAIVER OF PRIVILEGE.—The submission of testimony, a document, or information under the allocation process shall not constitute a waiver of any privilege applicable to the testimony, document, or information under any Federal or State law or rule of discovery or evidence.

"(4) PROCEDURE IF DISCLOSURE SOUGHT.—

"(A) NOTICE.—A person that receives a request for a statement, document, or material

submitted for the record of an allocation proceeding, shall—

"(i) promptly notify the person that originally submitted the item or testified in the allocation proceeding; and

"(ii) provide the person that originally submitted the item or testified in the allocation proceeding an opportunity to assert and defend the confidentiality of the item or testimony.

"(B) RELEASE.—No person may release or provide a copy of a statement, document, or material submitted, or the record of an allocation proceeding, to any person not a party to the allocation except—

"(i) with the written consent of the person that originally submitted the item or testified in the allocation proceeding; or

"(ii) as may be required by court order.

"(5) CIVIL PENALTY.—

"(A) IN GENERAL.—A person that fails to maintain the confidentiality of any statement, document, or material or the record generated or obtained during an allocation proceeding, or

that releases any information in violation of this section, shall be subject to a civil penalty of not more than $25,000 per violation.

"(B) ASSESSMENT OF PENALTY.—A penalty may be assessed by the Administrator in accordance with section 109 or by any allocation party in a citizen suit brought under section 310.

"(C) DEFENSES.—In any administrative or judicial proceeding, it shall be a complete defense that any statement, document, or material or the record at issue under subparagraph (A)—

"(i) was in, or subsequently became part of, the public domain, and did not become part of the public domain as a result of a violation of this subsection by the person charged with the violation;

"(ii) was already known by lawful means to the person receiving the information in connection with the allocation process; or

"(iii) became known to the person receiving the information after disclosure in connection with the allocation process and

did not become known as a result of any violation of this subsection by the person charged with the violation.

"(l) REJECTION OF ALLOCATION REPORT.—

"(1) REJECTION.—The Administrator and the Attorney General may jointly reject a report issued by an allocator only if the Administrator and the Attorney General jointly publish, not later than 180 days after the Administrator receives the report, a written determination that—

"(A) no rational interpretation of the facts before the allocator, in light of the factors required to be considered, would form a reasonable basis for the shares assigned to the parties; or

"(B) the allocation process was directly and substantially affected by bias, procedural error, fraud, or unlawful conduct.

"(2) FINALITY.—A report issued by an allocator may not be rejected after the date that is 180 days after the date on which the United States accepts a settlement offer (excluding an expedited settlement under section 122) based on the allocation.

"(3) JUDICIAL REVIEW.—Any determination by the Administrator or the Attorney General under

this subsection shall not be subject to judicial review unless 2 successive allocation reports relating to the same response action are rejected, in which case any allocation party may obtain judicial review of the second rejection in a United States district court under subchapter II of chapter 5 of part I of title 5, United States Code.

"(4) DELEGATION.—The authority to make a determination under this subsection may not be delegated to any officer or employee below the level of an Assistant Administrator or Acting Assistant Administrator or an Assistant Attorney General or Acting Assistant Attorney General with authority for implementing this Act.

"(m) SECOND AND SUBSEQUENT ALLOCATIONS.—

"(1) IN GENERAL.—If a report is rejected under subsection (l), the allocation parties shall select an allocator to perform, on an expedited basis, a new allocation based on the same record available to the previous allocator.

"(2) MORATORIUM AND TOLLING.—The moratorium and tolling provisions of subsection (c) shall be extended until the date that is 180 days after the date of the issuance of any second or subsequent allocation report under paragraph (1).

"(3) SAME ALLOCATOR.—The allocation parties may select the same allocator who performed 1 or more previous allocations at the facility, except that the Administrator may determine that an allocator whose previous report at the same facility has been rejected under subsection (l) is unqualified to serve.

"(n) SETTLEMENTS BASED ON ALLOCATIONS.—

"(1) DEFINITION.—In this subsection, the term 'all settlements' includes any orphan share allocated under subsection (h).

"(2) IN GENERAL.—Unless an allocation report is rejected under subsection (l), any allocation party at a mandatory allocation facility (including an allocation party whose allocated share is funded partially or fully by orphan share funding under subsection (h)) shall be entitled to resolve the liability of the party to the United States for response actions subject to allocation if, not later than 90 days after the date of issuance of a report by the allocator, the party—

"(A) offers to settle with the United States based on the allocated share specified by the allocator; and

"(B) agrees to the other terms and conditions stated in this subsection.

"(3) PROVISIONS OF SETTLEMENTS.—

"(A) IN GENERAL.—A settlement based on an allocation under this section—

"(i) may consist of a cash-out settlement or an agreement for the performance of a response action; and

"(ii) shall include—

"(I) a waiver of contribution rights against all persons that are potentially responsible parties for any response action addressed in the settlement;

"(II) a covenant not to sue that is consistent with section 122(f) and, except in the case of a cash-out settlement, provisions regarding performance or adequate assurance of performance of the response action;

"(III) a premium, calculated on a facility-specific basis and subject to the limitations on premiums stated in paragraph (5), that reflects the actual risk to the United States of not collecting unrecovered response costs for

the response action, despite the diligent prosecution of litigation against any viable allocation party that has not resolved the liability of the party to the United States, except that no premium shall apply if all allocation parties participate in the settlement or if the settlement covers 100 percent of the response costs subject to the allocation;

"(IV) complete protection from all claims for contribution regarding the response action addressed in the settlement; and

"(V) provisions through which a settling party shall receive prompt contribution from the Fund under subsection (o) of any response costs incurred by the party for any response action that is the subject of the allocation in excess of the allocated share of the party, including the allocated portion of any orphan share.

"(B) RIGHT TO CONTRIBUTION.—A right to contribution under subparagraph (A)(ii)(V)

shall not be contingent on recovery by the United States of any response costs from any person other than the settling party.

"(4) REPORT.—The Administrator shall report annually to Congress on the administration of the allocation process under this section, providing in the report—

"(A) information comparing allocation results with actual settlements at multiparty facilities;

"(B) a cumulative analysis of response action costs recovered through post-allocation litigation or settlements of post-allocation litigation;

"(C) a description of any impediments to achieving complete recovery; and

"(D) a complete accounting of the costs incurred in administering and participating in the allocation process.

"(5) PREMIUM.—In each settlement under this subsection, the premium authorized—

"(A) shall be determined on a case-by-case basis to reflect the actual litigation risk faced by the United States with respect to any response action addressed in the settlement; but

"(B) shall not exceed—

"(i) 5 percent of the total costs assumed by a settling party if all settlements (including any orphan share) account for more than 80 percent and less than 100 percent of responsibility for the response action;

"(ii) 10 percent of the total costs assumed by a settling party if all settlements (including any orphan share) account for more than 60 percent and not more than 80 percent of responsibility for the response action;

"(iii) 15 percent of the total costs assumed by a settling party if all settlements (including any orphan share) account for more than 40 percent and not more than 60 percent of responsibility for the response action; or

"(iv) 20 percent of the total costs assumed by a settling party if all settlements (including any orphan share) account for 40 percent or less of responsibility for the response; and

"(C) shall be reduced proportionally by the percentage of the allocated share for that party paid through orphan funding under subsection (h).

"(o) FUNDING OF ORPHAN SHARES.—

"(1) CONTRIBUTION.—For each settlement agreement entered into under subsection (n), the Administrator shall promptly reimburse the allocation parties for any costs incurred that are attributable to the orphan share, as determined by the allocator.

"(2) ENTITLEMENT.—Paragraph (1) constitutes an entitlement to any allocation party eligible to receive a reimbursement.

"(3) AMOUNTS OWED.—

"(A) DELAY IF FUNDS ARE UNAVAILABLE.—If funds are unavailable in any fiscal year to reimburse all allocation parties pursuant to paragraph (1), the Administrator may delay payment until funds are available.

"(B) PRIORITY.—The priority for reimbursement shall be based on the length of time that has passed since the settlement between the United States and the allocation parties pursuant to subsection (n).

"(C) PAYMENT FROM FUNDS MADE AVAILABLE IN SUBSEQUENT FISCAL YEARS.—Any amount due and owing in excess of available appropriations in any fiscal year shall be paid from amounts made available in subsequent fiscal years, along with interest on the unpaid balances at the rate equal to that of the current average market yield on outstanding marketable obligations of the United States with a maturity of 1 year.

"(4) DOCUMENTATION AND AUDITING.—The Administrator—

"(A) shall require that any claim for contribution be supported by documentation of actual costs incurred; and

"(B) may require an independent auditing of any claim for contribution.

"(p) POST-ALLOCATION CONTRIBUTION.—

"(1) IN GENERAL.—An allocation party (including a party that is subject to an order under section 106 or a settlement decree) that incurs costs after the date of enactment of this section for implementation of a response action that is the subject of an allocation under this section to an extent that exceeds the percentage share of the allocation party, as

determined by the allocator, shall be entitled to prompt payment of contribution for the excess amount, including any orphan share, from the Fund, unless the allocation report is rejected under subsection (l).

"(2) NOT CONTINGENT.—The right to contribution under paragraph (1) shall not be contingent on recovery by the United States of a response cost from any other person.

"(3) TERMS AND CONDITIONS.—

"(A) RISK PREMIUM.—A contribution payment shall be reduced by the amount of the litigation risk premium under subsection (n)(5) that would apply to a settlement by the allocation party concerning the response action, based on the total allocated shares of the parties that have not reached a settlement with the United States.

"(B) TIMING.—

"(i) IN GENERAL.—A contribution payment shall be paid out during the course of the response action that was the subject of the allocation, using reasonable progress payments at significant milestones.

"(ii) CONSTRUCTION.—Contribution for the construction portion of the work shall be paid out not later than 120 days after the date of completion of the construction.

"(C) EQUITABLE OFFSET.—A contribution payment is subject to equitable offset or recoupment by the Administrator at any time if the allocation party fails to perform the work in a proper and timely manner.

"(D) INDEPENDENT AUDITING.—The Administrator may require independent auditing of any claim for contribution.

"(E) WAIVER.—An allocation party seeking contribution waives the right to seek recovery of response costs in connection with the response action, or contribution toward the response costs, from any other person.

"(F) BAR.—An administrative order shall be in lieu of any action by the United States or any other person against the allocation party for recovery of response costs in connection with the response action, or for contribution toward the costs of the response action.

"(q) POST-SETTLEMENT LITIGATION.—

"(1) IN GENERAL.—Subject to subsections (m) and (n), and on the expiration of the moratorium period under subsection (c)(4), the Administrator may commence an action under section 107 against an allocation party that has not resolved the liability of the party to the United States following allocation and may seek to recover response costs not recovered through settlements with other persons.

"(2) ORPHAN SHARE.—The recoverable costs shall include any orphan share determined under subsection (h), but shall not include any share allocated to a Federal, State, or local governmental agency, department, or instrumentality.

"(3) IMPLEADER.—A defendant in an action under paragraph (1) may implead an allocation party only if the allocation party did not resolve liability to the United States.

"(4) CERTIFICATION.—In commencing or maintaining an action under section 107 against an allocation party after the expiration of the moratorium period under subsection (c)(4), the Attorney General shall certify in the complaint that the defendant failed to settle the matter based on the share that the allocation report assigned to the party.

"(5) RESPONSE COSTS.—

"(A) ALLOCATION PROCEDURE.—The cost of implementing the allocation procedure under this section, including reasonable fees and expenses of the allocator, shall be considered as a necessary response cost.

"(B) FUNDING OF ORPHAN SHARES.—The cost attributable to funding an orphan share under this section—

"(i) shall be considered as a necessary cost of response cost; and

"(ii) shall be recoverable in accordance with section 107 only from an allocation party that does not reach a settlement and does not receive an administrative order under subsection (n) or (p).

"(r) NEW INFORMATION.—

"(1) IN GENERAL.—An allocation under this section shall be final, except that any settling party, including the United States, may seek a new allocation with respect to the response action that was the subject of the settlement by presenting the Administrator with clear and convincing evidence that—

"(A) the allocator did not have information concerning—

"(i) 35 percent or more of the materials containing hazardous substances at the facility; or

"(ii) 1 or more persons not previously named as an allocation party that contributed 15 percent or more of materials containing hazardous substances at the facility; and

"(B) the information was discovered subsequent to the issuance of the report by the allocator.

"(2) NEW ALLOCATION.—Any new allocation of responsibility—

"(A) shall proceed in accordance with this section;

"(B) shall be effective only after the date of the new allocation report; and

"(C) shall not alter or affect the original allocation with respect to any response costs previously incurred.

"(s) DISCRETION OF ALLOCATOR.—A contract by which the Administrator retain an allocator shall give the allocator broad discretion to conduct the allocation process

in a fair, efficient, and impartial manner, and the Administrator shall not issue any rule or order that limits the discretion of the allocator in the conduct of the allocation.

"(t) ILLEGAL ACTIVITIES.—Section 107 (o), (p), (q), (r), (s), (t), (u), (v), and (w) and section 112(g) shall not apply to any person whose liability for response costs under section 107(a)(1) is otherwise based on any act, omission, or status that is determined by a court or administrative body of competent jurisdiction, within the applicable statute of limitation, to have been a violation of any Federal or State law pertaining to the treatment, storage, disposal, or handling of hazardous substances if the violation pertains to a hazardous substance, the release or threat of release of which caused the incurrence of response costs at the vessel or facility.".

SEC. 504. LIABILITY OF RESPONSE ACTION CONTRACTORS.

(a) LIABILITY OF CONTRACTORS.—Section 101(20) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601(20)) is amended by adding at the end the following:

"(H) LIABILITY OF CONTRACTORS.—

"(i) IN GENERAL.—The term 'owner or operator' does not include a response action contractor (as defined in section 119(e)).

"(ii) LIABILITY LIMITATIONS.—A person described in clause (i) shall not, in the absence of negligence by the person, be considered to—

"(I) cause or contribute to any release or threatened release of a hazardous substance, pollutant, or contaminant;

"(II) arrange for disposal or treatment of a hazardous substance, pollutant, or contaminant;

"(III) arrange with a transporter for transport or disposal or treatment of a hazardous substance, pollutant, or contaminant; or

"(IV) transport a hazardous substance, pollutant, or contaminant.

"(iii) EXCEPTION.—This subparagraph does not apply to a person potentially responsible under section 106 or 107 other than a person associated solely with the provision of a response action or a service or equipment ancillary to a response action.".

(b) NATIONAL UNIFORM NEGLIGENCE STANDARD.—Section 119(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9619(a)) is amended—

(1) in paragraph (1) by striking "title or under any other Federal law" and inserting "title or under any other Federal or State law"; and

(2) in paragraph (2)—

(A) by striking "(2) NEGLIGENCE, ETC.—Paragraph (1)" and inserting the following:

"(2) NEGLIGENCE AND INTENTIONAL MISCONDUCT; APPLICATION OF STATE LAW.—

"(A) NEGLIGENCE AND INTENTIONAL MISCONDUCT.—

"(i) IN GENERAL.—Paragraph (1)"; and

(B) by adding at the end the following:

"(ii) STANDARD.—Conduct under clause (i) shall be evaluated based on the generally accepted standards and practices in effect at the time and place at which the conduct occurred.

"(iii) PLAN.—An activity performed in accordance with a plan that was approved by the Administrator shall not be

considered to constitute negligence under clause (i).

"(B) APPLICATION OF STATE LAW.—Paragraph (1) shall not apply in determining the liability of a response action contractor under the law of a State if the State has adopted by statute a law determining the liability of a response action contractor.".

(c) EXTENSION OF INDEMNIFICATION AUTHORITY.—Section 119(c)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9619(c)(1)) is amended by adding at the end the following: "The agreement may apply to a claim for negligence arising under Federal or State law.".

(d) INDEMNIFICATION DETERMINATIONS.—Section 119(c) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9619(c)) is amended by striking paragraph (4) and inserting the following:

"(4) DECISION TO INDEMNIFY.—

"(A) IN GENERAL.—For each response action contract for a vessel or facility, the Administrator shall make a decision whether to enter into an indemnification agreement with a response action contractor.

"(B) STANDARD.—The Administrator shall enter into an indemnification agreement to the extent that the potential liability (including the risk of harm to public health, safety, environment, and property) involved in a response action exceed or are not covered by insurance available to the contractor at the time at which the response action contract is entered into that is likely to provide adequate long-term protection to the public for the potential liability on fair and reasonable terms (including consideration of premium, policy terms, and deductibles).

"(C) DILIGENT EFFORTS.—The Administrator shall enter into an indemnification agreement only if the Administrator determines that the response action contractor has made diligent efforts to obtain insurance coverage from non-Federal sources to cover potential liabilities.

"(D) CONTINUED DILIGENT EFFORTS.—An indemnification agreement shall require the response action contractor to continue, not more frequently than annually, to make diligent

efforts to obtain insurance coverage from non-Federal sources to cover potential liabilities.

"(E) LIMITATIONS ON INDEMNIFICATION.—An indemnification agreement provided under this subsection shall include deductibles and shall place limits on the amount of indemnification made available in amounts determined by the contracting agency to be appropriate in light of the unique risk factors associated with the cleanup activity.".

(e) INDEMNIFICATION FOR THREATENED RELEASES.—Section 119(c)(5)(A) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9619(c)(5)(A)) is amended by inserting "or threatened release" after "release" each place it appears.

(f) EXTENSION OF COVERAGE TO ALL RESPONSE ACTIONS.—Section 119(e)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9619(e)(1)) is amended—

(1) in subparagraph (D) by striking "carrying out an agreement under section 106 or 122"; and

(2) in the matter following subparagraph (D)—

(A) by striking "any remedial action under this Act at a facility listed on the National Priorities List, or any removal under this Act," and inserting "any response action,"; and

(B) by inserting before the period at the end the following: "or to undertake appropriate action necessary to protect and restore any natural resource damaged by the release or threatened release".

(g) DEFINITION OF RESPONSE ACTION CONTRACTOR.—Section 119(e)(2)(A)(i) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9619(e)(2)(A)(i)) is amended by striking "and is carrying out such contract" and inserting "covered by this section and any person (including any subcontractor) hired by a response action contractor".

(h) SURETY BONDS.—Section 119 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9619) is amended—

(1) in subsection (e)(2)(C) by striking ", and before January 1, 1996,"; and

(2) in subsection (g)(5) by striking ", or after December 31, 1995".

(i) NATIONAL UNIFORM STATUTE OF REPOSE.—Section 119 of the Comprehensive Environmental Response,

Compensation, and Liability Act of 1980 (42 U.S.C. 9619) is amended by adding at the end the following:

"(h) LIMITATION ON ACTIONS AGAINST RESPONSE ACTION CONTRACTORS.—

"(1) IN GENERAL.—No action may be brought as a result of the performance of services under a response contract against a response action contractor after the date that is 7 years after the date of completion of work at any facility under the contract to recover—

"(A) injury to property, real or personal;

"(B) personal injury or wrongful death;

"(C) other expenses or costs arising out of the performance of services under the contract; or

"(D) contribution or indemnity for damages sustained as a result of an injury described in subparagraphs (A) through (C).

"(2) EXCEPTION.—Paragraph (1) does not bar recovery for a claim caused by the conduct of the response action contractor that is grossly negligent or that constitutes intentional misconduct.

"(3) INDEMNIFICATION.—This subsection does not affect any right of indemnification that a response action contractor may have under this section or may acquire by contract with any person.

"(i) STATE STANDARDS OF REPOSE.—Subsections (a)(1) and (h) shall not apply in determining the liability of a response action contractor if the State has enacted a statute of repose determining the liability of a response action contractor.".

SEC. 505. RELEASE OF EVIDENCE.

(a) TIMELY ACCESS TO INFORMATION FURNISHED UNDER SECTION 104(e).—Section 104(e)(7)(A) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9604(e)(7)(A)) is amended by inserting after "shall be available to the public" the following: "not later than 14 days after the records, reports, or information is obtained".

(b) REQUIREMENT TO PROVIDE POTENTIALLY RESPONSIBLE PARTIES EVIDENCE OF LIABILITY.—

(1) ABATEMENT ACTIONS.—Section 106(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9606(a)) is amended—

(A) by striking "(a) In addition" and inserting the following: "(a) ORDER.—"

"(1) IN GENERAL.—In addition"; and

(B) by adding at the end the following:

"(2) CONTENTS OF ORDER.—An order under paragraph (1) shall provide information concerning the evidence that indicates that each element of liability described in section 107(a)(1) (A), (B), (C), and (D), as applicable, is present.".

(2) SETTLEMENTS.—Section 122(e)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9622(e)(1)) is amended by inserting after subparagraph (C) the following:

"(D) For each potentially responsible party, the evidence that indicates that each element of liability contained in section 107(a)(1) (A), (B), (C), and (D), as applicable, is present.".

SEC. 506. CONTRIBUTION PROTECTION.

Section 113(f)(2) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9613(f)(2)) is amended in the first sentence by inserting "or cost recovery" after "contribution".

SEC. 507. TREATMENT OF RELIGIOUS, CHARITABLE, SCIENTIFIC, AND EDUCATIONAL ORGANIZATIONS AS OWNERS OR OPERATORS.

(a) DEFINITION.—Section 101(20) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601(20)) (as amended by section 502(a)) is amended by adding at the end the following:

"(I) RELIGIOUS, CHARITABLE, SCIENTIFIC, AND EDUCATIONAL ORGANIZATIONS.—The term 'owner or operator' includes an organization described in section 501(c)(3) of the Internal Revenue Code of 1986 that is organized and operated exclusively for religious, charitable, scientific, or educational purposes and that holds legal or equitable title to a vessel or facility.".

(b) LIMITATION ON LIABILITY.—Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9607) (as amended by section 501(b)) is amended by adding at the end the following:

"(u) RELIGIOUS, CHARITABLE, SCIENTIFIC, AND EDUCATIONAL ORGANIZATIONS.—

"(1) LIMITATION ON LIABILITY.—Subject to paragraph (2), if an organization described in section 101(20)(I) holds legal or equitable title to a vessel or facility as a result of a charitable gift that is allowable as a deduction under section 170, 2055, or 2522 of the Internal Revenue Code of 1986 (determined without regard to dollar limitations), the liability of the organization shall be limited to the lesser of the fair market value of the vessel or facility or the actual proceeds of the sale of the vessel or facility received by the organization.

"(2) CONDITIONS.—In order for an organization described in section 101(20)(I) to be eligible for the limited liability described in paragraph (1), the organization shall—

"(A) provide full cooperation, assistance, and vessel or facility access to persons authorized to conduct response actions at the vessel or facility, including the cooperation and access necessary for the installation, preservation of integrity, operation, and maintenance of any complete or partial response action at the vessel or facility;

"(B) provide full cooperation and assistance to the United States in identifying and locating persons who recently owned, operated, or otherwise controlled activities at the vessel or facility;

"(C) establish by a preponderance of the evidence that all active disposal of hazardous substances at the vessel or facility occurred before the organization acquired the vessel or facility; and

"(D) establish by a preponderance of the evidence that the organization did not cause or contribute to a release or threatened release of hazardous substances at the vessel or facility.

"(3) LIMITATION.—Nothing in this subsection affects the liability of a person other than a person described in section 101(20)(I) that meets the conditions specified in paragraph (2).".

SEC. 508. COMMON CARRIERS.

Section 107(b)(3) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9607(b)(3)) is amended by striking "a published tariff and acceptance" and inserting "a contract".

SEC. 509. LIMITATION ON LIABILITY OF RAILROAD OWNERS.

Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9607) (as amended by section 507(b)) is amended by adding at the end the following:

"(v) LIMITATION ON LIABILITY OF RAILROAD OWNERS.—Notwithstanding subsection (a)(1), a person that does not impede the performance of a response action or natural resource restoration shall not be liable under this Act to the extent that liability is based solely on the status of the person as a railroad owner or operator of a spur track, including a spur track over land subject to an easement, to a facility that is owned or operated by a person that is not affiliated with the railroad owner or operator, if—

"(1) the spur track provides access to a main line or branch line track that is owned or operated by the railroad;

"(2) the spur track is 10 miles long or less; and

"(3) the railroad owner or operator does not cause or contribute to a release or threatened release at the spur track.".

SEC. 510. LIABILITY OF RECYCLERS.

(a) DEFINITIONS.—Section 101 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601) (as amended by section 501(a)) is amended by adding at the end the following:

"(47) RECYCLABLE MATERIAL.—The term 'recyclable material'—

"(A) means—

"(i) scrap glass, paper, plastic, rubber, or textile;

"(ii) scrap metal; and

"(iii) a spent battery; and

"(B) includes small amounts of any type of material that is incident to or adherent to material described in subparagraph (A) as a result of the normal and customary use of the material prior to the exhaustion of the useful life of the material.

"(48) SCRAP METAL.—The term 'scrap metal'—

"(A) means—

"(i) scrap metal (as that term is defined by the Administrator for purposes of the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.) in section 261.1(c)(6) of title

40, Code of Federal Regulations, or any successor regulation); and

"(ii) a metal byproduct (such as slag, skimming, or dross) that is not 1 of the primary products of, and is not solely or separately produced by, a production process; but

"(B) does not include—

"(i) any steel shipping container that—

"(I) has (or, when intact, had) a capacity of not less than 30 and not more than 3,000 liters; and

"(II) has any hazardous substance contained in or adherent to it (not including any small pieces of metal that may remain after a hazardous substance has been removed from the container or any alloy or other material that may be chemically or metallurgically bonded in the steel itself); or

"(ii) any material described in subparagraph (A) that the Administrator may by regulation exclude from the meaning of

the term based on a finding that inclusion of the material within the meaning of the term would result in a threat to human health or the environment.".

(b) LIABILITY OF RECYCLERS.—Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9607) (as amended by section 509) is amended by adding at the end the following:

"(w) LIABILITY OF RECYCLERS.—

"(1) APPLICABILITY OF SUBSECTION.—Subject to paragraph (10), this subsection shall be applied to determine the liability of any person with respect to a transaction engaged in before, on, or after the date of enactment of this subsection.

"(2) RELIEF FROM LIABILITY.—Except as provided in paragraph (6), a person that arranges for the recycling of recyclable material shall not be liable under subsection (a)(1) (C) or (D).

"(3) SCRAP GLASS, PAPER, PLASTIC, RUBBER, OR TEXTILE.—For the purposes of paragraph (2), a person shall be considered to arrange for the recycling of scrap glass, paper, plastic, rubber, or textile

if the person sells or otherwise arranges for the recycling of the recyclable material in a transaction in which, at the time of the transaction—

"(A) the recyclable material meets a commercial specification;

"(B) a market exists for the recyclable material;

"(C) a substantial portion of the recyclable material is made available for use as a feedstock for the manufacture of a new saleable product; and

"(D)(i) the recyclable material is a replacement or substitute for a virgin raw material; or

"(ii) the product to be made from the recyclable material is a replacement or substitute for a product made, in whole or in part, from a virgin raw material.

"(4) SCRAP METAL.—For the purposes of paragraph (2), a person shall be considered to arrange for the recycling of scrap metal if the person sells or otherwise arranges for the recycling of the scrap metal in a transaction in which, at the time of the transaction—

"(A) the conditions stated in subparagraphs (A) through (D) of paragraph (3) are met; and

"(B) in the case of a transaction that occurs after the effective date of a standard, established by the Administrator by regulation under the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.), regarding the storage, transport, management, or other activity associated with the recycling of scrap metal, the person is in compliance with the standard.

"(5) SPENT BATTERIES.—

"(A) IN GENERAL.—For the purposes of paragraph (1), a person shall be considered to arrange for the recycling of a spent lead-acid battery, nickel-cadmium battery, or other battery if the person sells or otherwise arranges for the recycling of the battery in a transaction in which, at the time of the transaction—

"(i) the conditions stated in subparagraphs (A) through (D) of paragraph (3) are met;

"(ii) the person does not reclaim the valuable components of the battery; and

"(iii) in the case of a transaction that occurs after the effective date of a standard, established by the Administrator by regulation under authority of the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.) or the Mercury-Containing and Rechargeable Battery Management Act), regarding the storage, transport, management, or other activity associated with the recycling of batteries, the person is in compliance with the standard.

"(B) TOLLING ARRANGEMENTS.—A person that, by contract, arranges for reclamation and smelting of a battery by a third party not a party to a transaction under subparagraph (A) and receives from the third party material reclaimed from the battery shall not, by reason of the receipt of the reclaimed material, be considered to reclaim the valuable components of the battery for purposes of subparagraph (A)(ii).

"(6) GROUNDS FOR ESTABLISHING LIABILITY.—

"(A) IN GENERAL.—A person that arranges for the recycling of recyclable material that would be liable under subsection (a)(1) (C)

or (D) but for paragraph (2) shall be liable notwithstanding that paragraph if—

"(i) the person has an objectively reasonable basis to believe at the time of the recycling transaction that—

"(I) the recyclable material will not be recycled;

"(II) the recyclable material will be burned as fuel, for energy recovery or incineration;

"(III) the consuming facility is not in compliance with a substantive provision (including a requirement to obtain a permit for handling, processing, reclamation, or other management activity associated with recyclable material) of any Federal, State, or local environmental law (including a regulation), or a compliance order or decree issued under such a law, applicable to the handling, processing, reclamation, or other management activity associated with the recyclable material; or

"(IV) a hazardous substance has been added to the recyclable material for purposes other than processing for recycling;

"(ii) the person fails to exercise reasonable care with respect to the management or handling of the recyclable material (for which purpose a failure to adhere to customary industry practices current at the time of the recycling transaction designed to minimize, through source control, contamination of the recyclable material by hazardous substances shall be considered to be a failure to exercise reasonable care); or

"(iii) any item of the recyclable material contains—

"(I) polychlorinated biphenyls at a concentration in excess of 50 parts per million (or any different concentration specified in any applicable standard that may be issued under other Federal law after the date of enactment of this subsection); or

"(II) in the case of a transaction involving scrap paper, any concentration of a hazardous substance that the Administrator determines by regulation, issued after the date of enactment of this subsection and before the date of the transaction, to be likely to cause significant risk to human health or the environment as a result of its inclusion in the paper recycling process.

"(B) OBJECTIVELY REASONABLE BASIS FOR BELIEF.—Whether a person has an objectively reasonable basis for belief described in subparagraph (A)(i) shall be determined using criteria that include—

"(i) the size of the person's business;

"(ii) customary industry practices (including practices designed to minimize, through source control, contamination of recyclable material by hazardous substances);

"(iii) the price paid or received in the recycling transaction; and

"(iv) the ability of the person to detect the nature of the consuming facility's operations concerning handling, processing, or reclamation of the recyclable material or other management activities associated with the recyclable material.

"(7) REGULATIONS.—The Administrator may issue a regulation that clarifies the meaning of any term used in this subsection or by any other means makes clear the application of this subsection to any person.

"(8) LIABILITY FOR ATTORNEY'S FEES FOR CERTAIN ACTIONS.—A person that, after the date of enactment of this subsection, commences a civil action in contribution against a person that is not liable by operation of this subsection shall be liable to that person for all reasonable costs of defending the action, including all reasonable attorney's fees and expert witness fees.

"(9) RELATIONSHIP TO LIABILITY UNDER OTHER LAWS.—Nothing in this subsection shall affect—

"(A) liability under any other Federal, State, or local law (including a regulation); or

"(B) the authority of the Administrator to issue regulations under the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.) or any other law.

"(10) TRANSITION RULES.—

"(A) DECREE OR ORDER ENTERED PRIOR TO JANUARY 1, 1997.—This subsection shall not affect any judicial decree or order that was entered or any administrative order that became effective prior to January 1, 1997, unless, as of the date of enactment of this subsection, the judicial decree or order remained subject to appeal or the administrative order remained subject to judicial review.

"(B) DECREE OR ORDER ENTERED ON OR AFTER JANUARY 1, 1997.—Any consent decree with the United States, administrative order, or judgment in favor of the United States that was entered, or in the case of an administrative order, became effective, on or after January 1, 1997, and before the date of enactment of this subsection shall be reopened at the request of any party to the recycling transaction for a determination of the party's liability to the United States based on this subsection.

"(C) EFFECT ON NONRECYCLERS.—

"(i) COSTS BORNE BY THE UNITED STATES.—All costs attributable to a recycling transaction that, absent this subsection, would be borne by a person that is relieved of liability (in whole or in part) by this subsection shall be borne by the United States, to the extent that the person is relieved of liability.

"(ii) NO RECOVERY FROM THE UNITED STATES.—Notwithstanding clause (i), no person shall be entitled to recover any sums paid to the United States prior to the date of enactment of this subsection in satisfaction of any liability attributable to a recycling transaction.

"(D) CONTRIBUTION AMONG PARTIES TO RECYCLING TRANSACTIONS.—Notwithstanding the other provisions of this subsection, a person that is relieved of liability by this subsection, but incurred response costs for a response action taken prior to the date of enactment of this subsection, may bring a civil action for contribution for the costs against—

"(i) any person that is liable under section 107(a)(1) (A) or (B); or

"(ii) any person that, before the date of enactment of this subsection—

"(I) received and failed to comply with an administrative order issued under section 104 or 106; or

"(II) received and did not accept a written offer from the United States to enter into a consent decree or administrative order.".

TITLE VI—FEDERAL FACILITIES

SEC. 601. TRANSFER OF AUTHORITIES.

Section 120 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9620) is amended by striking subsection (g) and inserting the following:

"(g) TRANSFER OF AUTHORITIES.—

"(1) DEFINITIONS.—In this section:

"(A) INTERAGENCY AGREEMENT.—The term 'interagency agreement' means an interagency agreement under this section.

"(B) TRANSFER AGREEMENT.—The term 'transfer agreement' means a transfer agreement under paragraph (3).

"(C) TRANSFEREE STATE.—The term 'transferee State' means a State to which authorities have been transferred under a transfer agreement.

"(2) STATE APPLICATION FOR TRANSFER OF AUTHORITIES.—A State may apply to the Administrator to exercise the authorities vested in the Administrator under this Act at any facility located in the State that is—

"(A) owned or operated by any department, agency, or instrumentality of the United States (including the executive, legislative, and judicial branches of government); and

"(B) listed on the National Priorities List.

"(3) TRANSFER OF AUTHORITIES.—

"(A) DETERMINATIONS.—The Administrator shall enter into a transfer agreement to transfer to a State the authorities described in paragraph (2) if the Administrator determines that—

"(i) the State has the ability to exercise such authorities in accordance with this Act, including adequate legal authority, financial and personnel resources, organization, and expertise;

"(ii) the State has demonstrated experience in exercising similar authorities;

"(iii) the State has agreed to be bound by all Federal requirements and standards under section 133 governing the design and implementation of the facility evaluation, remedial action plan, and remedial design; and

"(iv) the State has agreed to abide by the terms of any interagency agreement or agreements covering the Federal facility or facilities with respect to which authorities are being transferred in effect at the time of the transfer of authorities.

"(B) CONTENTS OF TRANSFER AGREEMENT.—A transfer agreement—

"(i) shall incorporate the determinations of the Administrator under subparagraph (A); and

"(ii) in the case of a transfer agreement covering a facility with respect to which there is no interagency agreement that specifies a dispute resolution process, shall require that within 120 days after the effective date of the transfer agreement,

the State shall agree with the head of the Federal department, agency, or instrumentality that owns or operates the facility on a process for resolution of any disputes between the State and the Federal department, agency, or instrumentality regarding the selection of a remedial action for the facility; and

"(iii) shall not impose on the transferee State any term or condition other than that the State meet the requirements of subparagraph (A).

"(4) EFFECT OF TRANSFER.—

"(A) STATE AUTHORITIES.—A transferee State—

"(i) shall not be deemed to be an agent of the Administrator but shall exercise the authorities transferred under a transfer agreement in the name of the State; and

"(ii) shall have exclusive authority to exercise authorities that have been transferred.

"(B) EFFECT ON INTERAGENCY AGREEMENTS.—Nothing in this subsection shall require, authorize, or permit the modification or revision of an interagency agreement covering a facility with respect to which authorities have been transferred to a State under a transfer agreement (except for the substitution of the transferee State for the Administrator in the terms of the interagency agreement, including terms stating obligations intended to preserve the confidentiality of information) without the written consent of the Governor of the State and the head of the department, agency, or instrumentality.

"(5) SELECTED REMEDIAL ACTION.—The remedial action selected for a facility under section 133 by a transferee State shall constitute the only remedial action required to be conducted at the facility, and the transferee State shall be precluded from enforcing any other remedial action requirement under Federal or State law, except for—

"(A) any corrective action under the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.) that was initiated prior to the date of enactment of this subsection; and

"(B) any remedial action in excess of remedial action under section 133 that the State selects in accordance with paragraph (10).

"(6) DEADLINE.—

"(A) IN GENERAL.—The Administrator shall make a determination on an application by a State under paragraph (2) not later than 120 days after the date on which the Administrator receives the application.

"(B) FAILURE TO ACT.—If the Administrator does not issue a notice of approval or notice of disapproval of an application within the time period stated in subparagraph (A), the application shall be deemed to have been granted.

"(7) RESUBMISSION OF APPLICATION.—

"(A) IN GENERAL.—If the Administrator disapproves an application under paragraph (1), the State may resubmit the application at any time after receiving the notice of disapproval.

"(B) FAILURE TO ACT.—If the Administrator does not issue a notice of approval or notice of disapproval of a resubmitted application within the time period stated in paragraph (6)(A), the resubmitted application shall be deemed to have been granted.

"(8) JUDICIAL REVIEW.—The State (but no other person) shall be entitled to judicial review under section 113(b) of a disapproval of a resubmitted application.

"(9) WITHDRAWAL OF AUTHORITIES.—The Administrator may withdraw the authorities transferred under a transfer agreement in whole or in part if the Administrator determines that the State—

"(A) is exercising the authorities, in whole or in part, in a manner that is inconsistent with the requirements of this Act;

"(B) has violated the transfer agreement, in whole or in part; or

"(C) no longer meets one of the requirements of paragraph (3).

"(10) STATE COST RESPONSIBILITY.—The State may require a remedial action that exceeds the remedial action selection requirements of section 121 if the State pays the incremental cost of implementing that remedial action over the most cost-effective remedial action that would result from the application of section 133.

"(11) DISPUTE RESOLUTION AND ENFORCEMENT.—

"(A) DISPUTE RESOLUTION.—

"(i) FACILITIES COVERED BY BOTH A TRANSFER AGREEMENT AND AN INTERAGENCY AGREEMENTS.—In the case of a facility with respect to which there is both a transfer agreement and an interagency agreement, if the State does not concur in the remedial action proposed for selection by the Federal department, agency, or instrumentality, the Federal department, agency, or instrumentality and the State shall engage in the dispute resolution process provided for in the interagency agreement, except that the final level for resolution of the dispute shall be the head of the Federal department, agency, or instrumentality and the Governor of the State.

"(ii) FACILITIES COVERED BY A TRANSFER AGREEMENT BUT NOT AN INTERAGENCY AGREEMENT.—In the case of a facility with respect to which there is a transfer agreement but no interagency agreement, if the State does not concur in the remedial action proposed for selection

by the Federal department, agency, or instrumentality, the Federal department, agency, or instrumentality and the State shall engage in dispute resolution as provided in paragraph (3)(B)(ii) under which the final level for resolution of the dispute shall be the head of the Federal department, agency, or instrumentality and the Governor of the State.

"(iii) FAILURE TO RESOLVE.—If no agreement is reached between the head of the Federal department, agency, or instrumentality and the Governor in a dispute resolution process under clause (i) or (ii), the Governor of the State shall make the final determination regarding selection of a remedial action. To compel implementation of the State's selected remedy, the State must bring a civil action in United States district court.

"(B) ENFORCEMENT.—

"(i) AUTHORITY; JURISDICTION.—An interagency agreement with respect to which there is a transfer agreement or an order issued by a transferee State shall be

enforceable by a transferee State or by the Federal department, agency, or instrumentality that is a party to the interagency agreement only in the United States district court for the district in which the facility is located.

"(ii) REMEDIES.—The district court shall—

"(I) enforce compliance with any provision, standard, regulation, condition, requirement, order, or final determination that has become effective under the interagency agreement;

"(II) impose any appropriate civil penalty provided for any violation of an interagency agreement, not to exceed $25,000 per day;

"(III) compel implementation of the selected remedial action; and

"(IV) review a challenge by the Federal department, agency, or instrumentality to the remedial action selected by the State under this section, in accordance with section 113(j).

"(12) COMMUNITY PARTICIPATION.—If, prior to the date of enactment of this section, a Federal department, agency, or instrumentality had established for a facility covered by a transfer agreement a facility-specific advisory board or other community-based advisory group (designated as a 'site-specific advisory board', a 'restoration advisory board', or otherwise), and the Administrator determines that the board or group is willing and able to perform the responsibilities of a community response organization under section 117(e)(2), the board or group—

"(A) shall be considered to be a community response organization for the purposes of section 117 (e) (2), (3), (4), and (9), and (g) and sections 131 and 133; but

"(B) shall not be required to comply with, and shall not be considered to be a community response organization for the purposes of, section 117 (e) (1), (5), (6), (7), or (8) or (f).".

SEC. 602. LIMITATION ON CRIMINAL LIABILITY OF FEDERAL OFFICERS, EMPLOYEES, AND AGENTS.

Section 120 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9620) is amended by adding at the end the following:

"(k) CRIMINAL LIABILITY.—Notwithstanding any other provision of this Act or any other law, an officer, employee, or agent of the United States shall not be held criminally liable for a failure to comply, in any fiscal year, with a requirement to take a response action at a facility that is owned or operated by a department, agency, or instrumentality of the United States, under this Act, the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.), or any other Federal or State law unless—

"(1) the officer, employee, or agent has not fully performed any direct responsibility or delegated responsibility that the officer, employee, or agent had under Executive Order 12088 (42 U.S.C. 4321 note) or any other delegation of authority to ensure that a request for funds sufficient to take the response action was included in the President's budget request under section 1105 of title 31, United States Code, for that fiscal year; or

"(2) appropriated funds were available to pay for the response action.".

SEC. 603. INNOVATIVE TECHNOLOGIES FOR REMEDIAL ACTION AT FEDERAL FACILITIES.

(a) IN GENERAL.—Section 311 of the Comprehensive Environmental Response, Compensation, and Liability Act

of 1980 (42 U.S.C. 9660) is amended by adding at the end the following:

"(h) FEDERAL FACILITIES.—

"(1) DESIGNATION.—The President may designate a facility that is owned or operated by any department, agency, or instrumentality of the United States, and that is listed or proposed for listing on the National Priorities List, to facilitate the research, development, and application of innovative technologies for remedial action at the facility.

"(2) USE OF FACILITIES.—

"(A) IN GENERAL.—A facility designated under paragraph (1) shall be made available to Federal departments and agencies, State departments and agencies, and public and private instrumentalities, to carry out activities described in paragraph (1).

"(B) COORDINATION.—The Administrator—

"(i) shall coordinate the use of the facilities with the departments, agencies, and instrumentalities of the United States; and

"(ii) may approve or deny the use of a particular innovative technology for remedial action at any such facility.

"(3) CONSIDERATIONS.—

"(A) EVALUATION OF SCHEDULES AND PENALTIES.—In considering whether to permit the application of a particular innovative technology for remedial action at a facility designated under paragraph (1), the Administrator shall evaluate the schedules and penalties applicable to the facility under any agreement or order entered into under section 120.

"(B) AMENDMENT OF AGREEMENT OR ORDER.—If, after an evaluation under subparagraph (A), the Administrator determines that there is a need to amend any agreement or order entered into pursuant to section 120, the Administrator shall comply with all provisions of the agreement or order, respectively, relating to the amendment of the agreement or order.".

(b) REPORT TO CONGRESS.—Section 311(e) of Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9660(e)) is amended—

(1) by striking "At the time" and inserting the following:

"(1) IN GENERAL.—At the time"; and

(2) by adding at the end the following:

"(2) ADDITIONAL INFORMATION.—A report under paragraph (1) shall include information on the use of facilities described in subsection (h)(1) for the research, development, and application of innovative technologies for remedial activity, as authorized under subsection (h).".

TITLE VII—NATURAL RESOURCE DAMAGES

SEC. 701. RESTORATION OF NATURAL RESOURCES.

Section 107(f) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9607(f)) is amended—

(1) by inserting "NATURAL RESOURCE DAMAGES.—" after "(f)";

(2) by striking "(1) NATURAL RESOURCES LIABILITY.—In the case" and inserting the following:

"(1) LIABILITY.—

"(A) IN GENERAL.—In the case"; and

(3) in paragraph (1)(A), as designated by paragraph (2)—

(A) by inserting after the fourth sentence the following: "Sums recovered by an Indian tribe as trustee under this subsection shall be available for use only for restoration, replacement, or acquisition of the equivalent of such

natural resources by the Indian tribe. A restoration, replacement, or acquisition conducted by the United States, a State, or an Indian tribe shall proceed only if it is technologically feasible from an engineering perspective at a reasonable cost and consistent with all known or anticipated response actions at or near the facility."; and

(B) by striking "The measure of damages in any action" and all that follows through the end of the paragraph and inserting the following:

"(B) LIMITATIONS ON LIABILITY.—

"(i) MEASURE OF DAMAGES.—The measure of damages in any action for damages for injury to, destruction of, or loss of natural resources shall be limited to—

"(I) the reasonable costs of restoration, replacement, or acquisition of the equivalent of natural resources that suffer injury, destruction, or loss caused by a release; and

"(II) the reasonable costs of assessing damages.

"(ii) NONUSE VALUES.—There shall be no recovery under this Act for any impairment of nonuse values.

"(iii) NO DOUBLE RECOVERY.—A person that obtains a recovery of damages, response costs, assessment costs, or any other costs under this Act for the costs of restoring an injury to or destruction or loss of a natural resource (including injury assessment costs) shall not be entitled to recovery under this Act or any other Federal or State law for the same injury to or destruction or loss of the natural resource.

"(iv) RESTRICTIONS ON RECOVERY.—

"(I) LIMITATION ON LOST USE DAMAGES.—There shall be no recovery from any person under this section for the costs of a loss of use of a natural resource for a natural resource injury, destruction, or loss that occurred before December 11, 1980.

"(II) RESTORATION, REPLACEMENT, OR ACQUISITION.—There shall be no recovery from any person under

this section for the costs of restoration, replacement, or acquisition of the equivalent of a natural resource if the natural resource injury, destruction, or loss for which the restoration, replacement, or acquisition is sought and the release of the hazardous substance from which the injury resulted occurred wholly before December 11, 1980.".

SEC. 702. ASSESSMENT OF INJURY TO AND RESTORATION OF NATURAL RESOURCES.

(a) NATURAL RESOURCE INJURY AND RESTORATION ASSESSMENTS.—Section 107(f)(2) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9607(f)(2)) is amended by striking subparagraph (C) and inserting the following:

"(C) NATURAL RESOURCE INJURY AND RESTORATION ASSESSMENT.—

"(i) REGULATION.—A natural resource injury and restoration assessment conducted for the purposes of this Act made by a Federal, State, or tribal trustee shall be performed, to the extent practicable, in accordance with—

"(I) the regulation issued under section 301(c); and

"(II) generally accepted scientific and technical standards and methodologies to ensure the validity and reliability of assessment results.

"(ii) FACILITY-SPECIFIC CONDITIONS.—Injury assessment, restoration planning, and quantification of restoration costs shall, to the extent practicable, be based on facility-specific information.

"(iii) RECOVERABLE COSTS.—A trustee's claim for assessment costs—

"(I) may include only—

"(aa) costs that arise from work performed for the purpose of assessing injury to a natural resource to support a claim for restoration of the natural resource; and

"(bb) costs that arise from developing and evaluating a reasonable range of alternative restoration measures; but

"(II) may not include the costs of conducting any type of study relying on the use of contingent valuation methodology.

"(iv) PAYMENT PERIOD.—In a case in which injury to or destruction or loss of a natural resource was caused by a release that occurred over a period of years, payment of damages shall be permitted to be made over a period of years that is appropriate in view of the period of time over which the damages occurred, the amount of the damages, the financial ability of the responsible party to pay the damages, and the time period over which and the pace at which expenditures are expected to be made for restoration, replacement, and acquisition activities.

"(v) TRUSTEE RESTORATION PLANS.—

"(I) ADMINISTRATIVE RECORD.—Participating natural resource trustees may designate a lead administrative trustee or trustees. The lead administrative trustee may establish an

administrative record on which the trustees will base the selection of a plan for restoration of a natural resource. The restoration plan shall include a determination of the nature and extent of the natural resource injury. The administrative record shall be made available to the public at or near the facility at which the release occurred.

"(II) PUBLIC PARTICIPATION.—The Administrator shall issue a regulation for the participation of interested persons, including potentially responsible parties, in the development of the administrative record on which the trustees will base selection of a restoration plan and on which judicial review of restoration plans will be based. The procedures for participation shall include, at a minimum, each of the requirements stated in section 113(k)(2)(B).".

(b) REGULATIONS.—Section 301 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9651) is amended by striking subsection (c) and inserting the following:

"(c) REGULATIONS FOR INJURY AND RESTORATION ASSESSMENTS.—

"(1) IN GENERAL.—The President, acting through Federal officials designated by the National Contingency Plan under section 107(f)(2), shall issue a regulation for the assessment of injury to natural resources and the costs of restoration of natural resources (including the costs of assessment) for the purposes of this Act and for determination of the time periods in which payment of damages will be required.

"(2) CONTENTS.—The regulation under paragraph (1) shall—

"(A) specify protocols for conducting assessments in individual cases to determine the injury, destruction, or loss of natural resources;

"(B) identify the best available procedures to determine the reasonable costs of restoration and assessment;

"(C) take into consideration the ability of a natural resource to recover naturally and the

availability of replacement or alternative resources;

"(D) provide for the designation of a single lead Federal decisionmaking trustee for each facility at which an injury to natural resources has occurred within 180 days after the date of first notice to the responsible parties that an assessment of injury and restoration alternatives will be made; and

"(E) set forth procedures under which—

"(i) all pending and potential trustees identify the injured natural resources within their respective trust responsibilities, and the authority under which such responsibilities are established, as soon as practicable after the date on which a release occurs;

"(ii) assessment of injury and restoration alternatives will be coordinated to the greatest extent practicable between the lead Federal decisionmaking trustee and any present or potential State or tribal trustees, as applicable; and

"(iii) time periods for payment of damages in accordance with section 107(f)(2)(C)(iv) shall be determined.

"(3) DEADLINE FOR ISSUANCE OF REGULATION; PERIODIC REVIEW.—The regulation under paragraph (1) shall be issued not later than 1 year after the date of enactment of the Superfund Cleanup Acceleration Act of 1997 and shall be reviewed and revised as appropriate every 5 years.".

SEC. 703. CONSISTENCY BETWEEN RESPONSE ACTIONS AND RESOURCE RESTORATION STANDARDS.

(a) RESTORATION STANDARDS AND ALTERNATIVES.—Section 107(f) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9607(f)) is amended by adding at the end the following:

"(3) COMPATIBILITY WITH REMEDIAL ACTION.—Both response actions and restoration measures may be implemented at the same facility, or to address releases from the same facility. Such response actions and restoration measures shall not be inconsistent with one another and shall be implemented, to the extent practicable, in a coordinated and integrated manner.".

(b) CONSIDERATION OF NATURAL RESOURCES IN RESPONSE ACTIONS.—Section 121(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9621(a)) (as amended by section 402(1)) is amended by adding at the end the following:

"(6) COORDINATION.—In evaluating and selecting remedial actions, the Administrator shall take into account the potential for injury to a natural resource resulting from such actions.".

SEC. 704. CONTRIBUTION.

Subparagraph (A) of section 113(f)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9613(f)(1)) is amended in the third sentence by inserting "and natural resource damages" after "costs".

TITLE VIII—MISCELLANEOUS

SEC. 801. RESULT-ORIENTED CLEANUPS.

(a) AMENDMENT.—Section 105(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9605(a)) is amended—

(1) by striking "and" at the end of paragraph (9);

(2) by striking the period at the end of paragraph (10) and inserting "; and"; and

(3) by inserting after paragraph (10) the following:

"(11) procedures for conducting response actions, including facility evaluations, remedial investigations, feasibility studies, remedial action plans, remedial designs, and remedial actions, which procedures shall—

"(A) use a results-oriented approach to minimize the time required to conduct response measures and reduce the potential for exposure to the hazardous substances, pollutants, and contaminants in an efficient, timely, and cost-effective manner;

"(B) require, at a minimum, expedited facility evaluations and risk assessments, timely negotiation of response action goals, a single engineering study, streamlined oversight of response actions, and consultation with interested parties throughout the response action process;

"(C) be subject to the requirements of sections 117, 120, 121, and 133 in the same manner and to the same degree as those sections apply to response actions; and

"(D) be required to be used for each remedial action conducted under this Act unless the

Administrator determines that their use would not be cost-effective or result in the selection of a response action that achieves the goals of protecting human health and the environment stated in section 121(a)(1)(B).".

(b) AMENDMENT OF NATIONAL HAZARDOUS SUBSTANCE RESPONSE PLAN.—Not later than 180 days after the date of enactment of this Act, the Administrator, after notice and opportunity for public comment, shall amend the National Hazardous Substance Response Plan under section 105(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9605(a)) to include the procedures required by the amendment made by subsection (a).

SEC. 802. NATIONAL PRIORITIES LIST.

Section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9605) (as amended by section 407(a)(2)) is amended by adding at the end the following:

"(i) NATIONAL PRIORITIES LIST.—

"(1) LIMITATION.—

"(A) IN GENERAL.—After the date of the enactment of this subsection, the President may

add vessels and facilities to the National Priorities List only in accordance with the following schedule:

"(i) Not more than 30 vessels and facilities in 1997.

"(ii) Not more than 25 vessels and facilities in 1998.

"(iii) Not more than 20 vessels and facilities in 1999.

"(iv) Not more than 15 vessels and facilities in 2000.

"(v) Not more than 10 vessels and facilities in any year after 2000.

"(B) RELISTING.—The relisting of a vessel or facility under section 130(d)(5)(C)(ii) shall not be considered to be an addition to the National Priorities List for purposes of this subsection.

"(2) PRIORITIZATION.—The Administrator shall prioritize the vessels and facilities added under paragraph (1) on a national basis in accordance with the threat to human health and the environment presented by each of the vessels and facilities, respectively.

"(3) STATE CONCURRENCE.—A vessel or facility may be added to the National Priorities List under paragraph (1) only with the concurrence of the Governor of the State in which the vessel or facility is located.".

SEC. 803. OBLIGATIONS FROM THE FUND FOR RESPONSE ACTIONS.

Section 104(c)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9604(c)(1)) is amended—

(1) in subparagraph (C) by striking "consistent with the remedial action to be taken" and inserting "not inconsistent with any remedial action that has been selected or is anticipated at the time of any removal action at a facility.";

(2) by striking "$2,000,000" and inserting "$4,000,000"; and

(3) by striking "12 months" and inserting "2 years".

TITLE IX—FUNDING

Subtitle A—General Provisions

SEC. 901. AUTHORIZATION OF APPROPRIATIONS FROM THE FUND.

Section 111(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42

U.S.C. 9611(a)) is amended in the first sentence by striking "not more than $8,500,000,000 for the 5-year period beginning on the date of enactment of the Superfund Amendments and Reauthorization Act of 1986, and not more than $5,100,000,000 for the period commencing October 1, 1991, and ending September 30, 1994" and inserting "a total of $8,500,000,000 for fiscal years 1998, 1999, 2000, 2001, and 2002".

SEC. 902. ORPHAN SHARE FUNDING.

Section 111(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9611(a)), as amended by section 301(c), is amended by inserting after paragraph (8) the following:

"(9) ORPHAN SHARE FUNDING.—Payment of orphan shares under section 136.".

SEC. 903. DEPARTMENT OF HEALTH AND HUMAN SERVICES.

Section 111 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9611) is amended by striking subsection (m) and inserting the following:

"(m) HEALTH AUTHORITIES.—There are authorized to be appropriated from the Fund to the Secretary of Health and Human Services to be used for the purposes of carrying out the activities described in subsection (c)(4)

and the activities described in section 104(i), $50,000,000 for each of fiscal years 1998, 1999, 2000, 2001, and 2002. Funds appropriated under this subsection for a fiscal year, but not obligated by the end of the fiscal year, shall be returned to the Fund.".

SEC. 904. LIMITATIONS ON RESEARCH, DEVELOPMENT, AND DEMONSTRATION PROGRAMS.

Section 111 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9611) is amended by striking subsection (n) and inserting the following:

"(n) LIMITATIONS ON RESEARCH, DEVELOPMENT, AND DEMONSTRATION PROGRAMS.—

"(1) ALTERNATIVE OR INNOVATIVE TECHNOLOGIES RESEARCH, DEVELOPMENT, AND DEMONSTRATION PROGRAMS.—

"(A) LIMITATION.—For each of fiscal years 1998, 1999, 2000, 2001, and 2002, not more than $30,000,000 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) other than basic research.

"(B) CONTINUING AVAILABILITY.—Such amounts shall remain available until expended.

"(2) HAZARDOUS SUBSTANCE RESEARCH, DEMONSTRATION, AND TRAINING.—

"(A) LIMITATION.—From the amounts available in the Fund, not more than the following amounts may be used for the purposes of section 311(a):

"(i) For fiscal year 1998, $37,000,000.

"(ii) For fiscal year 1999, $39,000,000.

"(iii) For fiscal year 2000, $41,000,000.

"(iv) For each of fiscal years 2001 and 2002, $43,000,000.

"(B) FURTHER LIMITATION.—No more than 15 percent of such amounts shall be used for training under section 311(a) for any fiscal year.

"(3) UNIVERSITY HAZARDOUS SUBSTANCE RESEARCH CENTERS.—For each of fiscal years 1998, 1999, 2000, 2001, and 2002, not more than $5,000,000 of the amounts available in the Fund may be used for the purposes of section 311(d).".

SEC. 905. AUTHORIZATION OF APPROPRIATIONS FROM GENERAL REVENUES.

Section 111(p) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9611(p)) is amended by striking paragraph (1) and inserting the following:

"(1) AUTHORIZATION OF APPROPRIATIONS.—

"(A) IN GENERAL.—There are authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, to the Hazardous Substance Superfund—

"(i) for fiscal year 1998, $250,000,000;

"(ii) for fiscal year 1999, $250,000,000;

"(iii) for fiscal year 2000, $250,000,000;

"(iv) for fiscal year 2001, $250,000,000; and

"(v) for fiscal year 2002, $250,000,000.

"(B) ADDITIONAL AMOUNTS.—There is authorized to be appropriated to the Hazardous Substance Superfund for each such fiscal year an amount, in addition to the amount authorized by subparagraph (A), equal to so much of

the aggregate amount authorized to be appropriated under this subsection and section 9507(b) of the Internal Revenue Code of 1986 as has not been appropriated before the beginning of the fiscal year.".

SEC. 906. ADDITIONAL LIMITATIONS.

Section 111 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9611) (as amended by section 102(c)) is amended by adding at the end the following:

"(t) COMMUNITY RESPONSE ORGANIZATION.—For the period commencing January 1, 1997, and ending September 30, 2002, not more than $15,000,000 of the amounts available in the Fund may be used to make grants under section 117(f) (relating to Community Response Organizations).

"(u) RECOVERIES.—Effective beginning January 1, 1997, any response cost recoveries collected by the United States under this Act shall be credited as offsetting collections to the Superfund appropriations account.".

SEC. 907. REIMBURSEMENT OF POTENTIALLY RESPONSIBLE PARTIES.

Section 111(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42

U.S.C. 9611(a)) (as amended by section 902) is amended by inserting after paragraph (9) the following:

"(10) REIMBURSEMENT OF POTENTIALLY RESPONSIBLE PARTIES.—If—

"(A) a potentially responsible party and the Administrator enter into a settlement under this Act under which the Administrator is reimbursed for the response costs of the Administrator; and

"(B) the Administrator determines, through a Federal audit of response costs, that the costs for which the Administrator is reimbursed—

"(i) are unallowable due to contractor fraud;

"(ii) are unallowable under the Federal Acquisition Regulation; or

"(iii) should be adjusted due to routine contract and Environmental Protection Agency response cost audit procedures,

a potentially responsible party may be reimbursed for those costs.".

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CRS Report for Congress

A Summary of S. 8, A Superfund Reauthorization Bill

February 28, 1997

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Congressional Research Service • The Library of Congress

A Summary of S. 8, The Superfund Cleanup Acceleration Act of 1997

The Superfund Cleanup Acceleration Act of 1997, S. 8, was introduced on January 21, 1997, by Senator Bob Smith, Chairman of the Environment and Public Works Subcommittee on Superfund, Waste Control, and Risk Assessment. The bill reauthorizes the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA, or Superfund) for 5 years at a level of $8.5 billion total, and makes extensive amendments in its nine titles.

TITLE I - Brownfields Revitalization

There is no specific brownfields authority in CERCLA; the current program was initiated administratively by EPA. It provides 2-year grants of up to $100,000 annually ($200,000 total) to assist communities in cleaning up idle industrial and commercial facilities where expansion or redevelopment is complicated by real or perceived environmental contamination.

S. 8 directs EPA to establish two programs. The first, the Brownfield Characterization Grant Program, would provide grants of up to $100,000 per year for 2 years to characterize and assess brownfield sites; $15 million annually is authorized for the program for 5 years. "Eligible entities" to receive the grants are local governments, regional councils, state-chartered redevelopment agencies, and Indian tribes.

The second program, the Brownfield Remediation Grant Program, would provide grants to states or eligible entities to capitalize revolving loan funds for brownfield cleanups. The maximum amount of a grant with respect to any brownfield facility may not exceed $150,000 annually for 2 years. Twenty-five million dollars annually is authorized for the program for 5 years.

Requirements for grant applications are set out, as are criteria for EPA to use in ranking the applications. Facilities being cleaned up under other authorities are excluded from the program, namely:

- facilities subject to emergency removal actions under CERCLA,
- facilities on the National Priorities List (NPL),
- facilities subject to corrective action under RCRA,
- facilities being closed under RCRA,
- facilities subject to administrative orders or consent decrees,
- federal facilities, and

- facilities for which cleanup assistance has been provided under the Leaking Underground Storage Tank (LUST) Trust Fund.

The bill also authorizes technical and financial assistance to states to establish and expand voluntary response programs. Elements of a qualifying state program include public participation in remedy selection, streamlined procedures, oversight and enforcement authorities to ensure that response activities are completed, and a requirement for state certification that the response is complete. A voluntary cleanup at an NPL site must protect human health and the environment to the same extent as a remedial action selected by EPA. The bill authorizes $25 million per year for 5 years for assistance to states.

Under S. 8, a state would have final authority at sites subject to a state remedial action plan. The federal government is forbidden from taking an administrative or judicial enforcement action, or bringing a private civil action against anyone at a facility subject to a state remedial action plan, or at a facility where a state has certified that response action is complete. At a facility not subject to a state remedial action plan, the President shall provide notice to the state within 48 hours after issuing a section 106(a) administrative order; the order shall cease to have effect 90 days after issuance unless the state concurs in the continuation of the order.

The bill protects from liability landholders whose property was contaminated by a contiguous NPL site if they did not contribute to the contamination; such landholders shall provide cooperation and facility access to those cleaning up the facility. Also relieved from liability are purchasers of contaminated property, if they did not contribute to the contamination, and conducted appropriate inquiries prior to the purchase.

TITLE II - State Role

At present, states are involved in the selection of remedies and may enter into cooperative agreements with EPA to carry out most cleanup activities on a site-by-site basis. However, final remedy selection must be done by EPA.

The bill allows states to apply to EPA to be delegated one or more of five specified categories of delegable federal CERCLA authorities at one or more non-federal facilities in the state. (State authority at federal facilities is addressed in Title VI of S. 8) The categories are:

- site investigations, evaluations, and risk analyses;
- development of alternatives, and remedy selection, including issuance of records of decision;
- remedial design;
- remedial action, and operation and maintenance, including removal actions; and
- liability allocation, including issuance of final settlements.

Each category includes the related enforcement authorities to recover response costs, to require potentially responsible parties (PRP) to perform response actions, and otherwise to compel implementation of a response action.

Delegated states may remove all or part of a designated facility from the NPL, and EPA may not relist such a facility unless the cleanup is not completed in accordance with an enforceable state-federal agreement. A state may retain 25% of any federal response costs recovered from a responsible party, plus its own response costs. EPA shall review a state's use of funds, may withdraw delegated authority, may take response actions and perform other authorities not delegated to a state, and may perform emergency removals at delegated sites if the state fails to act. Facility-specific and non-facility-specific grants to delegated states are provided for. Grant money may not be used to pay the state share of response costs.

The 50% state cost-share requirement at state-operated facilities is repealed. The state cost share will be the lower of 10%, or a percentage determined by the Office of Management and Budget.

TITLE III - Community Participation

Currently, CERCLA requires only that there be a public notice and comment period before the adoption of many emergency removal actions and all remedial (cleanup) actions. Technical assistance grants (TAGs) of $50,000 are available to the public.

Title III authorizes the establishment of Community Response Organizations (CROs) near sites on the National Priorities List (NPL), and near sites on State Registries. A CRO will contain 15 to 20 EPA-selected members representing residents; property owners; the local medical community; Indian tribes; citizen, environmental, or public interest groups; local government and land use regulatory bodies; and local businesses.

CROs would serve as conduits of information to and from the community, and represent it during the remedial action planning and implementation process. The bill would direct EPA to inform and consult with CROs, and to consider their views in developing and implementing the remedial action plan. CROs would have access to documents regarding response actions, but not to those relating to liability nor confidential documents.

CROs are the preferred recipients of technical assistance grants (TAGs) to obtain aid in interpreting information. As in current law, TAGs are for $50,000, but the bill allows renewal for a total of $100,000. TAGs are also made available to groups at sites on State Registries. The bill eliminates the current law fund-matching requirement, and authorizes early disbursement of up to $5,000 of the grant. Total funding is limited to 2% of Superfund appropriations. Grants may not be used to collect field data. The bill directs EPA to ensure that communication about risks conforms to specified standards of accuracy and intelligibility to the lay person.

TITLE IV - Selection of Remedial Actions

Under CERCLA, cleanup standards are set by looking at applicable or relevant and appropriate requirements (ARARs) of federal and state laws. Where no ARARs exist cleanup levels are determined using site-specific risk assessments. The law states a preference for remedies using treatment (of soil and groundwater) that permanently reduces or eliminates volume, toxicity, and mobility of contaminants.

The bill adds two definitions to CERCLA section 101. "Actual or planned or reasonably anticipated future use of the land and water resources" means the actual use of the land, surface water, and ground water at a facility on the date of submittal of the proposed remedial action plan. Further, regarding land, it means the use that is authorized for the facility and the land adjacent to it, by the local land use planning authority at the time of the facility evaluation; and any other reasonably anticipated use that the planning authority, in consultation with the CRO, determines to have a substantial probability of occurring based on recent development patterns and population projections. With respect to water, it means the future use of the surface water and ground water that is potentially affected by releases from the facility, that is reasonably anticipated by the water use/planning governmental unit on the date of submission of the proposed remedial action plan.

The second added definition, "sustainability," means the ability of an ecosystem to continue to function within the normal range of its variability absent the effects of a release of a hazardous substance.

Title IV requires EPA to select a cost-effective remedial action that achieves the goals of protecting human health and the environment, and that complies with other applicable federal and state laws, on the basis of a facility-specific risk evaluation, and in accordance with the criteria listed below.

Goals of Protecting Human Health and the Environment. The remedial action is deemed to protect human health if, considering the expected exposures associated with future land and water use, and on the basis of the risk evaluation, the remedial action achieves a residual risk (1) from exposure to threshold[1] carcinogenic hazardous substances such that the cumulative lifetime additional cancer risk is in the range of 10^{-4} to 10^{-6} for the affected population, and (2) from exposure from nonthreshold[2] carcinogenic and noncarcinogenic hazardous substances that does not exceed a hazard index of 1. The remedial action is deemed to protect the environment if it protects ecosystems from significant threats to their sustainability posed by releases of hazardous substances, and does not cause a greater threat to their sustainability than a release of a hazardous substance. A remedial action must prevent or eliminate any human ingestion of drinking water containing hazardous substances in excess of Safe Drinking Water Act maximum contaminant levels (MCLs), or if MCLs have not been established for the substance, at levels meeting the human health goal above (1).

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[1] A typographical error in the printed bill makes it read "nonthreshold."

[2] A typographical error in the printed bill makes it read "threshold."

A remedy must comply with the substantive requirements of federal and state environmental and facility-siting laws that are applicable to the conduct of the remedial action, or to the determination of the cleanup level. Other state requirements may be applied at NPL sites if they are re-promulgated and the state shows that they are generally applicable and consistently applied; this does not apply to the return of "contaminated media into the same media in ... then-existing areas of contamination at the facility." Institutional and engineering controls shall be considered on an equal basis with other remedial action alternatives. Federal and state procedural requirements, including permitting requirements, shall not apply to response actions conducted on site at the facility. Waivers are authorized for specified reasons.

Remedy Selection Criteria. When selecting a remedy, EPA is to balance the following factors equally:

- effectiveness of the remedy in protecting health and the environment;
- reliability in achieving the protectiveness standard over the long term (replacing the current law's preference for permanence);
- short-term risk posed by implementing the remedial action;
- acceptability to the community;
- technical feasibility from an engineering perspective; and
- reasonableness of the cost.

If achieving the goals is technically impracticable, EPA shall select a technically practicable remedy that most closely achieves the cleanup goals through cost-effective means. A presumptive remedial action is considered to achieve the goals.

If appropriate, a remedial action for ground water may proceed in phases, allowing collection of sufficient data to evaluate other actions at the site, and to determine the appropriate scope of the remedial action. Ground water decisions must take into consideration actual or planned future use of the ground water, and any natural attenuation that would occur without action. A remedial action shall protect uncontaminated ground water that is suitable for humans or livestock. For contaminated ground water that is, or is planned to be, used for drinking by humans or livestock, if it is technically practicable, EPA shall try to restore it to a condition suitable for use. Technical practicability shall be determined by modeling. In determining the need for restoring contaminated ground water, and in selecting the remedy, EPA shall take into account the ability to substantially accelerate the availability of ground water for use as drinking water. If restoration is technically impracticable, the selected remedy may rely on point-of-use treatment or other measures to ensure there is no ingestion of contaminated drinking water; point-of-use treatment shall be considered as part of the remedy's operation and maintenance.

Ground water shall be considered unsuitable for drinking water if naturally occurring conditions prevent it, or it is so contaminated by broad-scale human activity that restoration is technically impracticable, or if it is physically incapable of yielding 150 gallons a day to a well or spring. Remedial action for ground water not having an actual or planned use as drinking water for humans or livestock shall attain levels suitable for whatever the actual or planned use may be.

Remedy Selection Methodology. The bill directs that facility-specific risk evaluations be used to: identify the risks posed by a facility, compare the relative protection of alternative potential remedies, and demonstrate that the selected remedial action can achieve the goals of protecting health and the environment. The risk evaluation must comply with stated principles that ensure that future land and water use is considered, and that the evaluation is scientifically objective and includes all relevant data. A facility-specific risk evaluation shall: (1) be based on actual information or scientific estimates of exposure to the extent that substituting such estimates for standard assumptions alters the basis for decisions to be made; (2) be scientifically objective; (3) use chemical and facility-specific data and analysis (such as bioavailability, exposure, and fate and transport evaluations) in preference to default assumptions when such data and analysis are likely to vary by facility, and facility-specific risks are to be communicated to the public, or the use of such data and analysis alter the basis for decisions to be made; and (4) use a range and distribution of realistic and scientifically supportable assumptions when chemical and facility-specific data are not available, if the use of such assumptions would communicate more accurately the consequences of the various decision options.

The document reporting the results of the risk evaluation must clearly explain the risks, identify the assumptions and uncertainties, present a range and distribution of exposure and risk estimates, state the size of the population at risk, and compare risks from the facility with other daily and regulated risks.

EPA must issue regulations within 18 months that promote a realistic characterization of risks posed by a facility or a proposed remedial action.

Within one year, EPA is to issue a rule establishing presumptive remedial actions for common types of facilities with reasonably well-understood contamination and exposure problems. Such presumptive remedies may include institutional and engineering controls. A remedial action that implements a presumptive remedial action is considered to meet the goals of protecting human health and the environment.

The bill establishes procedures for conducting remedial investigations, feasibility studies, records of decisions, remedial designs, and remedial actions. The procedures provide for public participation. EPA or a potentially responsible party (PRP) must prepare and implement a remedial action plan which includes the results of a facility evaluation; a discussion of viable remedies and their costs; a description of the chosen remedy; a facility-specific risk-based evaluation; and a realistic schedule.

EPA must establish remedy review boards within 60 days of enactment. A proposed remedial action plan may be submitted to a board at the request of the person responsible for preparing or implementing the plan. The board has 180 days to recommend to the Administrator whether the plan is consistent with section 121 cleanup standards, is technically feasible, and is reasonable in cost. The Administrator must approve or disapprove the plan within 180 days of the plan's submission to the board.

The bill sets procedures and time frames for EPA to provide notice of completion of a remedial action and delisting of a facility from the NPL. Delisting does not affect liability allocations, cost-recovery provisions, or operation and

maintenance obligations. A PRP is released from liability if the facility is available for unrestricted use, and operation and maintenance is not needed. If the facility is not available for unrestricted use, or operation and maintenance is required, EPA must review the status of the facility every 5 years and require additional remedial action, as needed. A facility or portion of a facility may be made available for restricted use.

EPA shall use the remedy review boards to determine, on petition by the PRP, whether an alternative remedy should apply to a facility, rather than the one specified in the record of decision (ROD). The review board shall issue its decision within 180 days. Determinations of cost savings shall consider only expenditures avoided by undertaking the alternative remedy. The proposed alternative remedy shall be approved if it satisfies the cleanup requirements of section 121(a), and achieves a costs savings of at least $1 million to $2.5 million (the minimum amount depending on the cost of the remedy, and whether it involves ground water treatment and dense, nonaqueous phase liquids). The state governor may object to the board considering the petition to review the remedy if he demonstrates that the selection of the alternative remedy would cause an unreasonably long delay likely to result in adverse health or environmental impacts, disruption of planned future use, or economic hardship.

When listing a site on the NPL, EPA may not include property at which no release has occurred, but to which a contaminant has migrated in ground water.

TITLE V - Liability

Current law imposes joint and several liability on a strict and retroactive basis, covering owners and operators of sites, generators and transporters of hazardous substances released at Superfund sites, and those who arranged for disposal at those sites. It authorizes EPA to settle with PRPs, provides authority for EPA to prepare non-binding allocations of responsibility, and has special settlement provisions for *de minimis* parties. EPA may use mixed funding, and may provide settling parties protection from third party lawsuits and covenants not to sue.

The bill defines "codisposal landfills", "municipal solid waste", "municipality", and "sewage sludge". A codisposal landfill is one that was listed on the NPL as of January 1, 1997; received municipal solid waste or sewage sludge (MSW or SS); and also may have received, before the effective date of RCRA subtitle C requirements,[3] hazardous waste, if a substantial portion of the total volume of waste disposed at the landfill consisted of MSW or SS that was transported to the landfill from outside the facility.

Title V exempts from liability the generator, arranger, and transporter of MSW and SS. *De minimis* contributors are exempt from liability for response costs incurred after enactment unless the material contributed significantly to the amount of response costs; a *de minimis* contribution is less than 1% of the volume of

[3] Subtitle C of the Resource Conservation and Recovery Act addresses the generation, handling, treatment, storage, and disposal of hazardous waste.

material containing a hazardous substance disposed prior to January 1, 1997, or less than 200 pounds or 110 gallons of material containing a hazardous substance prior to January 1, 1997. Also exempt from liability is any small business with fewer than 30 employees, or less than $3 million in gross revenues. The liability of "501(c)(3) organizations" (religious, charitable, scientific and educational organizations) that receive a facility as a gift, is limited to the fair market value of the facility. The bill relieves the liability of a railroad owner or operator of a spur track.

For generators, transporters, and arrangers there is no liability for response costs incurred after enactment for codisposal landfills. For the owners and operators of codisposal landfills, the situation is different, and depends on whether the owner or operator is private or a municipality, and if the latter, on its size.

Large and small municipalities are defined as those with populations above and below 100,000 respectively. For a codisposal landfill that is owned or operated only by small municipalities, and is not subject to RCRA subtitle D[4] criteria, the aggregate liability of the municipalities for response costs incurred after enactment shall be the lesser of (a) 10% of the total response costs, or (b) the cost of complying with RCRA subtitle D (as if the facility had continued to accept MSW through January 1, 1997). For large municipalities, their aggregate liability will be the lesser of 20% of the total response costs, or the RCRA subtitle D compliance costs.

For codisposal landfills owned or operated by non-municipalities, and that are not subject to RCRA subtitle D, the liability is the lesser of 30% of the total amount of response costs, or the costs of complying with RCRA subtitle D. For codisposal landfills owned or operated by a combination of small and large municipalities, or persons other than municipalities, and *are not*[5] subject to RCRA subtitle D, the allocator shall determine the proportion of the use of the landfill that was made by small and large municipalities and persons other than municipalities, and shall allocate among them an appropriate percentage of total liability not exceeding the aggregate liability percentages stated. For a codisposal landfill that *is* subject to RCRA subtitle D, regardless of the status of the owners and operators, the aggregate liability is no more than the costs of complying with RCRA subtitle D.

The codisposal landfill exemption does not apply to one who acted in violation of RCRA subtitle C or D, nor to a facility not operated in substantial compliance with its permit issued by the state or other appropriate authority.

A responsible party who currently is subject to a section 106 administrative order or has entered into a settlement decree is required to fulfill his obligations, even if the responsible party is not liable by reason of a liability exemption or limitation. The party may apply to the Fund for contribution, and shall be reimbursed expeditiously.

The bill establishes a mandatory, non-binding allocation process for multi-party non-federal NPL sites where response costs are incurred after enactment. Excluded from the allocation process are facilities where cost shares are already determined.

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[4] RCRA subtitle D addresses non-hazardous wastes.

[5] A typographical error in the printed bill makes it read "are" subject to subtitle D.

The bill excludes from liability relief any party found guilty of violating federal or state law resulting in the release of a hazardous substance which caused the incurring of response costs at the facility.

The bill sets a moratorium on litigation until 120 days after the allocator's report is issued.

Within 180 days of enactment EPA shall establish a process for the conduct of mandatory, requested, and permissive allocations. The allocation process shall ensure that parties eligible for an exemption from liability are notified of their status at the earliest practicable time, and are provided with assurances that they are not liable. By regulation, EPA shall provide an expedited process for the retention of an impartial allocator; permit any person to name additional responsible parties; and require that the allocator adopt any settlement that allocates 100% of the costs of the response action, provided the settlement waives a right of recovery from other parties and a right to contribution from the Fund.

Federal, state, and local governments, are subject to, and are entitled to the benefits of, the allocation process and determination to the same extent as any other party. The EPA Administrator or the Attorney General shall participate in the allocation process as the representative of the Fund from which any orphan share shall be paid.

The allocator has information gathering authorities, including an administrative subpoena, and he shall make every effort to streamline the allocation process. The allocator shall have broad discretion to conduct the allocation in a fair, efficient, and impartial manner.

The allocator shall prepare a written nonbinding allocation report that specifies the percentage share of each party, and any orphan share. The factors for allocation are:

- the amount, degree of toxicity, and mobility of hazardous substances contributed by each party;
- the degree of involvement of each party;
- the degree of care exercised with respect to hazardous substances;
- the cooperation of each party in contributing to any response action, and in providing complete and timely information to the allocator; and
- any other equitable factors that the allocator determines are appropriate.

The orphan share consists of: (1) the shares of insolvent or defunct parties; (2) the remainder of any share not paid by a party where: (i) it was an expedited settlement with a person with limited ability to pay; (ii) the party's share is eliminated, limited, or reduced by any provision of this Act; or (iii) the person settled with the U.S. before the allocation was completed; and (3) all response costs at a codisposal landfill incurred after enactment that are attributable to but are not fully paid for by the generators, transporters, and arrangers of MSW and SS; *de minimis* parties; small businesses; and those involved at the codisposal landfill. Unattributable shares will be distributed among the allocation parties and the orphan share in accordance with the allocated share assigned to each.

If a party does not pay his allocation share, EPA may commence an action against him to recover his share plus any response costs not recovered through settlements with other parties, including the orphan share, but excluding any share allocated to a federal, state, or local government agency.

Response action contractors (RACs) receive additional liability protection by being excluded from the definition of owners and operators, and by extending their existing exemption from federal law to state law. RAC negligence would be evaluated based on the standards and practices in effect at the particular time and place. Subcontractors are also covered.

The bill provides an exemption from liability for those who arrange for the recycling of seven specified materials if they can meet certain threshold demonstrations. The seven materials are scrap glass, paper, plastic, rubber, textiles, metal, and spent batteries.

TITLE VI - Federal Facilities

Current law makes federal facilities subject to CERCLA in the same way as other parties, but they are not eligible to receive Superfund monies. Federally owned sites that are not on the NPL are subject to state law concerning removal, remedial action, and enforcement.

Title VI authorizes a qualified state to make application to exercise EPA's authorities at federal facilities, on a site-by-site basis, provided the state utilizes the federal remedy selection process and standards. The state has exclusive authority to exercise transferred authorities; existing interagency agreements are unchanged, except for the state replacing EPA. A state may require a remedial action exceeding federal standards if the state pays the incremental costs.

A federal officer, employee, or agent may not be held criminally liable for failing to comply with a state order to take a response action at a federally owned or operated site, unless he has not requested sufficient funds in the President's budget to undertake the response action, or appropriated funds were available to pay for the response action.

A federal facility on the NPL may be designated for research, development, and application of innovative technologies.

TITLE VII - Natural Resource Damages

CERCLA makes the federal and state governments trustees for natural resources; claims against responsible parties must be made within 3 years of discovery of the loss.

The bill limits the measure of damages for injury or loss of natural resources to the costs of restoration, replacement, or acquisition of equivalent natural resources, and the costs of assessing damages. The bill eliminates non-use damages,

and all lost use damages for pre-December 11, 1980, activities; there will be no double recovery under both CERCLA and other law.

The bill strikes the provision which gives a trustee's determination of damages the force and effect of a rebuttable presumption. The President is directed to issue natural resource injury and restoration assessment regulations that identify procedures for determining the reasonable cost of restoration, and that require consideration of natural recovery as a restoration method, and the availability of replacement or alternative resources. The regulation shall be issued within 1 year of enactment, and shall be reviewed every 5 years.

A responsible party may seek contribution from other liable persons for natural resource damages.

TITLE VIII - Miscellaneous

Section 801 amends section 105(a) of CERCLA to require the President to revise the National Hazardous Substance Response Plan (a part of the National Contingency Plan) to establish results-oriented procedures for remedial actions that minimize the time required and reduce the potential for exposure to hazardous substances in a cost-effective manner.

Section 802 amends section 105 of CERCLA to limit additions to the National Priorities List to 30 vessels and facilities in 1997, 25 in 1998, 20 in 1999, 15 in 2000, and 10 in any year after 2000. EPA shall prioritize the vessels and facilities on a national basis in accordance with the threat they pose to health and the environment. Additions to the list may be made only with the concurrence of the governor of the state in which the vessel or facility is located.

Section 803 increases the authority for emergency response actions from $2 million to $4 million, and the time limit from 1 year to 2.

TITLE IX - Funding

Section 901 amends CERCLA section 111 to authorize appropriations from the Fund of $8.5 billion for the 5-year period, FYs 1998 to 2002.

Section 902 amends CERCLA section 111 to allow payment of orphan shares as a use of the Fund.

Section 903 amends CERCLA section 111 to authorize appropriations from the Fund for the activities of the Agency for Toxic Substances and Disease Registry of $50 million for each of FYs 1998-2002.

Section 904 sets limits for FY1998-2002 of $30 million per year for alternative or innovative technologies research, development, and demonstration programs; for hazardous substance research, demonstration and training, $37 million for FY1998, $39 million for FY1999, $41 million for FY2000, and $43 million each year for

FY2001 and FY2002, with no more than 15% of those amounts to be used for training; and $5 million annually for university research centers.

Section 905 authorizes appropriations from General Revenues of $250 million annually for FYs 1998-2002.

Section 906 limits funding for Community Response Organizations to $15 million for the period from January 1, 1997, to September 30, 2002. The section also specifies that any response cost recoveries will be credited as offsetting collections to the Superfund appropriations account.

Section 907 amends CERCLA Section 111(a) to allow the Fund to be used to reimburse PRPs if a PRP and EPA have entered into a settlement under which the Administrator is reimbursed for response costs, and the Administrator determines (through a federal audit) that the costs are unallowable due to contractor fraud or the Federal Acquisition Regulation, or should be adjusted due to audit procedures.

PREPARED STATEMENT OF CAROL M. BROWNER, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY

INTRODUCTION

Good morning, Mr. Chairman, and Members of the Committee. I am pleased to have this opportunity to appear before you to describe the Superfund program and discuss legislative reform of Superfund in the 105th Congress.

Superfund is an important, and above all, a necessary program, dedicated to cleaning up our nation's hazardous waste sites. EPA has worked closely with the Agency for Toxic Substances and Disease Registry (ATSDR) in evaluating the impacts of these sites on public health. ATSDR studies show a variety of health effects that are associated with specific sites, including birth defects, cardiac disorders, changes in pulmonary function, impacts on the immune system (the body's natural defense system from disease and sickness), and increases in chronic lymphocytic leukemia. These findings support EPA risk estimates that show the impacts of these sites on public health. EPA also works with other Federal agencies to assess the impacts of hazardous material releases on natural resources and the environment. Together, the efforts of these agencies, working with EPA, provide the basis for targeting cleanups to protect public health and the environment, and show the need for Superfund.

The Clinton Administration remains committed to responsible, Superfund legislative reform. We are also committed to participating in a process by which Republicans, Democrats, the Administration and a broad cross-section of stakeholder representatives work together to build consensus on the elements of Superfund legislative reform. As drafted, the Administration does not believe S. 8 provides the basis for consensus based legislative reform. The Administration is ready to work with you to craft Superfund reform legislation that can attract broad consensus support. Only through a consensus based legislative process can we craft a proposal that is fully protective and delivers on our commitment to the American people to accelerate toxic waste cleanup. By developing a broad consensus based process, we believe we can achieve Superfund reform in the 105th Congress.

We are determined that our third try at legislative reform address today's Superfund program, not out of date problems now resolved. The Superfund program is fundamentally different and better. It is faster, fairer, and more efficient—reality, not just rhetoric—than when the legislative debate started 4 years ago. Responsible legislative reform must buildupon initiatives and reforms that have brought about program improvements, and must address remaining legislative barriers to success with an eye toward the 21st Century, in which we can all hope to see less exposure from toxic waste sites for all Americans, and the return of these resources to productive reuse.

My purpose today is threefold: (1) to forge an understanding of where the Superfund program is today by sharing with you the substantial accomplishments EPA has achieved over the past few years, not only maintaining, but accelerating the pace of cleanup through three rounds of Administrative Reforms; (2) to discuss a vision and potential components for responsible Superfund legislative reform; and (3) to discuss our concerns with S. 8, which fails to meet our principles for responsible, Superfund legislative reform in this Congress.

Finally, the Administration remains concerned over the expiration of the authority to replenish the Superfund Trust Fund. Without the availability of these funds, the Administration will be unable to continue cleaning up sites at the current pace, or guarantee our ability to respond to environmental threats.

A FUNDAMENTALLY BETTER SUPERFUND PROGRAM

Proof of a faster, fairer, more efficient Superfund program can be found in three simple indicators: first, We have completed cleanup at 423 sites on the National Priorities List, and 485 more are in construction. We have reduced by more than a year the average duration of the long-term cleanup process, with much faster cleanups at sites using presumptive remedies. The President's budget request for Fiscal Year 1998 allows us to establish a new cleanup goal of 900 completions by the end of the year 2000, representing approximately two-thirds of the sites on the NPL. Our most recent analysis make us optimistic that we can achieve our goal of a 20 percent reduction, or 2 years, in the total cleanup process time; and second, responsible parties are performing or funding approximately 75 percent of Superfund long-term cleanups, saving taxpayers more than $12 billion. Meanwhile, EPA has succeeded in removing over 14,000 small contributors from the liability system and has, in 1 year, offered orphan share compensation of more than $57 million to responsible parties willing to negotiate long-term cleanup settlements; and third, costs of clean-

ups, are decreasing because of a number of factors, including: the use of reasonably anticipated future land use determinations, which allow cleanups to be tailored to specific sites; the use of a phased approach or multiple approaches to groundwater cleanups; EPA's current policy of concentrating on principle threats at sites, not the entire site; and EPA's 15 plus years of implementing the program provided greater efficiencies and lower costs when selecting cleanup options.

In addition, through the commitment of EPA, State, and Tribal site managers, and other Federal agencies, EPA has achieved real results for public health and the environment while experimenting with and instituting changes to our cleanup process through three rounds of Administrative Reforms. EPA is committed to further administrative and regulatory (including NCP) improvements in the Superfund program in the years ahead. Our objectives for administrative reforms have been to:

- Protect public health and the environment over the long-term, while lowering the cost of cleanups
- Increase the pace of cleanups
- Preserve the principle that parties responsible for contamination should be responsible for cleaning it up, while promoting fairness in the liability scheme, and reducing transaction costs and litigation
- Involve local communities, States, and Tribes in decisionmaking
- Promote economic redevelopment at Superfund sites

The success of the Administrative reforms has been demonstrable. In a recent report, the Superfund Settlements Project (SSP), a private organization comprised of industry representatives, published in December 1996, acknowledges EPA's "substantial" track record "since EPA began implementing the October 2,1995 administrative reforms . . . especially in light of the severe obstacles that EPA encountered during fiscal year 1996 as it began implementation of these reforms." These positive comments, from a group of large corporations involved in many Superfund cleanups, echo the Agency's recent Superfund Administrative Reforms Annual Report, for Fiscal Year 1996, which details specific program accomplishments.

Providing Protective Cleanups at Lower Costs

EPA has initiated a number of administrative reforms which promote cleanups that are technologically and scientifically sound, cost-effective and appropriately consistent. These reforms will lower cleanup costs, while assuring long-term protection of human health and the environment.

National Remedy Review Board

EPA has achieved significant success in creating substantial future cost reductions for parties at complex, high-cost Superfund sites across the country, by creating a national board of technical and policy experts within EPA to review high cost, long term cleanups. This newly established National Remedy Review Board, comprised of both Headquarters and Regional experts is providing targeted review of cleanup plans, prior to final remedy selection, without delaying the overall pace of cleanup. The Board's preliminary analysis indicates it has identified potential reductions in the range of $15–30 million in total estimated future costs for reviews completed during FY96.

Using Technology and Science Updates to Save Money

Approximately $280 million in future cost reductions are predicted as a result of the Agency's review and updates to previous remedy decisions made in the early years of the Superfund program. These early remedies were based on "state-of-the-knowledge-and-practice" available at the time. Where science and technology have advanced and adequate levels of public health and environmental protection are assured, EPA is revising remedies where future cost reductions can be achieved while still preserving appropriate levels of protection, and the current pace of the program.

Better Land Use Assumptions in Remedy Selection

EPA has improved its cleanup decisions by consistently using reasonable assumptions about current and future land use. Recognizing that land may be appropriate for uses other than residential use can yield a more realistic risk assessment and less expensive remedy. EPA is working with local land use planning authorities, other government officials and the public as early as possible during site investigation to develop reasonable land use assumptions to use in the decisionmaking process. EPA also is making extra efforts to reach out to communities which may have environmental justice concerns to ensure that they are fully informed and able to

participate in these decisions. Currently, about 60 percent of EPA's Records of Decision (RODs) include a land use scenario other than residential land use, typically where there is no residential land use onsite or adjacent to the site.

Setting Priorities for Cleanups

To ensure that available funds are directed to the highest priority response projects on a national basis, EPA established a National Risk-Based Priority Panel (Panel) in August 1995. Prior to this reform, individual Regions established the relative priority of their cleanup projects which were then funded on a first-come, first-served basis. This reform established a national priority system to fund cleanups based on the principle of "worst problems first." The Panel evaluates proposed cleanup actions, looking at the following factors: risks to humans and the ecology; stability and characteristics of contaminants; and economic, social and program management considerations. With the exception of emergencies and the most critical removal actions, cleanup projects are generally funded in order of priority based on the recommendations of the Panel. By early 1997, the panel had ranked projects approaching $1 billion in cleanup costs.

Increasing the Pace of Cleanups

The completion of 423 Superfund toxic waste site cleanups (as of February 28, 1997) is a hallmark of the improved pace of cleanups. At the Lord-Shope Landfill near Erie, Pennsylvania (the 400th site to be cleaned up), parties used innovative technology to remove contaminants. Tons of industrial wastes had been dumped over 20 years (including organic and inorganic chemicals, solvents, cooling acids, and caustic agents) that resulted in groundwater contamination. Today, the community no longer needs to worry about the safety of drinking water, the impact on farmland near the site, the effect on property values of their homes and businesses, or the possibility of children wandering onto the site and playing among the drums of toxic chemicals.

SACM

EPA (with the support of the Corps of Engineers and the Bureau of Reclamation and their cleanup contractors) also has implemented reforms which streamlined its rapid action cleanup authority. EPA's Superfund Accelerated Cleanup Model (SACM) accelerates cleanup and risk reduction at sites by consolidating site-assessment into a one-step process. SACM includes the following initiatives: taking early actions while assessing long-term cleanup; using "presumptive" remedies where appropriate; initiating enforcement activities earlier; and addressing the worst threats to people and the environment first. SACM reduces cleanup time through a single, continuous site assessment and early action process.

Presumptive Remedies

The Agency is saving time and money by using standardized or "presumptive" remedies for certain types of sites. Presumptive remedies are based on scientific and engineering analyses performed at similar Superfund sites and are used to eliminate duplication of effort, facilitate site characterization, and simplify analysis of cleanup options. EPA issued presumptive remedy guidances for the following: municipal landfill sites; sites with volatile organic compounds in soil; wood treater sites (with an update 2 years later); and a groundwater presumptive response strategy. Regions are reporting significant reductions in costs and time required to complete remedies. A recent Office of Inspector General report focused on an independent review of the use of a presumptive remedy and concluded that "Use of a Presumptive Remedy increased consistency in decisionmaking by taking advantage of lessons learned at similar sites, and allowed speedup of the Feasibility Study process."

Promoting Fairness in Enforcement

As I have stated, a core principle of the Superfund program is that the parties responsible for contamination should be responsible for the cleanup. EPA's "Enforcement First" strategy has assured that responsible parties perform or pay for approximately 75 percent of long-term cleanups, thereby conserving the Superfund trust fund for sites for which there are no viable or liable responsible parties.

Over the course of the Superfund program's implementation, however, stakeholders have expressed a variety of concerns regarding the fairness of the liability system. Issues related to excess litigation and associated transaction costs, the perceived inequities in the issuance of cleanup orders, the liability of parties contributing small amounts of hazardous substances to Superfund sites, the liability of par-

ties that have limited assets, and the liability associated with the disposal of municipal solid waste, have all contributed to criticisms of the program. Through Administrative Reforms, EPA has addressed these concerns.

Recognizing the Orphan Share

EPA has fundamentally changed the way it conducts settlements at Superfund sites through implementation of its 1996 "orphan share compensation" policy. Under the new orphan share reform, EPA offers to forgive a portion of its past costs and projected future oversight costs during every settlement negotiation for long-term cleanup or non-time critical removal, to cover some or all of the orphan share at the site. The orphan share policy encourages parties to settle, rather than to litigate, and enhances the fairness and equity of settlements. Without a settlement, responsible parties at a site are potentially liable under the Superfund law for the entire cost of the cleanup, including the share that might be attributable to other parties that are insolvent or defunct. EPA's new approach creates a major incentive for responsible parties to agree to perform the cleanup without litigation and the associated transaction costs. In FY96, the Agency offered over $57 million in orphan share compensation to potential settling parties across the United States.

Getting the "Little Guy" Out Early

EPA's reforms are removing thousands of small volume waste contributors from the liability system. PRPs that are liable for cleanup costs have sometimes sued huge numbers of small businesses that had little or no connection to the toxic contamination—sometimes simply by naming every business in the local yellow pages as a defendant in a contribution lawsuit. EPA's reforms have responded to the burden this can place on parties that made a very limited contribution to the pollution at a site by using its settlement authority to remove small volume waste contributors from Superfund litigation. To date, the Federal Government has completed settlements with over 14,000 small volume contributors of hazardous waste at hundreds of Superfund sites. These settlements protect the settling parties from expensive private contribution suits. In addition, EPA has stepped in to prevent the big polluters from dragging untold numbers of the smallest "*de micromis*" contributors of waste into contribution litigation by publicly offering to any such party $0 (i.e., no-cost) settlements that would prevent lawsuits by other PRPs.

Site Specific Special Accounts

Prior to the Administrative Reforms, any funds recovered in early settlements at a particular site were usually deposited in the Superfund Trust Fund, and could not be spent until appropriated. When appropriated, these funds could be spent at other sites. Through the use of Site Specific Special Accounts, EPA is able to direct settlement funds, as well as interest earned on those dollars, to future response actions at a specific site. As of August 31,1996, $226 million in principal, and $35 million in interest, had been set aside for exclusive use at specific sites.

Equitable Issuance of UAOs

To address the criticism that EPA routinely issues cleanup orders under section 106 of the Superfund law (unilateral administrative orders or UAOs) only to a subset of the parties identified at a particular site, EPA has established a protocol requiring a detailed explanation of the basis for not including certain parties when issuing a UAO. This new requirement will ensure greater equity among parties receiving UAOs, because these orders will be issued to the largest manageable number of PRPs at each site.

Piloting Allocations

EPA is conducting pilot projects that test a fundamentally different approach to the allocation of Superfund costs (called the allocations pilots) in order to promote fairness in settlements. Allocations are one approach to determine PRPs' share of cleanup costs which may be used to settle their liability with the United States. A neutral party, known as an allocator, selected by parties to the process, conducts an out-of-court allocation. The allocator assigns shares of responsibility for cleanup costs among all PRPs at a site. In concert with an allocation, EPA expects to pay the "orphan share," which includes the shares of parties which are defunct or insolvent. EPA has offered allocation pilots at 12 Superfund sites.

EPA is evaluating the pilot projects and has learned valuable lessons about the relationship of allocations to settlement. We have learned, for example, that some

PRPs prefer not to participate in a formal allocation process, instead preferring to allocate shares of responsibility among themselves. We have also learned that a single allocation process is inappropriate for all sites, and that any process must be flexible to meet site-specific needs and promote settlements. We hope our on-going evaluation of the allocation pilots will continue to reveal valuable information about the process of conducting allocations.

Reducing Costs for PRPs Through Reduced Oversight

PRPs incur costs at sites in part because of EPA's need to oversee the quality of cleanup work. Oversight is the process EPA uses to ensure that all studies and work performed by PRPs are technically sound and comply with statutory requirements, regulations, guidances, policies, and the signed settlement agreement. Oversight may include reviewing reports submitted for approval, ensuring interim cleanup milestones are met, or conducting site visits. As the Superfund program matures, parties performing cleanup work have developed a considerable body of experience in conducting response activities at sites. EPA can reduce oversight of such parties while continuing to exercise sufficient oversight to ensure that the work is performed properly and in a timely manner.

EPA Regions have initially identified approximately 100 sites where reductions in oversight of ongoing work for cooperative and capable PRPs have occurred or will occur—significantly reducing PRP costs at some of these sites. EPA also may look at opportunities to involve communities in deciding the appropriate level of PRP oversight.

Involving Communities and States in Decisionmaking

The Agency supports 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.

Involving Communities in Remedy Selection

EPA is promoting "consensus-based" approaches to the remedy selection process by involving community stakeholders in site pilot projects. This effort is intended to empower local citizens and other stakeholders to be involved in the remedy selection process that ultimately results in EPA choosing common sense remedies that meet statutory and regulatory requirements. For example, at the Lower East Fork Poplar Creek Site in Oak Ridge, Tennessee, the cleanup strategy, agreed to in August 1995, reflected the concerns of the local community in the remedy selection process. This included input into a change in cleanup goals. Through a citizen working group established by the Department of Energy, working in partnership with EPA and the State of Tennessee, the citizens' influence on the remedy selection decision averted the expenditure of more than $100 million and helped protect human health and the environment more quickly.

Regional Ombudsmen

EPA established an Ombudsman in every Region to serve as a direct point of contact for stakeholders to address their concerns at Superfund sites. Prior to this reform, stakeholders raised concerns with Regional personnel, but had no formal mechanism for having their issues elevated. The Ombudsmen now serve as facilitators for stakeholders on concerns that have not been resolved between Regional personnel and the stakeholder through informal means. The Ombudsman reports to a top Regional management official in every Region to assure management attention to issues raised.

Improving Public Access to Superfund Information

EPA recognized that improving communication with stakeholders and improving access to Superfund information will help the public become more aware of, and informed about, Superfund. EPA is using electronic tools to improve communication, including having sites for both the Office of Emergency and Remedial Response (OERR) and the Office of Site Remediation Enforcement (OSRE) on the Internet, with separate pages devoted to Superfund reform. Each Region also is developing Internet "home pages" which will include information on Regional Superfund programs, such as Superfund site lists, site-specific information, successful site cleanup actions, and links to State Superfund activities.

State Programs Speed Cleanup of Non-NPL Sites

EPA recognizes the important role that State environmental agencies have in encouraging economic redevelopment of brownfields. EPA plans to provide $10 million, earmarked in FY97 appropriations, to encourage the development or enhancement of State programs that encourage private parties to voluntarily undertake early protective cleanups of less seriously contaminated sites, thus accelerating their cleanup and their redevelopment. EPA recently issued a memorandum setting out an interim approach for its relations with State voluntary cleanup programs. The memorandum includes criteria for State voluntary cleanup programs that are enabling EPA and the States to start negotiating a division of labor between EPA and the States in memoranda of agreement (MOAs) as well as ensuring protection of public health and the environment. Nine States have now signed MOAs with EPA regarding sites cleaned up under voluntary cleanup programs. The growing number of States creating and operating voluntary cleanup programs provides a unique opportunity to respond to the brownfields cleanup and redevelopment issues.

Greater Power for States in Picking Remedies

The goal of this reform is to provide qualified States with an increased role in the selection of cleanup alternatives at sites on the NPL, whenever possible. States selected for this reform enter into "Participating States" agreements with EPA, through which the States conduct the remedy selection process, consistent with applicable law and regulations. Participating States supervise the remedy selection process with minimal EPA oversight or involvement, giving the State significantly more control than usual over NPL site cleanups. Selected Federal facilities are achieving similar success through incorporation of a lead agency concept in interagency cleanup agreements.

Promoting Economic Redevelopment

EPA is promoting redevelopment of abandoned and contaminated properties across the country that were once used for industrial and commercial purposes ("brownfields"). While the full extent of the brownfields problem is unknown, the United States General Accounting Office (GAO/RCED–95–172, June 1995) estimates that approximately 450,000 brownfields sites exist in this country, affecting virtually every community in the Nation. EPA believes that environmental cleanup is a building block, not a stumbling block, to economic development, and that cleaning up contaminated property must go hand-in-hand with bringing life and economic vitality back to communities. The Brownfields reforms are directed toward empowering States, communities, and others to work together to assess, safely cleanup, and sustainably reuse these sites. EPA efforts have been accomplished through the Brownfields Action Agenda-an outline of specific actions the Agency is conducting. The initial Brownfields Action Agenda outlined four key areas of action for returning brownfields to productive reuse: (1) awarding Brownfields Assessment Demonstration Pilots; (2) building partnerships to all Brownfields stakeholders; (3) clarifying liability and cleanup issues; and (4) fostering local workforce development and job training initiatives. A new Action Agenda for fiscal years 1997 and 1998 will further identify, strengthen, and improve the commitments EPA and its colleagues can make to brownfields.

Brownfields Pilots are Encouraging Redevelopment

The Brownfields Assessment Pilots form a major component of the Brownfields Action Agenda. EPA exceeded its commitment to fund at least 50 pilots by actually funding 76 pilots at up to $200,000 each by the end of 1996. And, just this month, EPA announced the addition of two more pilots, bringing the total to 78. These 2-year pilots are intended to generate further interest in Brownfields redevelopment by bringing together public and private efforts including Federal, State, and local governments and affected communities. The Brownfield pilots will develop information and strategies that promote a unified approach to site assessment, environmental cleanup, and redevelopment. Many different communities are participating, ranging from small towns to large cities. Stakeholders tell the Agency that Brownfields development activities could not have occurred in the absence of EPA efforts. As the National Community Reinvestment Coalition (NCRC) said "[W]e wholeheartedly support the EPA's Brownfields Economic Redevelopment Initiative. NCRC believes that [EPA's] multifaceted initiative represents a significant step forward by the Administration in working with distressed communities on the local level in their revitalization efforts."

Getting Sites off the "List"

Prior to reform, EPA kept track of all potential hazardous waste sites in an inventory known as the Comprehensive Environmental Response and Liability Information System (CERCLIS). Even sites where no further Federal Superfund interest was warranted remained in the CERCLIS inventory. This practice led to unintended barriers to the redevelopment of these properties because sites listed in CERCLIS could be automatically considered risky by some lenders, making it difficult for potential purchasers to secure loans to develop these properties. To avoid this result, EPA redefined CERCLIS, deleting or archiving sites from the active CERCLIS inventory. EPA has archived approximately 30,000 sites (e.g., sites where 'no further Federal remedial action [is] planned') from CERCLIS to date, and EPA expects to archive over 2,000 additional sites from CERCLIS per year over the next several years.

Deleting Clean Parcels from the NPL

Prior to the Administrative Reforms, EPA's policy had been to delete releases from the NPL only after evaluation of the entire site. However, deletion of entire sites does not communicate the successful cleanup of portions of those sites. Total site cleanup may take many years, while portions of the site may have been cleaned up and become available for productive use before cleaning has been completed at other portions of the site. Some potential investors or developers may be reluctant to undertake economic activity at a cleaned up portion of real property that is part of a site listed on the NPL. This reform allows EPA to delete portions of sites, as appropriate, upon the receipt of petitions from interested parties, allowing redevelopment to occur quickly. Four parcels are currently moving through the deletion process.

Removing Redevelopment Barriers Based on Liability Concerns

EPA is promoting redevelopment of contaminated properties by protecting prospective purchasers, lenders, and property owners from Superfund liability. EPA's "prospective purchaser" policy is stimulating the development of sites where parties otherwise may have been reluctant to take action by clarifying (through agreements known as "prospective purchaser agreements") that bona fide prospective purchasers will not be responsible for cleaning up sites where they did not contribute to or worsen contamination. EPA issued new guidance in May 1995, which allowed the Agency greater flexibility in entering into such agreements. The new guidance expanded the universe of sites eligible for such agreements to include instances where there is a substantial benefit to the community in terms of cleanup, creation of jobs, or development of property. Of the 50 agreements to date, 60 percent have been reached since issuance of the May 1995 guidance. At the Indiana Woodtreating Site near Bloomington, Indiana, the work performed under a prospective purchaser agreement will prevent contaminants from entering Clear Creek, which is a drinking water source for the city of Bloomington, Indiana.

People owning property under which hazardous substances have migrated through groundwater also feared liability under the statute. EPA responded by announcing that it will not take enforcement actions under CERCLA against owners of property under which contaminated groundwater has migrated, but where the property is not also a source of contamination. Further, EPA also will consider providing protection to such property owners from third party lawsuits through a settlement that affords contribution protection.

EPA has given reassurance to the lending industry and to government entities acquiring property involuntarily. EPA outlined in guidance what it considered appropriate actions a lender may undertake without becoming a liable party. In September 1996, Congress passed legislation very similar to EPA's policy and guidance on lenders. EPA also is providing assurances ("comfort/status letters") in appropriate circumstances to new owners, lenders, or developers which assure them that they need not fear incurring Federal environmental liability.

The Agency is proud of the improvements to Superfund that have been made through Administrative Reforms. Throughout the course of the reauthorization process, we have heard stakeholders express their concerns and have taken the opportunity to address those concerns. We recognize, however, that there are areas of the law that could benefit from legislative provisions. Therefore, the Administration continues to seek responsible Superfund legislative reform to further improve the program.

VISION FOR RESPONSIBLE SUPERFUND LEGISLATIVE REFORM

Legislative reform must buildupon the successes and lessons learned through the Administrative Reform effort and provide solutions to the problems that cannot be addressed administratively or through regulatory change. Our goals for legislative reform are consistent with the objectives of Administrative Reforms. We want a Superfund program that protects human health and the environment through cost-effective cleanups which are reliable over the long term and foster economic redevelopment. We want a Superfund program in which those who pollute are held responsible, but allows parties to resolve their liability as efficiently as possible and does not catch inappropriate parties in the liability net. We want a Superfund program in which citizens are encouraged and supported in their efforts to participate meaningfully in the cleanup decisions that affect their lives. We want a Superfund program that supports the continued development of State and Tribal cleanup programs and fosters collaboration between the Federal, State, and Tribal governments to divide up the enormous task of hazardous waste cleanup in this country in sensible, mutually supportive ways.

Long-Term, Cost-Effective Protection

Any legislative changes addressing cleanup decisions must, as a baseline, continue to ensure that cleanups are protective of human health and the environment over the long term. Cleanups should also be cost-effective, and foster productive reuse of contaminated property, to the degree practicable.

In order to facilitate these goals, the Administration supports addressing statutory remedy preferences and supports treatment for those wastes that are highly toxic and/or highly mobile, in light of the continuing challenges in ensuring the long-term reliability of engineering and institutional controls, as well as the limitations that containment and institutional controls place on productive reuse or redevelopment of property. It is important to note that we can see the market impacts of the treatment mandates under current law in the development of new, often in-situ technologies which are giving us more alternatives to incineration, and a decline in the costs of those technologies as they are used increasingly. These changes in the treatment market are part of the reason for the decline in estimated remedy costs I mentioned earlier.

Additionally, legislation should not alter our goal of restoring groundwater to beneficial uses. Over half of this nation's population relies on groundwater as its source of drinking water. Superfund has raised consciousness about the need to prevent contamination of this resource by demonstrating the consequences—financial, technological, and practical—of contamination that threatens real people now and future generations.

"Smart" groundwater remediation as EPA has defined it in a series of Administrative Reforms is another major reason for declining remedy cost estimates. In the early days of the program, we relied solely on extraction and treatment of groundwater to achieve cleanup objectives. In 1995, 60 percent of our groundwater cleanup decisions reflect extraction and treatment being used in conjunction with other techniques, such as bioremediation, underground treatment walls, or monitored natural attenuation, which is often used to reduce low levels of contaminants. In 1995, about 25 percent of Superfund groundwater remedies included monitored natural attenuation of contamination. It is worth noting that our success in developing groundwater cleanup policy is consistent and concurrent with ongoing developments in science and technology and it uses the flexibility afforded under current law. Participants in the process of defining Superfund legislative reform in this Congress will have to balance thoughtfully the desire to be clear and specific to promote transparency and certainty, and the benefits of our current flexibility that permits continuous improvements to be made as our knowledge progresses.

Fairness and Reduced Transaction Costs

In discussing any proposed legislative changes to the Superfund liability scheme, it is imperative to retain the fundamental principle of holding the polluter responsible for the cleanup. This has been the cornerstone of our ability to obtain as many cleanups as we have, and has left the Superfund trust fund available for truly abandoned sites and public health and environmental emergencies.

The Administration would support liability reform for *de micromis* parties. Their liability is often less in dollars than the transaction costs they incur in defending against a lawsuit. These are parties contribute truly small volumes of hazardous waste. The government does not currently bring these parties into the system, but they have occasionally been pulled in by other parties, with expensive and unfortunate results. Last year before this very committee, we heard from Ms. Williams, who runs a restaurant in Gettysburg, Pennsylvania. She was pulled into litigation

at the Keystone Superfund site, not by the government, not by the PRPs brought in by the government, but as a fourth tier of PRPs pulled into the litigation by other responsible parties. We do not believe that a party such as this should be involved in the Superfund process, and we have worked to enter into settlements with these parties to help get them out. A *de micromis* liability exemption would protect Ms. Williams from other over-zealous PRPs.

Last year, EPA began offering orphan share compensation during every negotiation for long term cleanup and non-time-critical removal. The work we have done with orphan share compensation has significantly enhanced the fairness of the Superfund program. Although EPA does not need statutory authority to offer orphan share compensation, EPA would support legislation creating a separate mandatory spending account for orphan share, so that funds for orphan share do not compete with cleanup dollars.

We would also like to address the liability of municipalities and others who generated or transported municipal solid waste. EPA and the Justice Department have embarked on an exercise to address this issue through additional administrative reforms. As the legislative debate proceeds on Superfund reform, statutory provisions that efficiently and fairly address the liability of municipalities and generators and transporters of municipal solid waste should be considered. In addition, we believe that we should address the issue of prospective purchasers in our efforts to make sure that we can cleanup and reuse brownfield properties.

Finally, I reiterate that any changes to the liability and enforcement provisions of Superfund must ensure that those who created the problems be held responsible for cleanup. Further, changes in the law must not compromise the availability of cleanup dollars or endanger the speed or thoroughness of site cleanups and our ability to accomplish the President's goal of completing 500 additional cleanups by the year 2000. Any exemptions or limitations on liability—or use of Trust Fund money—must be considered against the backdrop of these principles. Therefore, the Administration has consistently opposed, and continues to oppose site-based "carve outs" that relieve viable, responsible parties of their obligation to clean up sites.

Meaningful Community Involvement

Through years of implementation of the program, EPA has determined that early and meaningful community involvement can increase the overall pace of cleanups. Though enhanced community involvement may add steps in the early portions of the cleanup process, this investment generally accelerates later cleanup stages, as all parties are informed and have had time to work through their concerns. EPA has learned the hard way that a decision process that alienates the people our cleanups are supposed to protect results in constant revisiting of decisions, not quicker cleanups.

We have also learned that we need a variety of tools and resources, and the flexibility to tailor the application of those tools and resources, to meet the particular needs of citizens at different sites. No two sites or communities are alike. We have citizens who are disinterested in large-scale NPL cleanups, and keenly interested citizens at smaller scale removal sites.

Consistent with our experience, we would like to see Technical Assistance Grants (TAGs) available to citizens at non-NPL sites, in addition to NPL sites. Additionally, the Administration would like to ensure direct input from citizens into the development of assumptions regarding reasonably anticipated land uses upon which remedies are based. While we support processes which build consensus within communities, the achievement of consensus should never be the price of admission into the decisionmaking process. We must always listen to the diversity of views among citizens affected by hazardous waste sites.

Enhanced State and Tribal Efforts

In addition to the many changes and accomplishments that have occurred in the Superfund program over the last 4 years, the context in which the program exists is also dramatically different. We recognize and support the continued growth of the State and Tribal regulated and voluntary programs which have greatly expanded the number of hazardous waste sites cleaned up to protect human health and the environment. Superfund legislation should address greater opportunities for States and Tribes to address a full range of hazardous waste sites for which they have the necessary response capacity, while providing the financial and technical support needed to further improve existing programs. We must recognize that retention of strong cleanup standards, enforcement authorities, and sufficient resources at the Federal level provides States and Tribes with resources critical to the effectiveness of their own programs. It is particularly vital that the Federal emergency preven-

tion, preparedness, and response capabilities, which are looked to as a model, and for support the world over, remain vital and effective.

Over the last 4 years, States, Tribes, and EPA have been finding their own ways of dividing up the broad universe of contaminated site work. Under this emerging model of customized partnerships, all regulators work together to determine which sites should proceed under what authorities, and under whose lead, seeking to reduce overlap and duplication in favor of more complementary, mutually supportive arrangements. In general, States and Tribes have the primary role in the process of discovering new sites and making screening decisions about which sites warrant action. In comparison to just a few years ago, States now exert substantial control over not only which sites will be included on the National Priorities List, but also in the CERCLIS inventory. By contrast, States, in many cases by their choice, are in the lead at only roughly 140 of the 1300 NPL sites. However, the more interesting story here is the tremendous variety of arrangements EPA and States and Tribes have worked out to address waste sites.

When it comes to the role of States and Tribes, Superfund legislative reform must consider comprehensively the scope of the hazardous waste contamination problem Federal, State and Tribal programs are trying to address across this country and where we are succeeding today in our efforts to organize our collective resources to achieve more protective cleanups by more parties. The types of authorities, resources, and flexibilities best suited to harness the positive forces of a Federal program in a manner which supports the cleanup efforts of States and Tribes and, through their voluntary cleanup programs, private parties, needs to be considered in that context.

Economic Redevelopment

The Brownfields Economic Redevelopment Initiative has achieved much initial success. The continuing value of the Brownfields Initiative is its evolution and promise for the future. To buildupon these successful first steps and launch others, we must not lose sight of our overall goal to revitalize communities. Future efforts under the Brownfields Economic Redevelopment Initiative must be viewed as an important component of any Superfund legislative reform strategy. With the breadth and variety of activities and stakeholders converging on the brownfields issue, we have tried to establish a framework that articulates a complete and comprehensive brownfields program. It is against this framework that we will measure proposals regarding the brownfields.

Brownfields legislative reforms should continue the progress made under EPA's administrative reforms and address the full range of Brownfield issues including: technical assistance funding for brownfields identification, assessment, and reuse planning; cooperative agreement funding to capitalize revolving loan funds for brownfields cleanup; support for State development of voluntary cleanup programs; liability protection for bona fide prospective purchasers and innocent landowners of contaminated property; support for mechanisms for partnering with Federal, State, local and tribal governments, and other non-governmental entities to address Brownfields; and support and long-term planning for fostering training and workforce development.

In summary, the above discussion has highlighted some of the major elements we believe could be addressed in order to achieve consensus based, responsible Superfund legislative reform. Our intent is to work within the Administration over the next few weeks to develop a set of principles and associated key components for this legislative reform process. These principles will also include the topic of Natural Resource Damages (NRD), which will also be addressed in other testimony before this Committee today. When these principles are complete, the Administration will share this product with your Committee.

THE SUPERFUND CLEANUP ACCELERATION ACT OF 1997

The Administration has evaluated S. 8, the Superfund Cleanup Acceleration Act of 1997, against many of the same criteria which have guided our Administrative Reform efforts and which describe our goals for legislative reform.

I was pleased to see that one of the top priorities of this body is Superfund reform. The early introduction of S. 8 reflects the commitment with which you, Mr. Chairman, have approached the legislation. The Administration's most serious concerns are that: (1) the bill may fail to ensure long-term protection of human health and the environment; (2) it will slow down cleanups; (3) it lets polluters off the hook and shifts costs to taxpayers and consumers; and (4) it provides incomplete support for communities, States, and Tribes, and economic redevelopment. But perhaps more fundamentally, S. 8 does not reflect the current status of the Superfund program, and fails to recognize the vast changes made to this program in the last 4 years.

Inadequate Protection

Remedies under S. 8 would not assure protection of human health and the environment over the long term because highly toxic, highly mobile waste would not be treated and because contaminated groundwater may not be cleaned up in most, if not all, cases.

Elimination of Treatment for Long-Term Reliability

While S. 8 retains a decision process not dissimilar to the current program, in which tradeoffs between cleanup options with respect to a common set of criteria are balanced to select a cost-effective response, the results would be dramatically different. S. 8 eliminates all of the treatment provisions of CERCLA, under which EPA generally seeks to reduce the intrinsic hazards of the highly toxic and/or highly mobile waste constituting the "principal threats" at a site. Treatment of highly toxic, highly mobile wastes helps ensure that any materials managed onsite over the long term would not pose a serious threat to human health and the environment, should engineering and institutional controls fail at some point in the future. And obviously, the more contaminated material that remains onsite and the higher the potential risks it poses, the less likely productive reuse of that property, or significant portions of that property, will occur. Despite improvements in our knowledge about how to make engineering and institutional controls work, significant uncertainties related to the long-term management of hazardous waste remain.

Worse still, S. 8 establishes a new "mega" technical impracticability waiver from the fundamental requirement to protect human health and the environment in addition to the existing (and continued) waiver from applicable or relevant and appropriate requirements (ARAR) waiver for technical impracticability. This "mega" waiver can be invoked if "there is no known reliable means of achieving at a reasonable cost the goals for remedy selection." As a result of this finding, the protectiveness goal is eliminated in favor of "remedial measures that mitigate the risk to human health and the environment." Under this process, cost would receive more emphasis in deciding not only the method of protection for a site, (likely to be cheap exposure controls such as fences), but whether to protect at all. S. 8 may leave the real business of cleanup to a future generation, and it reflects concerns with treatment of wastes based on old anecdotes—not the current program.

Contaminated Groundwater Will Not Be Cleaned Up

Contaminated groundwater is a problem at over 85 percent of Superfund sites. With over fifty percent of the U.S. population relying on groundwater for their drinking water, the Administration holds firm to the belief that this critical public health and environmental concern should continue to be addressed. I think you would agree that the citizens of this nation want and deserve a safe and reliable supply of water for drinking and household use, industry and agriculture, recreation, and many other beneficial uses, and to know that they will continue to have such a supply available for the generations to come.

Despite this, S. 8 would replace the goal under the current program to restore contaminated groundwater to beneficial uses, wherever practicable, with the tragically modest mandate to "prevent or eliminate any actual human ingestion of contaminated drinking water." This goal could be met through treatment at the tap or simply by preventing the use of the water. Though S. 8 does provide for protection of uncontaminated groundwater, it relies too heavily on natural attenuation to provide this protection.

Even if actual cleanup of contamination in the groundwater were proposed as a cleanup alternative, S. 8 sets up a burdensome three part test which must be passed to justify its selection. The bill would require: (1) "a determination regarding the technical practicability of restoration"; (2) a justification that demonstrates that active cleanup can "substantially accelerate the availability of groundwater for use as drinking water beyond the rate achievable by natural attenuation"; and, in the final analysis; (3) consideration of active cleanup "on an equal basis" with institutional and engineering controls. Under S. 8, we may all need to buy our own water treatment plants. S. 8 reflects concerns about groundwater cleanup from the 1980's—not the current Superfund practices.

Other Concerns

S. 8 also fails to provide specific cleanup and protection standards for surface water, and adds prescriptive language regarding risk assessment, which is a glaring example of how the bill is out of touch with the Superfund program of today. Under the Administrative Reforms, EPA has met with stakeholder representatives from industry, Indian Tribes, environmental groups, and local government and citizen rep-

resentatives from communities with hazardous waste sites to develop an agenda for technical improvements to the Risk Assessment Guidance for Superfund and to improving stakeholder involvement in the process of conducting a risk assessment which are very different than the technical and risk communication principles S. 8 would dictate by law. Risk assessment is a key area where policy needs to be able to evolve with new scientific understandings and changing stakeholder needs.

S. 8 DELAYS CLEANUPS

The seminal mission of Superfund is to protect public health and the environment through cleanup. To better accomplish this mission, a reformed Superfund must speed the pace of cleanup. Unfortunately, S. 8 will involve more lawyers in the process and therefore increase the time required for cleanup decisions dramatically, resulting in slower cleanups. Transaction costs will also increase commensurate with delays.

ROD Reopeners

The provision for ROD "reopeners" will cause significant disruption to and delay of ongoing cleanups. The complex thresholds for reopening RODs are based solely on cost savings anticipated, and thus have little to do with modifications of RODs based on advances in science and technology. Delays and disruptions will occur at sites where cleanups are well underway, and have been accepted by the community and PRPs, yet the RODs will be reopened, unless vetoed by the Governor of the affected State. Not only will RODs have to be amended, but consent decrees and interagency agreements that incorporate these RODs would have to be modified as well. This provision will increase, not reduce, transaction costs.

Multiple Reviews of Cleanup Decisions

In a marked departure from EPA's successful Administrative Reform, which provides a review of costly remedies to see if savings can be made, S. 8 institutes a series of decision points for a "remedy review board." While the Agency's National Remedy Review Board was implemented to promote national consistency in prospective decisions in such a manner that minimizes disruptions or delays, the framework of S. 8 provides for a petition process that affects both prospective and past cleanup decisions, and provides for many disruptions and delays that can only be avoided if there is a finding that the delay is so unreasonably long that it threatens human health and the environment. These provisions do not prevent delays, which may cause increased costs as contamination spreads, nor do they give voice to the communities affected by the site caught up in this process.

Overly Prescriptive Risk Assessments

S. 8 institutes new risk assessment provisions that can only be described as redundant, expensive, and time-consuming, but without apparent benefit. The requirement for risk ranges of 10^{-4} to 10^{-6} and risk distributions and central estimates of average exposed individual risk for each facility only adds wasteful steps to the evaluation process, as a central estimate would fall within either a range or distribution, and a distribution is merely a graphical representation of a range. Additionally, because of the requirement to utilize site-specific information, instead of using valid assumptions, risk assessments will no longer benefit from time and cost savings due to the Agency's experience in performing these evaluations. Instead, risk assessments are likely to be more expensive and take more time under S. 8, delaying the cleanup. While we support appropriate uses of site-specific information in risk assessments, the bill's insistence onsite-specific data for all key variables would be not only time consuming and impractical, but downright impossible for many factors.

S. 8 HAS BROAD LIABILITY EXEMPTIONS

The Administration has several concerns regarding many of the liability provisions of S. 8. The proposed legislation exempts or limits the liability of parties that are viable and liable and should remain responsible for cleanup of their sites. As an example, S. 8 exempts generators and transporters of any waste, whether municipal solid waste (MSW) or extremely hazardous waste, found at a "co-disposal" site. This provision exempts parties regardless of the hazard associated with their waste or the impact that waste may have on the cleanup. At the Delaware Sand and Gravel Site, for example, S. 8 likely would exempt major industrial generators of hazardous substances merely because they chose to dispose of their hazardous waste at a site which accepted MSW.

S. 8 also limits the liability of private owners and operators of "co-disposal" sites—a position EPA has never endorsed. Under the terms of S. 8, major waste

management companies that are liable, viable and understand the costs of this business, would be relieved of their liability. At many sites, this could mean that cleanup costs will be shifted to the Fund through S. 8's orphan share funding provisions. In fact, as S. 8 is currently written, the collective "co-disposal" provisions result in a de facto co-disposal carve out, which we believe is inconsistent with good public policy.

The co-disposal provisions raise other issues of concern. Under S. 8, a "co-disposal" landfill is one at which there "may" be a "substantial portion" of municipal solid waste. The term "substantial" is not defined. The absence of a definition is certain to encourage litigation. Further, where a site continues to receive municipal solid waste, its status may change over time. These new and vague terms are fertile ground for litigation.

The *de minimis* exemption found in S. 8 is another example of an exemption that is broader than is needed to address the intended parties of concern. This provision, probably intended to exempt only those very small contributors of waste which we all agree should not be forced to incur the transaction costs associated with Superfund liability, goes well beyond exempting contributors of very small amounts of waste. The 1 percent cutoff of this provision potentially will exempt parties that have contributed very large amounts of hazardous waste, and may leave very few responsible parties remaining liable. For example, at the Bypass 601 Site in North Carolina, a 1 percent contribution represents approximately 3 million pounds of lead-bearing materials. Only 20 of the approximately 4,000 responsible parties at this site contributed volumes in excess of 1 percent. This is another example of an exemption that violates the principle that parties that are responsible for the contamination should remain responsible for the cleanup.

Finally, the liability exemptions and limitations in S. 8, when read together with the Orphan Share Funding provisions, would create an enormous obligation for the Trust Fund and could divert funds from cleanups. Because orphan share funding is not provided from a source separate from cleanup dollars, cleanups will be competing for the same dollars as the Orphan Share claimants. To make matters worse, S. 8 provides that orphan share funding is an entitlement. As such, claims for orphan share funding would be legally superior to other claims against the Fund, including the costs of cleanups.

S. 8 also requires EPA to reimburse responsible parties for costs that exceed their allocated share—this includes in many cases, costs and work that parties have already agreed to perform. These provisions for "Fund Contribution" present several problems. First, they require EPA to repay recalcitrant parties working under an order in the same manner we would repay a cooperative party working under a consent decree. This would be a windfall to the recalcitrant parties. Second, these provisions require EPA to pay costs within 1 year. If large numbers of applications are received at once, this could cause funding shortfalls and resource drains resulting in major cleanup delays. Third, final settlements will be reopened and parties who have previously incurred the costs of negotiations will have to proceed through an allocation to determine their share of liability for the purpose of reimbursement. Such reconsideration of liability effectively duplicates transaction costs previously incurred.

Narrow and Unworkable "Illegal Activity" Exception

S. 8 attempts to prevent a person from claiming a liability exemption where a court determines, within the applicable statute of limitations, that the person violated a Federal or State law relating to the hazardous substances at issue. Because Superfund addresses the results of acts that frequently took place many decades before cleanup, and at a time when applicable laws may have been unclear, proof of illegal or culpable behavior may have been impossible at most sites, as the provision requires court action at the time of the activity.

The Allocation Process is Broad and Prescriptive

The Administration has a number of concerns with S. 8's allocations provisions. First, the large number of sites subject to a mandatory allocation will result in extraordinary allocation costs, will increase transaction costs, and will slow the settlement process. S. 8 requires formal and prescriptive allocations at all multi-party sites on the NPL where post-enactment costs are outstanding, even where the parties are exempt under S. 8. In addition, Under S. 8, the allocator alone makes the determination as to which parties not already settled out are to be considered exempt or liable. These provisions preclude EPA from excluding small volume contributors or parties with an inability to pay, and thus from protecting them from the transaction costs associated with an allocation. As drafted, courts could interpret S. 8 to require EPA to accept "cashout" settlement offers. This provision could rap-

idly turn Superfund into a public works program, with the government undertaking the cleanups. Finally, S. 8 allows no means for the allocation process to be set aside if some parties wish to settle, rather than proceed with the allocation. This allows just one party to hold other parties hostage, even in cases where a settlement could be easily reached.

In 1994, as part of Administrative Reforms, EPA implemented an Allocations Pilot Project at 12 Superfund sites. Although the pilots are not yet complete, much has been learned about the strengths and weaknesses of the allocations process. Based on this experience, EPA cannot support a mandatory allocations process at every multi-party site. For example, some responsible parties do not want to use an allocation process, even where EPA has offered orphan share compensation. Based on our experience with allocating and our allocation pilot projects, EPA is reevaluating the need for legislation establishing a detailed allocations process.

Other Liability Concerns

S. 8 imposes a bar on additional enforcement, cost recovery or even private party actions against a party after the issuance of an administrative order, even in situations where an order is used as an interim measure to address an emergency, or where orders are used to achieve portions of work at large or complex sites. Another provision of S. 8 precludes Federal or administrative enforcement action at any facility that is subject to a State remedial action plan. There are no exceptions to this provision for emergencies, threats to human health or the environment, or in cases where the State requests EPA to act. S. 8 further requires that where a facility is not subject to a State remedial action plan, that is, in cases where the State is not taking the lead, all CERCLA section 106 orders issued by the U.S. relating to that facility cease to have effect after 90 days if the State does not affirmatively concur on the order. This would put a huge burden on the States, creates a potentially duplicative system, and could disrupt cleanups. Each of these provisions inappropriately impose restrictions on the ability of the U.S. to enforce Federal law, and to act to protect public health and the environment.

S. 8 PROVIDES INCOMPLETE SUPPORT FOR COMMUNITIES

The Administration supports 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. Because one out of four Americans lives within five miles of a hazardous waste site, Superfund is a Federal program that truly has local impacts. Additionally, EPA recognizes and supports the continued growth of State regulated and voluntary programs, and the successes States have achieved in addressing their sites.

Community Response Organizations

While S. 8 adds many provisions regarding enhanced community involvement, there are significant weaknesses. The bill establishes Community Response Organizations (CRO) to serve as the primary conduit of information to and from the community to appropriate Federal, State and local agencies and PRPs concerning development and implementation of remedial actions. Among the concerns the Agency has with the provisions addressing communities, the CRO provisions limit participation to the remedial action phase of cleanups. We support meaningful community involvement throughout the cleanup process and from the earliest possible opportunity during site assessment and before NPL listing. The Agency supports giving substantial weight to CRO recommendations on future land-use and other significant decisions throughout the cleanup process. The CRO should represent community concerns directly to the Agency, as opposed to the mere requirement for CRO consultation (assuming a CRO exists) on input from the local land use authority. Unfortunately, involvement of this type is absent from the provisions of S. 8.

Technical Assistance Grant Limitations

Another concern with the community involvement provisions of S. 8 is the implementation of a changed Technical Assistance Grant (TAG) program. The purpose of the TAG program is to provide local citizens with resources to obtain and evaluate technical information. S. 8 requires that if a CRO exists, it is the preferred recipient of a TAG. Aside from the inherent conflicts of interest that may arise from PRP participation in CROs, by requiring that the TAG be awarded to a CRO, the bill eliminates the opportunity for other community-based organizations to access TAG funds. Giving preference to CROs when awarding TAGs is not the way to ensure that the local citizen's groups will bring an equal voice to the table. In addition, S. 8 limits TAG grants to sites listed or proposed to the NPL, limiting community involvement in other facets of the Superfund program (i.e., removal actions and non-NPL cleanups).

S. 8 PROVIDES INCOMPLETE SUPPORT FOR STATES AND TRIBES

Problematic State Delegation Process

S. 8 sets up an elaborate "menu" approach for providing delegation of the Federal program to States, which allows States to pick and choose authorities they would like to undertake. Unlike prior legislative provisions that had EPA support, it raises the potential for increased delays and costs due to uneven divisions of labor and could hamper coordination among Federal agencies. Partial or limited delegations can allow States to undertake portions of cleanup activities or studies, and then require EPA to perform the portions that the State declined to perform, either on a site by site or State by State basis. In some cases, this could lead to implementation delays and higher costs associated with attempting to implement a State plan at the Federal level using different personnel or contractors. It could also create inconsistent approaches, confusion, and could greatly compromise cost recovery if the work is Fund-lead.

Even the delegation process itself is problematic in S. 8. The bill provides for no public notice or comment on a proposed approval or disapproval of a State application to take over the program. RCRA, the program most closely related to the Superfund program requires such procedures, however, S. 8 does not. In the case of S. 8, where the decision as to the lead regulatory agency is made on a site-specific basis, this is very troubling. In many cases, the public has very strong views about which agency is best suited to oversee the cleanup. In addition, the default approvals of State programs could have unintended consequences, and could even lead to a lack of protection of public health and the environment in cases where a State is automatically approved to take over a site because of the default provisions, but does not currently have the resources available to devote to the particular site.

Limiting Application of State Law

One of the most troubling aspects of S. 8's treatment of the role of States in the Superfund program is the effective preemption of State law involving remedy selection. Under S. 8, this occurs when a delegated State attempts to select a remedy more costly than what EPA would have selected, in which case the State must pay the difference in cost and cannot recover the costs through State or Federal cost recovery, even if it would otherwise be covered by their own State cleanup requirements. Aside from the question of costs or resources necessary to duplicate the State remedy process for comparison purposes every time a remedy is challenged, this represents a preemption of the State's ability to select remedies under its own authority, as well as a preemption of the State's liability scheme.

Other State Issues

Besides the issues listed above, there are other potential problems with the provisions of S. 8. For example, the new State cost share requirements could add $90 to $100 million to the cost borne by the Trust Fund, based on 1994 estimates, and under S. 8, this cost may be increased by State petitions for further reductions. Additionally, early authority to delist sites from the NPL could negatively impact sites where cleanup has not been completed, or at RCRA facilities or other sites with ongoing activities which might give rise to new problems or releases. S. 8 does not recognize Indian Tribes at all.

S. 8 FAILS TO ADEQUATELY PROMOTE AND ENHANCE ECONOMIC REDEVELOPMENT

One of the most important aspects of any Superfund legislation is its ability to promote and enhance economic redevelopment at Superfund sites. Because of this EPA is very encouraged to see substantial Brownfields provisions, as well as voluntary cleanup program provisions, within S. 8. However, in reviewing the provisions, several concerns were apparent.

Brownfields Grants are Limited

One of the major concerns with S. 8's Brownfields characterization grants provision is the exclusion of States from the list of eligible recipients for the program. EPA's experience with the Brownfields Pilot Program has taught us that in the case of many smaller communities, it may make more sense and be more efficient to provide the grants directly to States. Additionally, the limitation on funding per year for these grants may restrict and inhibit the grant recipient from efficiently managing and benefiting from the grant itself. Finally, in the definition of Brownfields, S. 8 improperly excludes sites where removals have occurred, or are planned to occur, and sites deleted from the NPL with "No Action" RODs. These sites may be appropriate candidates for redevelopment. In addition, EPA has first-hand experience with prospective purchaser redevelopment of these properties.

Voluntary Cleanup Program Concerns

The Administration is opposed to provisions in S. 8 regarding voluntary cleanup that would eliminate the authority of EPA and other Federal agencies to respond to releases of hazardous substances whenever a State remedial action plan has been prepared, whether under a voluntary response program, or any other State program. Under S. 8, the mere existence of such a cleanup plan eliminates any Federal authority to respond to a release or threatened release of hazardous substances—even where there may be an imminent and substantial endangerment to human health and the environment. This compromise of public protection is alarming. The provisions of S. 8 could leave us powerless to respond to immediate threats from the worst toxic sites (Voluntary Response Programs are given authority to clean up NPL sites) even where the State's VRP program lacks the resources and expertise to "qualify" under the provisions of S. 8.

In addition, the level of community involvement provided by S. 8 is questionable. The bill limits the community to an "adequate opportunity" for public involvement and does not guarantee participation in all levels of the cleanup process or determinations regarding end uses of the property. Finally, the preclusion of all private and citizen suits belies the apparent commitment in S. 8 to strengthen community participation.

OTHER CONCERNS

The problems discussed above are not a complete list of problems in S. 8. The bill significantly restricts restoration of natural resources injured as a result of hazardous waste contamination. Further, the bill prematurely limits Federal involvement in the effort to clean up hazardous waste sites by mandating that only a limited number of sites may be added to the National Priorities List (NPL) over the next several years. EPA estimates that hundreds of sites currently meet the eligibility criteria for NPL. Without adequate Federal involvement, these sites would become the responsibility of State and local governments that may not have the resources to address them.

The Administration views these and other problems I do not have time or space to mention here as sufficiently numerous and serious to suggest that S. 8 is probably not an effective vehicle by which to forge consensus regarding Superfund legislative reform in this Congress.

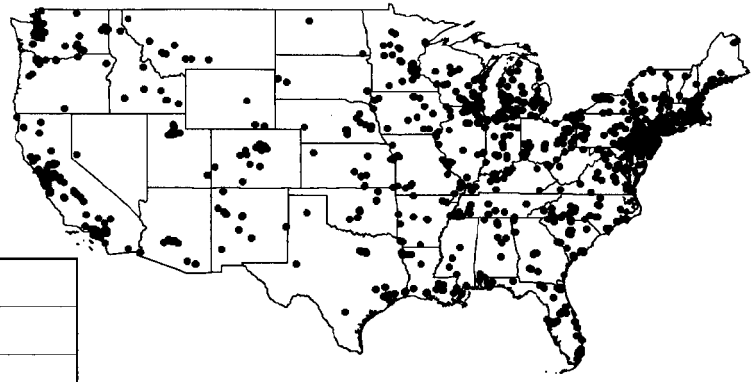
CONCLUSION

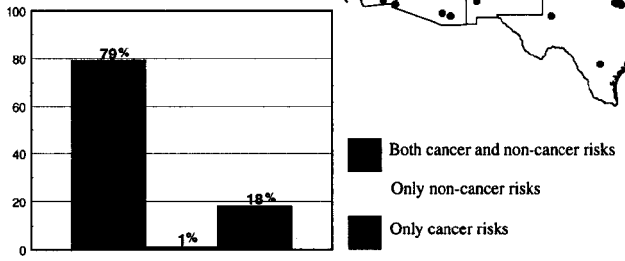
The Clinton Administration believes that responsible, consensus based Superfund legislative reform is necessary to remedy some inherent problems in the existing statute. However, any such reform must be based upon an understanding of where the program is today. I have tried in my testimony today to start the process of forging a common understanding of the current Superfund program by describing our accomplishments under the Administrative Reforms. We need to continue this dialog through a consensus building process in which the full array of stakeholders participate so that we can clear away phantom issues that cloud our ability to share a common vision of what the Superfund program of the future should look like. We are prepared to start over, and work together to develop Superfund reform legislation. The Administration is fully committed to participating in such a process and to seeing that responsible, consensus based Superfund legislative reform is enacted in the 105th Congress.

Mr. Chairman, thank you for this opportunity to address the Committee. Now we'll be happy to answer any questions you or the other Members may have.

One in Four Americans Lives within Four Miles of a NPL Site

Within 4 Miles:
5.1 Million Children 0-4
4.7 Million Children 5-9
8.4 Million Over 65





Chemicals contributing to risks shown above include:

24% Sites with Chromium Contamination (Known human carcinogen)

21% Sites with Benzene Contamination (Known human carcinogen)

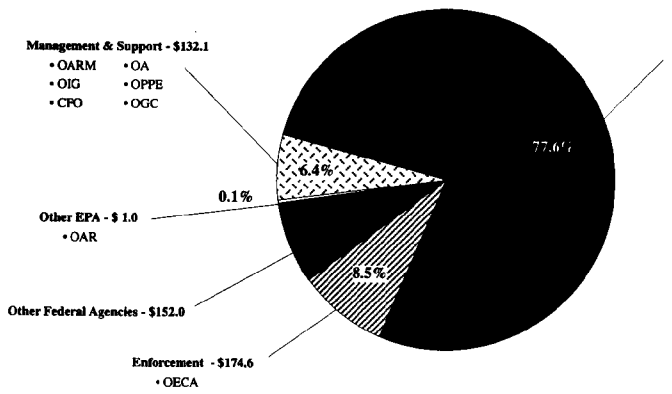
36% Sites with Lead Contamination (Lowers IQ Levels)

12% Sites with Mercury Contamination (Causes brain damage)

9% Sites with Cyanide Contamination (Nerve damage)

October, 1995

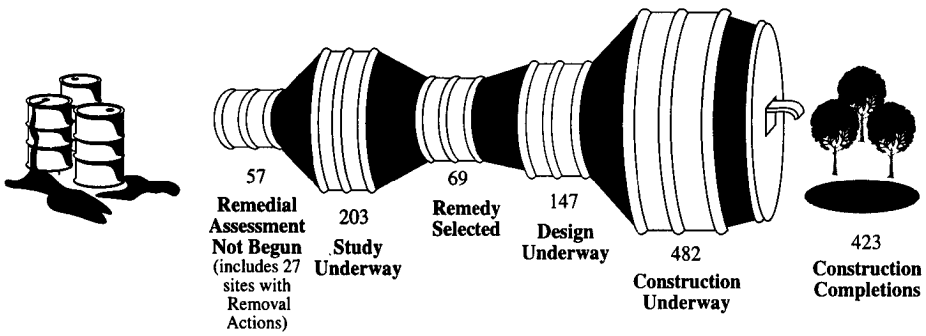
FY 98 Superfund Budget



Total Cleanup/Response -	**$1,594.7 Million**
Total Enforcement -	**$ 174.6 Million**
Total Support -	**$ 285.1 Million**
TOTAL BUDGET -	**$2,054.4 Million**
ORD Transfer to Science & Technology	**$ 39.8 Million**
TOTAL	**$2,094.2 Million**

Note: Budget Figures Around Pie are in Millions
Source: FY98 Presidents Budget

Measuring the Progress of Site Remediation:
As of January 31, 1997



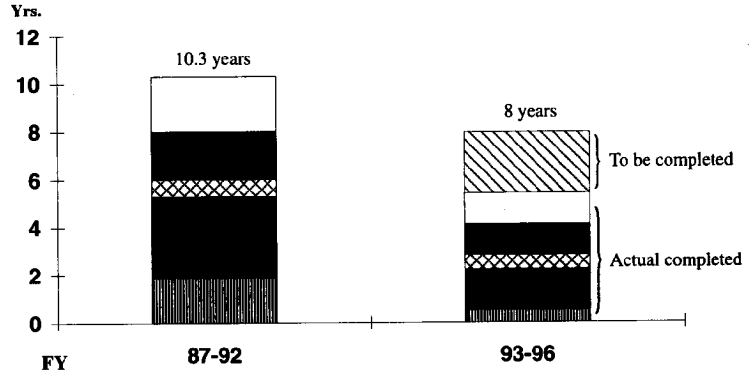
Total NPL Sites = 1,387*

*Total NPL sites includes six sites that were referred to another authority.
Source: CERCLIS

51-001-117C

Shorter Remedial Clean-up Projects at Superfund Sites

(Includes Non-Federal and Federal Facility Sites)



	87-92 Projects	87-92 Average Duration	93-96 Projects	93-96 Average Duration
Remedial Action	445	2.3	193	1.3
Remedial Design	739	2.0	219	1.3
ROD to Remedial Design Start	701	0.7	219	0.6
Remedial Investigation/ Feasibility Study (RI/FS)	639	3.4	42	1.7
NPL Proposed to RI/FS Start	391	1.9	67	0.5

NOTE: This chart represents the average duration, plotted by start date, of pipeline projects completed by the end of FY96. Excludes Federal Facility Sites.

51-001-137

Enhancing Fairness

- **Orphan Share Compensation** - Over $57 million in FY 96 offered to potentially responsible parties at 22 sites.
- **De Minimis Parties** - 9,000 small parties protected by EPA from liability litigation since 1993.
- **De Micromis Parties** - Homeowners, non-profits, churches, and others assured protection against litigation by EPA's June 1996 guidance.
- **Flexible Prospective Purchaser Protection** - Prospective purchaser protection guidance issued May 1995; 30 agreements signed under the guidance to date.
- **Interest-Bearing Site Cleanup Accounts** - $35 million of additional money for site cleanup through use of interest-bearing accounts (adopted June 1996).

RESPONSES OF CAROL M. BROWNER TO ADDITIONAL QUESTIONS FROM SENATOR SMITH

Question 1. EPA's administrative reforms are welcome and recognize a need to improve the current program. However, a number of States and private parties say that these reforms, while meritorious, have not been implemented consistently, nor have they achieved the kind of results that your testimony suggests. Are EPA's administrative reforms being implemented consistently by each region?

Response. One of the main goals of EPA's administrative reforms is to promote national consistency in the Superfund program. EPA has achieved significant successes through implementation of the reforms to date. For example, through the National Remedy Review Board, a panel of national experts is ensuring that costs are given an appropriate role in remedy selection. EPA's orphan share compensation reform has produced a fundamental and nationally uniform change in the enforcement process—orphan share compensation is now offered at every eligible site to parties agreeing to perform cleanups. The General Accounting Office currently is evaluating development and implementation of the administrative reforms and will soon issue a report that provides additional information about the reforms' implementation on a national basis.

Question 2. Is EPA the lead agency for articulating the Administration's position on Superfund.

Response. EPA is the lead agency on behalf of the Administration on Superfund reauthorization issues. EPA will continue to work together with other Federal agencies as the Administration addresses Superfund reauthorization issues in the 105th Congress.

Question 3. Ms. Browner, page 1 of your testimony states "the Administration does not believe that S. 8 provides the basis for consensus based legislative reform." Are you aware of whether this is a new precondition for negotiations.

Response. The Superfund program has been considerably improved and has produced significant accomplishments over the past 4 years. Therefore, Superfund legislation should reflect the current status of the program. EPA does not believe S. 8 reflects the current status of the program, thus, it does not provide the basis for consensus based legislative reform.

Question 4. One of your administrative reforms is a remedy review board. I congratulate you on this particular reform. Apparently, in only 12 reviews you have saved over $15 million dollars. However, the decisions of this board, even if they are equally effective and less costly, are not binding on the Region. Why is this the case? Do you support looking at remedies through a remedy review board?

Response. In general, EPA policy and guidance recognizes the need for decisions tailored to site-specific circumstances. The National Remedy Review Board (the Board) focuses on achieving cost effectiveness and appropriate consistency with EPA policy and guidance for high cost remedies prior to the development of a proposed plan, but it was never intended to supersede Regional decisionmaking authority. Because National Priorities List (NPL) sites are generally large and complex cleanup projects that require intense study and planning, it is the Regional personnel who are the most familiar with these sites, their cleanup strategies, and other criteria that are essential to sound cleanups (e.g., the preferences of the community). EPA believes that combining the Board's senior policy expertise with the experience and site-specific knowledge of the Regions will result in the most effective remedies.

Although the Board's recommendations are not binding, EPA Regional decisionmakers give them substantial consideration when proceeding with a cleanup decision. We expect that Regions will adopt all Board recommendations that are appropriate to the site-specific circumstances, and are consistent with the interests of the local community.

EPA is extremely encouraged by the success of the National Remedy Review Board so far. As you know, focusing our efforts on high-cost, high priority cleanups has generated estimated future cost savings of between $15 million and $30 million in fiscal year 1996 alone.

The proposed remedy review boards in S. 8 substantially expand authority beyond that of EPA's Remedy Review Board. The involvement of multiple review boards in reopening remedies, proposing alternative remedies and making recommendations to the Administrator appears to interfere with EPA's current policy of delegating decisions to Regional officials and could substantially delay cleanups and undercut community involvement in the remedy selection process. In addition, EPA does not support submitting all potential remedies to the Remedy Review Board. EPA specifically designed the National Remedy Review Board to ensure: that it enhances the

remedy selection process; that it avoid delays in cleanup; and that it avoids the alteration of the public's role in remedy selection.

Because the Board's review takes place before a remedy is formally proposed, community members and other stakeholders still retain their ability to participate in the remedy selection process through their review and comment of the proposed remedy. Our careful consideration in designing the review process, and the decision to focus on high-cost, high priority NPL sites, has played a large part in the Board's success, and has provided significant estimated fixture cost savings, while minimizing delays in cleanup. This does not mean, however, that the impacts of the Board are limited to the remedies it reviews.

Question 5. To address the problem of co-disposal site litigation, Senator Chafee and I thought it made a lot more sense to take the taxes collected from polluting industries, recognize that these sites are a national problem, and get them cleaned up. In your testimony you disagree with this proposal stating that major waste management companies" (p. 21) would get off the hook.

However, in the proposal you made last year, you were willing to waive liability from entities that had fewer than 25 employees and less than $2 million in gross revenue. How is it that you say it is OK to let to let those polluters off the hook, but kick up such a fuss when we try to deal with these contentious co-disposal sites? I am particularly curious about this because when Congressman Sherry Boehlert floated this idea 2 years ago, you said it was a pretty good idea.

Response. I have always been opposed to any site carve-out. I agree that the so called "co-disposal sites" offer unique problems, and that there are parties that Congress never intended to be caught up in the liability "net" (e.g., pizza parlors, beauty salons, homeowners, other small parties with purely MSW). However, I oppose a co-disposal site carve-out because many contributors of large volumes of hazardous waste are exempted; Fund dollars that should be spent at orphan sites are used for providing relief to large viable parties; and defining what is a "co-disposal" site is difficult. For example, at just the Delaware Sand & Gravel Site (DE) and the Global Sanitary Landfill Site (NJ), approximately $40 million would be shifted to the Fund in order to provide companies such as E.I. Dupont, Chevron, BFI, and General Motors with liability relief.

The Administration has always supported providing relief to those parties that were never intended to be caught up in the Superfund at these co-disposal sites. We can provide these parties liability relief, eliminate the lawyers and the "contentiousness" of cleanup, without exempting the large industrial and hazardous waste generators and transporters. The longer we delay the passage of a Superfund bill, the longer the parties that we both want to help are left with little or no relief at all.

Question 6. Since May 26, 1995, only 50 sites have been cleaned up and deleted from the NPL. Is this an acceptable pace for toxic waste cleanup?

Response. Over the past several years, EPA has made it a priority to improve the Superfund program through a number of initiatives to make it work faster. In 1993, EPA began to focus on Construction Completions as a more representative measure of program accomplishments than deletions. At more than 420 sites (roughly one-third of the sites on the National Priority List (NPL)), cleanups have been completed, and an additional 485 have long-term cleanup construction activities underway. EPA plans to accelerate the program, in conjunction with the President's Superfund budget proposal, so that we can increase our goal for construction completions in the year 2000 from 650 to 900. That represents roughly two thirds of the NPL. EPA believes this will represent an appropriate rate of progress for the program, and is working hard to ensure that cleanups are completed as quickly as possible. In fact, this is one of the principles we have taken into account in evaluating proposals for legislative changes to the program—the need to avoid disrupting or slowing cleanups.

Question 7. The issue we keep coming back to when we discuss Superfund is liability. This is the issue that gets lawyers involved and lengthens cleanup and inflates costs. Now we all believe that law breakers should be punished, but, is that the situation we have here? I'm speaking about those sites which we consider co-disposal sites. These are the sites where sometimes hundreds of individuals and companies paid to have their waste safely disposed of only to face lawsuits when the firm handling the site under Superfund turns around and sues them. This doesn't seem fair. Our bill changes that and lets individuals, small business, and other generators and transporters that followed the law out of the Superfund web. What is wrong with that?

Response. I agree that the so called "co-disposal sites" offer unique problems, and that there are parties that Congress never intended to be caught up in the liability "net" (e.g., pizza parlors, beauty salons, homeowners, other parties with purely MSW). However, I oppose a co-disposal site carve-out because many contributors of large volumes of hazardous waste are exempted; Fund dollars that should be spent at orphan sites are used for providing relief to large viable parties; and defining what is a "co-disposal" site is difficult. For example, at just the Delaware Sand & Gravel Site (DE) and the Global Sanitary Landfill Site (NJ), approximately $40 million would be shifted to the Fund in order to provide companies such as E.I. Dupont, Chevron, BFI, and General Motors with liability relief.

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RESPONSES BY CAROL M. BROWNER TO ADDITIONAL QUESTIONS FROM SENATOR THOMAS

Question 1. Is the prompt and effective cleanup of contaminated sites your highest priority.

Response. Specific hearing questions about the Natural Resources Damage program are better addressed by Mr. Terry Garcia, who testified on behalf of NOAA and the Department of Commerce, the Department of Interior, and the Department of Agriculture. The protection of human health and the environment through the cleanup of hazardous waste sites and the restoration of natural resources is a high priority for EPA and the Administration.

Question 2. Is it the Administration's position that making NRD liability more predictable and adding more certainty to the cleanup process would impede response actions.

Response. Specific questions about the Administration's NRD position are better addressed by the Department of Commerce or other Federal Trustee agency. The Administration's NRD legislative reform position is based upon the following principles: Restore injured resources to baseline; and restore the losses the public suffers from their inability to use the resources from the time of injury until restoration is complete.

Question 3. Does the Administration support any reforms to CERCLA's NRD provisions?

Response. Specific questions about the Administration's NRD positions are better addressed by the Department of Commerce or other Federal Trustee agency. The Administration supports the reforms contained within the legislative proposal transmitted to the committee in October 1996.

RESPONSES OF CAROL M. BROWNER TO ADDITIONAL QUESTIONS FROM SENATOR ALLARD

Question 1. In a handout before the subcommittee from EPA, it was noted that 77.6 percent of all Superfund dollars went to cleanup/response. The amount indicated is $1,594.7 billion. Below that number are numerous subcategories, could EPA please provide us with funding for each subcategory, along with a more detailed description of each category?

Cleanup/Response—$1,594.7

- *Brownfields* ($80.9)—Funding used to address abandoned, idled, or under-used industrial and commercial properties where expansion or redevelopment is complicated by real or perceived environmental contamination.
- *Feasibility Study* ($4.1)—Used to develop and evaluate potential remediation alternatives to clean a hazardous waste site and forms the foundation for the Record of Decision (ROD) which codifies the remedy that is selected to abate ecological and human health risks at a site, and addresses site conditions and proposed future land use.

• *RD (RP/Fund)* ($60.0)—Remedial design is a CERCLA design that establishes the general size, scope, and character of a project, and details and addresses the technical requirements of the RA selected in the ROD.
• *RA (RP/Fund)* ($766.5)—Remedial action is performed upon approval of the remedial design and represents the actual construction or other work necessary to implement the remedy selected.
• *Early Actions* ($300.0)—Incidents where a response is necessary within a matter of hours (e.g., threats of fire or explosion) and time critical removal actions to protect human health and the environment.
• *USACE/BUREC* ($5.5)—USACE/BUREC contributes to the direct cleanup at many sites. These Federal Partners implement most high cost Fund-financed remedial actions, provide on-site technical expertise, and ensure that project management is consistent between Fund and PRP financed projects.
• *Lab Analysis* ($36.4)—Management of the process by which site samples are scheduled and analyzed. Includes acceptance of CLP data to ensure consistent and accurate validation of CLP data packages according to established protocols and standard operating procedures, and consistent with established data quality objectives.
• *Site Assessment* ($78.0)—Assessing ecological and human health risks at sites brought to the Agency's attention by States, Tribes, Federal agencies, citizens, or other sources. Assessment information is used to determine the course of response actions, including removal and remedial actions.
• *Response Mgmt* ($51.3)—Management of the Superfund program including contract support and NPL listings and evaluation of program implementation activities to determine effect of program policies.
• *State/Tribal* ($27.7)—Through cooperative agreements, funding to State/Tribal governments is used to assess and cleanup hazardous waste sites in their jurisdictions increasing the resources available for direct cleanup.
• *Community Involvement* ($19.2)—Community relations activities serve to encourage valuable communication with affected citizens and public participation in the decisionmaking process. Funding helps communities become more involved so that cleanup decisions make the most sense at the community level. Technical Assistance Grants provide citizens with information and support to be active participants in site decisions that affect their communities.
• *Federal Facilities* ($16.8)—The Superfund Federal Facilities response program supports the cleanup of federally owned or managed hazardous waste sites on the NPL.
• *TIO* ($5.2)—The Technology Innovation Office contributes to a more cost effective and efficient site assessment and cleanup process by advancing the use of innovative site characterization and remediation technologies.
• *CEPPO* ($4.1)—The Chemical Emergency Response program supports strong emergency response preparedness. This provides the necessary emergency response capability to address the Nation's worst chemical accidents and hazardous waste releases.
• *Salary/Expenses* ($136.0)—Salaries/expenses.
• *ORD Tech Support* ($3.0)—Office of Research and Development Technical Support.

Question 2. Is it true that if a State is not satisfied with a Superfund cleanup undertaken by the Federal Government that the State could utilize its RCRA authorities subsequently, to go after the same issue?

Response. One of EPA's highest priorities is to foster a productive relationship with States, and to minimize duplication of effort between EPA and the States. In the Superfund program, it is commonplace for EPA and a State to sign a cooperative agreement which identifies the appropriate lead agency for the NPL sites in the State. EPA also enters "memoranda of understanding" which give States resources and technical support in developing voluntary cleanup programs. In addition, in September, 1996, EPA issued a guidance which specifically sought to minimize duplication between the RCRA and Superfund programs. Although the law does not explicitly address whether a State may use RCRA authority if it is not satisfied with EPA's cleanup under Superfund, EPA believes that cleanups under RCRA corrective action or CERCLA will substantively satisfy the requirements of both programs.

RESPONSES OF CAROL M. BROWNER TO ADDITIONAL QUESTIONS FROM SENATOR LAUTENBERG

Question 1. Oklahoma Sites: Senator Inhofe referred to two sites in Oklahoma that he said had comparable hazardous waste problems, but different cleanup approaches and durations, depending upon whether these were conducted under State or Federal auspices. Please provide information on the two sites, including the pace and cost of cleanup, the nature of the problem at each, etc.

Response. Please refer to the attached letter of March 12, 1997 to Senator Inhofe, which outlines the differences between the two cleanups.

Question 2. Co-disposal Sites: Please indicate whether EPA has identified the number of NPL sites which could qualify as "co-disposal" sites under the definition contained in S. 8 (sites where "a substantial portion of the total waste disposed of at the landfill consisted of municipal solid waste or sewage sludge that was transported to the landfill from outside the facility"). Please indicate the effect on the program if liability were eliminated for these sites. Please identify the types of parties that might profit from this exemption. What would happen, under S. 8, for example, at a site like the Lipari Landfill in New Jersey.

Response.

Number of "co-disposal" sites

It is uncertain how many sites would be considered "co-disposal" sites as defined by S. 8 for a number of reasons:

S. 8 defines co-disposal sites to be those where a "substantial" portion of the waste at the site was MSS or MSW. S. 8 does not define what "substantial" means. This creates a great deal of uncertainty in determining how many sites would be considered to have a "substantial" amount of MSW or MSS. There could be a large incentive to litigate the issue of how much waste is "substantial" and to define it as liberally as possible. For example, if there is a determination that a site has a "substantial" amount of MSW or MSS, then all generators and transporters (including the industrial, hazardous waste generators/transporters) at the site will be exempt. However, if at the same site, there is a determination that there is not a substantial portion of MSW or MSS, then only the MSW or MSS generators and transporters are exempt. Obviously, large industrial and hazardous waste generators and transporters will have an incentive to litigate this issue and to make sure that a "co-disposal" site has a "substantial" amount of MSW or MSS.

Additionally, S. 8 expands the definition of MSW to include appliances such as refrigerators, washers, dryers, etc. The expanded definition of MSW could increase the sites "carved out" by S. 8.

Effect on program

The "co-disposal" site provisions in S. 8 are a *de facto* site carve-out. Thus, approximately ¼ of the work currently performed by PRPs (or more depending on the issues raised above) would shift to the Fund. The money that could have been spent on addressing sites that were truly orphan (e.g., no available, viable owners and operators) would be spent on providing a windfall to large commercial generators and transporters of hazardous and industrial waste.

Types of parties likely to profit

Some of the responsible parties that might benefit from the liability provisions in S. 8 include all generators of materials which happened to be disposed of at a site where MSW was also taken. These parties include: Waste Management, BP America, E.I. DuPont, Chrysler, General Motors, Chevron, Hercules, Zenica Inc. (formerly known as ICI America), Occidental Chemical Corp, and Browning-Ferris Industries (BFI). These represent parties that benefited directly by transporting waste, or parties that were large industrial producers of waste, that benefited from cheap disposal.

Examples:

At the Global Sanitary Landfill site, the elimination of generator and transporter liability under S. 8 would shift an estimated $30 million in future cleanup costs to the orphan share of the Superfund Trust Fund. Major generators and transporters at the site include Browning-Ferris Industries (BFI), DuPont, and Chevron. Eighty-six thousand citizens live within three miles of this site. Contaminants from the site have reached the aquifer directly beneath the landfill and have impacted nearby wetlands and marsh. The Global Sanitary Landfill site qualifies for the exemption because several municipalities contributed municipal solid waste to this privately owned and operated landfill. Although as much as 75 percent of the waste is munici-

pal solid waste, this waste is not contributing significantly to either the contamination or cost of the cleanup. The commercial and industrial waste generated and transported by many small and large private companies is the chief cause of the dangers posed by the site.

Question 3. De minimis Exemption: Does EPA support an exemption for *de minimis* parties? Are there other sites like the Bypass 601 site, where the majority of parties contributed 1 percent or less by volume, and therefore, would be exempt under S. 8?

Response. EPA does not support an exemption for *de minimis* parties. However, EPA holds strongly to the belief that many of these parties should be given the opportunity to settle their responsibility early in the cleanup process, enabling these parties and others to reduce their transaction costs. Any formal absolutely categorize *de minimis* parties should provide for a site-specific determination to be made, if appropriate. For certain sites, 1 percent of the volume (as defined by S. 8) could be a very large volume in absolute terms.

For example, at the Tonolli Site in Pennsylvania, 1 percent is over 1 million gallons of waste from a single responsible party. At this site, an exemption for contributors of 1 percent or less would exempt a total of almost 40 million gallons of waste. This volume is much larger than the total volume of waste disposed of at some Superfund sites. Finally, if the cutoff for the exemption is so high that it exempts an inordinate numbers of responsible parties, too few responsible parties will remain liable, and the cleanup of the site will be shifted to the Fund. At the Operating Industries site in California, with a cutoff of 1 percent of the total industrial waste (waste containing hazardous substances), only three generator parties, of the approximately 4,000 responsible parties would remain responsible for cleanup of the enormous contamination at the site. These three parties are responsible for only 14 percent of the industrial waste at the site.

Question 4. Non-Municipal Owners of Co-Disposal Sites: S. 8 limits the liability of non-municipal owners/operators of co-disposal NPL sites. Please indicate whether any major national waste companies would benefit from this limitation. Please describe the effect of this limitation on the Superfund program.

Response. Under S. 8, the aggregate liability of private parties who own or operate a "co-disposal" facility is limited to 30 percent of the costs at the site. This provision severely reduces the liability of many large, viable responsible parties. Many of these companies acquired contaminated sites with full knowledge of the contamination. Further, because these companies are in the business of MSW and hazardous waste management, they are often in the best position to prevent the problems associated with contamination. Further, these same businesses are often the most culpable parties at these sites. The public policy justification for elimination of this category of liability is unclear.

Question 5. Illegality: S. 8 excludes from its liability exemptions and limitations persons who violated RCRA or other requirements relating to disposal of MSW or MSS. Do you think the exclusion will leave liability intact in most instances?

Response. The exception to which you refer is extremely narrow and will have little impact in retaining liability as to those parties who have acted irresponsibly—the "bad actors." S. 8 provides that the exemptions and limitations established in S. 8 would not apply to any person whose act, omission, or status that is determined by a court or administrative body, within the applicable statute of limitation, to have been a violation of any Federal or State law pertaining to the treatment; storage, disposal or handling of hazardous substances, if the violation pertains to the substance or release that caused the response costs to be incurred. The effect of this provision is to divide the world of violators into two groups, those who got caught and those who benefit from the "rewards" of exemption or repayment.

This provision requires successful court or administrative action to have been taken at the time of the activity (within the statute of limitations of the law applicable at the time of disposal), and does not apply to actions which were pursued under common law (i.e., nuisance) or local law or regulation. Since many of these actions took place (1) before there were Federal laws in place, and (2) when there were very few State laws in place that directly pertained to the treatment, storage, disposal or handling of hazardous substances, this provision would be inapplicable in most cases. Further, since Superfund addresses the results of acts that frequently occurred many decades before cleanup, proof of illegal or culpable behavior may be impossible at most sites. Also for this reason, documentary evidence typically is scarce or non-existent and witnesses are unavailable or have incomplete memories. Further, since activity at Superfund sites occurred many years ago, it may not be

clear today what behavior was permitted and what was prohibited by a given law, including State law, even if a prosecution was successful.

Question 6. RACs: Please identify the number of times that EPA has indemnified Response Action Contractors ("RACs"), and the cost to EPA of providing such indemnification. In your experience, have RACs been sued so often that pre-emption of State negligence laws is warranted?

Response. Prior to the publishing of the Final Indemnification Guidelines in 1993, EPA routinely offered indemnification to its RAC contractors. Sixty-eight contracts contained indemnification provisions and approximately 100 subcontractors were provided indemnification. A small subset of these contractors were authorized to purchase insurance to offset the Governments liability. The cost of providing indemnification was thus the dollars expended on insurance premiums in addition to the cost of defending RAC claims (note that the original indemnification was unlimited in scope until renegotiated following the publication of the Final Guidelines. Fifty five of the 68 contracts have been renegotiated to insert indemnification limits). Since offering indemnification, EPA has been presented with 11 claims for indemnification coverage. Approximately 1.2 million dollars have been paid out for these claims, primarily to pay for defense costs. No judgments have been made against a RAC under 119 provisions; half of the claims were dismissed in court, 2 are still in process.

Since 1993 EPA has only offered limited indemnification 4 times. Indemnification was offered where there was inadequate competition and indemnification was cited as a reason for the lack of competition. All other RAC procurements have not included indemnification, although some firms have purchased insurance (as a reimbursable expense) to cover their pollution release liability.

This Administration has consistently opposed preemption of State response action contractor laws. EPA has not seen any information about litigation against RACs that would suggest a change in the Administration's position.

Question 7. Recycling: Please describe the effect on the program generally if liability were eliminated for generators and transporters who "recycled" their waste. Please describe how S. 8 expands the exemption from that seen in previous [Senate] legislative proposals, and the effect of such expansion. Is it correct to state that former "recycling sites" pose some of the worst environmental problems? Please provide examples.

Response. S. 8 is different than previous recycling provisions in that it expands the definition of "scrap metal" to include mining waste. S. 8's definition of scrap metal includes mining tailings, slags, skimmings, and drosses—materials that are products of the mining process. EPA has never supported including this language in the definition of scrap metal.

The other provisions in S. 8 are similar to the recycling provisions proposed by the Senate in S. 1834 and in S. 607. At a site that met the criteria established in S. 8, the generators and transporters would be exempt, thus shifting their share of the liability to the Fund. The parties that would benefit from this provision is not limited to small business and individuals, but also large industrial and fortune 500 companies, entities that clearly have the financial resources to pay for their fair share.

Since the generators and transporters would be exempt, the owners and operators would have to perform the cleanup at the site. For those sites without viable owners and operators, the cost of cleanup for the entire site would be shifted to the Fund. Since many of the recycling sites owned or operated by small business with limited resources, the recycling site provisions in S. 8 may have the effect of creating another *de facto* site carve-out.

Question 8. Small business: Please describe the potential impact on the program of S. 8's "small business" exemption. Please explain whether persons such as those responsible for the methyl parathion problem in Mississippi, and now, Louisiana, might not avail themselves of the exemption.

Response. S. 8 would exempt "small business" which is defined as those businesses with fewer than 30 employees or less than $3M in annual gross revenues. The "or" provision results in an exemption for all businesses that have 30 employees, regardless of its revenues, and an exemption for all businesses with revenues of $3 million or less, regardless of the number of employees. In addition, the exemption would apply even in those situations where the small business is the owner/operator of the site, has impeded cleanup, has not complied with CERCLA § 104(e) or other applicable laws, or has been uncooperative in allowing EPA to address the contamination. Finally, the exemption would apply even where hazardous substances generated or transported by the business have contributed significantly to

the costs of the response or to natural resource damages. Thus, S. 8's "small business" exemption is overbroad and would result in many parties being relieved of liability inappropriately.

The Administration previously has supported a narrower "small business" exemption. The Administration proposal would have exempted those small business generators or transporters who have annual gross revenues less than $2 million, have 25 or fewer employees, have not impeded cleanup, and are not affiliated with any other liable party. Furthermore, the exemption would not apply if the small business had not complied with requests under CERCLA § 104(e) or if the hazardous substances generated or transported by the business contributed significantly to the costs of the response or to natural resource damages.

EPA does not have information indicating whether persons involved with the methyl parathion problem in Mississippi and Louisiana would meet the definition of a "small business" under S. 8.

Question 9. NFIB: Please describe the nature and volume of waste disposed by Barbara Williams at the Keystone Sanitation Company, Inc. Superfund site; and steps taken by the United States to get Barbara Williams, and parties like her, out of the litigation regarding that site. Please describe whether instances of multi-party and multi-tier litigation, such as that occurring at Keystone, are the norm. Please provide examples of instances where EPA has successfully deterred the type of joinder that has occurred at Keystone. Please describe whether S. 8's, or last year's democratic alternative, would have relieved Mrs. Williams from litigation like that at Keystone if her small business contributed waste consisting of materials other than MSW. Please explain whether relief for small contributors, or MSW parties, is in your view a rejection of the "polluter pays" principle?

Response.

Keystone—Barbara Williams

Ms. Williams is a fourth-party defendant, involved in this litigation because other companies have brought her into this lawsuit seeking contribution. The United States did not pursue Ms. Williams for its costs, or for cleanup. However, other companies have joined her in this litigation in Federal district court (*U.S.* V. *Keystone Sanitation Company et al.,* Case No. 1: CV–93–1482 (M.D. Pa.), Chief Judge Sylvia H. Rambo). The United States sued 11 parties (three site owners and eight companies who disposed of industrial waste at the landfill) to recover the costs of cleanup. The United States is also using its enforcement authorities against the same 11 parties to clean up the site.

EPA has made and continues to make significant progress in this case to eliminate small parties from the litigation, and implement one of the key administrative reforms. EPA has prepared a settlement with 167 *de micromis* parties in which these parties will resolve their liability for only $1.00. The settlement is currently pending entry by the court.

In November 1994, the court entered an expedited *de minimis* settlement between the United States and 8 parties, each of whom certified that they brought no more than 6,500 cubic yards of waste to the site. In the spring of 1995, prior to Ms. Williams' joinder, EPA initiated a second *de minimis* settlement for third-party defendants (using the same volumetric cutoff of 6,500 cubic yards).

In September, 1995, the approximately 170 third-party defendants sued approximately 590 fourth-party defendants, including Ms. Williams. Ms. Williams certified that her restaurant sent at most 4,346 cubic yards of waste to the site consisting of food and paper refuse; other responsible parties allege that she sent over 11,000 cubic yards. Mrs. Williams was not a candidate for a *de micromis* settlement for $1.00 because she certified that she sent more than 1,800 cubic yards of waste to the site. However, the United States is continuing to explore a settlement with the remaining non-*de micromis* third-and fourth-party defendants. Recently, liaison counsel provided information requested by EPA that allowed the Agency to consider a settlement offer to resolve the involvement of third-and fourth party defendants at the site. EPA is soon to respond to the offer.

EPA's Protection of Small Volume Waste Contributors from Litigation

EPA has used its settlement authority to protect more than 14,000 small volume contributors. EPA established a policy to provide these *de micromis* parties (parties that have contributed 110 gallons or 200 pounds of materials containing hazardous substances) with contribution protection through settlements with the United States for the amount of $1.00 (EPA has revised this policy to now settle with these parties for $0 dollars). Further, to reduce the litigation against small volume waste contributors that contributed somewhat greater amounts of waste to the site, and therefore do not qualify for *de micromis* status, EPA has established guidance to provide *de*

minimis settlements (the Agency established a presumption that a *de minimis* party is one that has contributed less than 1 percent of materials containing hazardous substances to the site, a presumption that can be deviated from depending uponsite specific circumstances). For a dollar amount based on the volume of waste the party contributed to the site, parties are offered an opportunity to settle their liability early in the cleanup process, thereby receiving contribution protection and avoiding the transaction costs associated with litigation brought by other responsible parties.

Countless parties fall within the *de micromis* category. EPA only offers a *de micromis* settlement to parties whom are actually being sued, face the concrete threat of suit or have requested a settlement because they expect to be sued and EPA has determined that such an expectation is reasonable. EPA established this policy primarily to deter parties from suing *de micromis* parties. As to EPA's *de minimis* settlement policy, as of January 1997, EPA has completed settlements with over 14,000 parties.

Legislative Approaches to Relieving Small Volume Waste Contributors and Small Businesses of Liability Where the Party Has Sent Waste Other than MSW

EPA cannot assess whether Mrs. Williams' business would qualify for special treatment that would be accorded small businesses under the Administration's past liability proposals or under S. 8 because we do not have information regarding the number of the business's employees or the annual gross revenues. However, the Administration believes that parties who contributed very small amounts of waste should not be caught up in Superfund liability. In the past, the Administration has supported three approaches to reducing the number of small volume contributors and small businesses caught up in Superfund. The Administration has supported an exemption for parties that sent less than 110 gallons or 200 pounds of materials containing hazardous substances. S. 8 expands the definition of *de micromis* to parties that have contributed up to 1 percent of the waste at a site. The Administration opposes such an expansion because it would inappropriately relieve contributors of substantial amounts of hazardous materials from liability.

A second approach, presently EPA policy, is to settle with *de minimis* parties that have contributed less than 1 percent of materials containing hazardous substances. This is distinguishable from S. 8, in that parties settling under the policy are paying their share of responsibility for a site, but are also resolving their liability and any litigation. EPA seeks early settlement with these parties because such settlements reduce transaction costs for both the *de minimis* party and other parties. Finally, during negotiations in the last Congress, the Administration proposed exempting some small businesses, those with less than $2 million in gross revenues and no more than 25 employees. The Administration is still open to considering various methods of relieving the burden on small businesses.

Relief for Small Volume Contributors or MSW Contributors is not a Rejection of the "Polluter Pays" Principle

We continue to believe that when Congress enacted CERCLA and SARA, it never intended to hold "homeowners and pizza parlors" responsible for disposing of household, or similar wastes. We believe that to do so is patently unfair; and while EPA's policies seek to protect these parties, a "bright line" is necessary to provide protection from third-parties seeking reimbursement through litigation or other means.

Further, it is unfair for responsible parties to incur litigation costs that would exceed their share of responsibility. As we have indicated, because *de minimis* parties settle for their share of responsibility at a site, the treatment of these parties is consistent with the "polluter pays" principle. Finally, the proposals supported by the Administration provide that where the materials contributed by the party contributed significantly or could contribute significantly to the costs of response or to natural resource damages, or the party has not complied with all CERCLA section 104 information requests, the party would not be eligible for the liability protection.

Question 10. Groundwater Remedies: You mentioned in your oral testimony that "the NRC" had recently reported that groundwater plumes may indeed be cleaned up. Please provide a copy of this report. Please explain whether S. 8's rules for selecting groundwater remedies take into account findings such as these.

Response. The National Resource Council (NRC) report referenced during the testimony was taken from a book entitled "Alternatives for Groundwater Cleanups," which was jointly written by the Committee on Groundwater Cleanup Alternatives, the Water Science and Technology Board, the Board on Radioactive Waste Management, and the Commission on Geosciences, Environment, and Resources. It was published in 1994, by the National Academy Press.

The text makes several references to groundwater remediation (pertinent text attached), generally finding that "cleaning up large portions of these [groundwater]

sites is possible, even if limited areas remain contaminated." The text supports EPA's efforts to treat groundwater as an important environmental resource, and shows that efforts to provide treatment of contaminated groundwater are generating benefits.

Assuring the availability of clean groundwater is a very high EPA priority, as groundwater constitutes 86 percent of the fresh water in the United States. Additionally, over 50 percent of the United States population gets its drinking water from groundwater; in rural areas, 95 percent of households depend on groundwater. Thirty-four of the 100 largest cities in the United States rely completely or partially on groundwater for their drinking water supplies.

Despite these facts, S. 8 would replace the goal under the current program to restore contaminated groundwater to beneficial uses, wherever practicable, with the very different mandate to "prevent or eliminate any actual human ingestion of contaminated drinking water." This goal could be met through treatment at the tap or simply by preventing the use of the water. Though S. 8 does provide for protection of uncontaminated groundwater, it relies too heavily on natural attenuation to provide this protection.

Even if actual cleanup of contamination in the groundwater were proposed as a cleanup alternative, S. 8 sets up a burdensome three part test which must be passed to justify its selection. The bill would require: (1) an affirmative finding that restoration was technically practicable; (2) a justification that demonstrates that active cleanup can "substantially accelerate the availability of groundwater for use as drinking water beyond the rate achievable by natural attenuation"; and, in the final analysis; (3) consideration of active cleanup "on an equal basis" with institutional and engineering controls.

The current provisions of S. 8 make no acknowledgment of the successes EPA has achieved in its efforts to clean up contaminated groundwater, and the benefits such treatment provides. This is a clear difference in premise from the text identified during the testimony, which shows that groundwater remediation is not only possible in many instances, but beneficial.

Question 11. Remedy Selection: In your testimony, you referred to a "63 percent" figure regarding consideration of land use. Could you please clarify this reference and explain its significance?

Response. The 63 percent figure refers to the frequency at which EPA selected a land use "other than residential" in its Records of Decision (RODs) for FY95. It should also be noted, however, that multiple uses can be, and in fact are, assumed in the same ROD, if the future land use is uncertain. Based on EPA's review of these RODs, it is evident that EPA assumed a residential land use in only 37 percent of FY95 RODs typically where there was residential use onsite or adjacent to the site. This is a very important response to those who claim that EPA defaults to clean ups for residential use in all cases, or are unaware of the current practices pertaining to remedy selection.

Based on an internal analysis of EPA's fiscal year 1995 RODs, containing a potential site universe of 231 sites, 127 involving soil cleanup, the reasonably anticipated land use assumed in those decisions (i.e., 127 sites) were as follows (because of multiple uses as some sites, the total exceeds 100 percent):

- 37 percent (48 sites) assumed residential use.
- 61 percent (78 sites) assumed industrial/commercial use.
- 10 percent (13 sites) assumed recreational use.
- 9 percent (11 sites) assumed use as landfills/waste management units.
- 7 percent (9 sites) assumed the site would remain a military installation.
- 5 percent (7 sites) assumed agricultural use.
- 3 percent (4 sites) were remediated because of ecological concerns.

Question 12. Administrative Reforms: Senator Baucus inquired about the number of sites where EPA has "updated" RODs. Please provide information about the number of instances, criteria, and results, where ROD's were "updated."

Response.

Number of Instances

As part of implementing the Update Remedy Decisions Reform (Third Round of Superfund Reforms, October 1995), EPA has been tracking the remedy updates made, and their associated cost savings throughout FY96 and in the first quarter of FY97. In FY96, remedies with cost savings were updated at 30 sites, while in the first quarter of FY97, remedies with cost savings were updated at 9 sites.

Criteria

Modifications to the record of recision (ROD) must still comply with policies regarding remedy selection, treatment of principal threats, preference for permanence, establishment of cleanup levels, applicable or relevant and appropriate requirements (ARARs) waivers, or the degree to which remedies must protect human health and the environment. The goal of the 18 reform is to promote the use of the best science and most appropriate technologies at Superfund sites while limiting the impacts to the pace of cleanups, not to reopen RODs solely on the basis of cost savings.

Results

For FY96, 30 sites resulted in a total estimated future cost reduction of over $280 million. Of this $280 million, approximately $250 million resulted from remedy updates of the kind identified in EPA's reform guidance (dated September 27, 1996). Approximately 63 percent (19 of 30) of the changes were Explanation of Significant Differences (ESDs) while approximately 33 percent (10 of 30) of the changes were ROD Amendments. Some 50 percent of the changes were EPA-initiated while the remaining 50 percent were initiated by other parties (e.g., PRP, State, etc.). Approximately 63 percent (19 of 30) of the changes related to the soil media alone, while only 20 percent (6 of 30) of the changes related to the groundwater media alone.

For the first quarter of FY97, 9 sites resulted in a total estimated future cost reduction of over $28 million. Over 66 percent (6 of 9) of the changes were ESDs, while approximately 22 percent (2 of 9) of the changes were ROD Amendments. About 56 percent (5 of 9) of the changes were EPA-initiated, while the remaining 44 percent (4 of 9) were initiated by other parties. Approximately 67 percent (6 of 9) of the changes related to the groundwater media alone, while only about 22 percent (2 of 9) of the changes related to the soil media alone.

Summary of Estimated Savings for Remedy Updates in FY96

Region	Reform (New Sci./Tech.)			Other	
1	$45.0M	($4.0M)	$2.0M	$3.6M	
	$0.7M	$1.0M	$1.3M		
	$12.0M	$3.5M	$1.5M		
2	$9.6M				
3	$8.0M	$5.8M		$7.0M	
	$0.3M	[+3 TBDs]		$10.0M	
4	$1.0M	$0.8M	$4.0M		
5	$6.2M	$28.5M		$14.8M	$0.6M
				$1.8M	
6	$3.0M			$1.0M	
7					
8	$1.8M	$0.2M	[+2 TBDs]		
9	$26.0M	$15.0M			
10	$6.2M	$2.0M	$82.0M		
FY96 Totals:	**$243.3M (23sites)**	**+3 TBDs**		**$38.8M (7 sites)**	
FY96 Grand Total	$282.1M				
FY97 Totals:	**28.1M (6 sites)**	**+3TBDs**			

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MAR 12 1997

OFFICE OF CONGRESSIONAL
AND LEGISLATIVE AFFAIRS

The Honorable James M. Inhofe
The United States Senate
Washington, D.C. 20510

Dear Senator Inhofe:

At the March 5, 1997 Senate Environment and Public Works Subcommittee on Superfund, Waste Control and Risk Assessment Oversight Hearing on S.8, the Superfund Cleanup Acceleration Act of 1997, you raised a comparison of ARCO's cleanup costs and time frames for two Oklahoma sites in your opening remarks. The Administrator promised we would follow up with you on this example.

As outlined below, it is quite clear that these two sites are in no way comparable other than the fact they are both in Oklahoma and are currently owned by the same corporation. The Agency is very concerned that "old horror stories" and the way the program was operated prior to 1993 continue to dominate the Superfund debate. The Superfund program is fundamentally different today - a point the Administrator emphasized at the hearing. To that end, we are pleased that you have given us the opportunity to demonstrate that not all sites are the same and that states tend to undertake the cleanup only at lesser contaminated sites. We have also included an example of how our Superfund Administrative Improvements have impacted Oklahoma - which we hope you will factor into any discussions of Superfund Reauthorization.

Comparison of Cleanups at Sand Springs and Vinita, OK

Site Comparison
While both of these sites are former Sinclair refineries, several differences exist that prevent a credible direct comparison of cleanun costs and time frames between the two sites. The Sand Springs site was judged much more of a threat to public health and the environment and was listed on the NPL. The Vinita site was evaluated by EPA and referred to the State for action because it presented little health risk. Key differences include the following:

Volume of Waste Cleaned Up - The Sand Springs cleanup addressed nearly three-and-one-half times the volume of waste at Vinita.

Complexity of Wastes - After closing as a refinery, the Sand Springs site was used by several other industries, including a chemical recycler, resulting in a significant degree of contamination from chlorinated solvents and other chlorinated hydrocarbons at the site. As a result, 5000 cubic yards of Sand Springs waste had to be shipped off-site to a

commercial hazardous waste incinerator. In contrast, the Vinita site contained refinery wastes only, which are much less expensive to remediate than chlorinated wastes.

Proximity to Population - The Sand Springs site is located in a populated area, adjacent to businesses, near to residences, and adjacent to the Arkansas River, which is heavily used for recreational purposes. Approximately 300 people work on, or adjacent to, the site. There are four schools, a hospital, an orphanage, and numerous restaurants within a mile of the Sand Springs site. The Vinita site is in a relatively remote area, nearly two miles from the town of Vinita.

Ground Water Use - Ground water is used within one-half mile of the Sand Springs site. There are no water wells within four miles of the Vinita site.

Air Emissions Safeguards - Due to the proximity of population and the chemical composition of the wastes, there was a major concern with controlling air emissions at Sand Springs. For example, there was a documented incident which indicated the presence of hydrofluoric acid gases within the sludge pits. Prior to EPA involvement, earthwork activities by the City of Sand Springs to construct a storm water retention basin adjacent to the sludge pits caused a significant release of gases which required the hospitalization of workers and the evacuation of nearby businesses. Due to this potential for an off site release of air contaminants, EPA took extra precautions to protect the health and welfare of surrounding businesses and residents, including the Sand Springs Home for Orphans. EPA required extreme care to be taken during excavation activities, including emission controls and extensive air monitoring. Although expensive and time consuming, these protective measures were necessary to ensure the safety of the community. The more remote Vinita site, without the complications posed by chemical plant wastes, did not require this degree of protection .

Priority of Site - Due to the types of waste present, the proximity to population, and the sensitivity of ground water, the Sand Springs site ranked for NPL listing under the HRS, while the Vinita site fell far short.

Protectiveness of Disposal Cell - The Sand Springs site used a RCRA-caliber vault for disposal of the stabilized waste, whereas a simple clay-lined cell was used at Vinita.

Design Costs - Due to uncertainties as to whether the stabilization process would work effectively on the Sand Springs wastes within allowable air emission levels, ARCO proceeded with design of an incineration system so that they would have a fall-back treatment technology ready in case the stabilization did not work. This added significantly to ARCO's design costs at Sand Springs but was not a factor at Vinita. Furthermore, ARCO was able to utilize its extensive (and costly) initial stabilization process studies from Sand Springs to shortcut the design process at Vinita.

The following matrix compares some characteristics of the two sites:

Factor	Vinita	Sand Springs
Size of site	177 acres	200 acres
Volume of waste	62,000 cu yds	213,000 cu yds
Volume of Chlorinated Hydrocarbons	0	5,000 cu yds
Population within 4 miles	6,582	15,000
Distance to nearest water well	>4 miles	<1/2 mile
HRS Score	0.94 (prescore)	28.86
Drums of hazardous materials removed	0	400

Sand Springs Touted as Ahead of Schedule and Under Budget

The Sand Springs remediation (construction) actually began in 1992 (not 1985) and took four years to complete. At an August 29, 1995 ribbon-cutting to celebrate completion of construction, ARCO stated that the remedy had been completed one year ahead of the Consent Decree schedule and $10 million under budget.

Impact of Administrative Reforms

In addition to the differences above, it must also be pointed out that the Sand Springs cleanup was conducted prior to the Superfund Administrative reforms. A much better example of how EPA is currently addressing the cleanup of abandoned refineries is the Fourth Street site in Oklahoma City. The Fourth Street site utilized on-site stabilization/solidification, neutralization, and off-site disposal as the remedy. The waste at the site was an acidic sludge containing high levels of lead. The remediation of approximately 43,000 cubic yards of sludge was completed on schedule, under budget, and with no lost time accidents, at a total cost of just under $5 million. The volume and type of waste addressed make Fourth Street a much more credible point of comparison to the Vinita site, even though Fourth Street is in a much more populated area.

I hope that this clarifies the differences between the sites. If you have any additional comments or questions please contact Kevin Matthews (202-260-5188) in my office or Ed Curran (214-665-2172) at our Regional Office in Dallas.

Sincerely,

Robert W. Hickmott
Associate Administrator

cc: The Honorable John Chafee
The Honorable Robert Smith
The Honorable Max Baucus
The Honorable Frank Lautenberg

PREPARED STATEMENT OF RICHARD GIMELLO, ASSISTANT COMMISSIONER FOR SITE REMEDIATION, NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION

INTRODUCTION

Good morning Mr. Chairman. I am Richard Gimello and I am Assistant Commissioner for Site Remediation for the New Jersey Department of Environmental Protection. This testimony is presented on behalf of the National Governors' Association (NGA). NGA has a strong interest in Superfund reform and believes that a variety of administrative as well as legislative and regulatory changes are needed to improve the Superfund program's ability to clean up the nation's worst hazardous waste sites quickly and efficiently. We realize the importance of passing legislation this year, and we want to ensure that the collective interests of the states are considered carefully in the development of a final bill. We recognize that Superfund reform is particularly critical this year because the taxing authority has lapsed. Funding is essential to the continuation of site cleanups, the ultimate objective of the Superfund program.

The Governors appreciate the opportunity to review and comment on S. 8. I would like to begin by stating that NGA is very appreciative of the many improvements made in this bill over last year's bill, S. 1285. The Governors acknowledge the vast compromises that this bill reflects and commend the committee for introducing legislation that addresses many state concerns with the Superfund program. We would like to continue working cooperatively with you to develop a final bill that enjoys bipartisan support. We truly believe that this type of support requires the types of moderate compromises that you've made in S. 8. Today, I would like to address NGA's overall assessment of the bill and suggest a few areas where improvements could be made.

BROWNFIELDS REVITALIZATION AND VOLUNTARY CLEANUP PROGRAMS

The Governors believe that brownfields revitalization is critical to the successful redevelopment of many contaminated former industrial properties, and we commend the committee for including brownfields language in the bill.

The Governors would like to emphasize the importance of state voluntary cleanup programs in contributing to the nation's hazardous waste cleanup goals. Many states have developed highly successful voluntary cleanup programs that have enabled sites to be remediated more quickly and with minimal governmental involvement. It is important that any legislation supports and encourages these successful programs by providing clear incentives and by ensuring that any minimum program criteria set by the Environmental Protection Agency (EPA) are extremely flexible.

It is the view of NGA that voluntary cleanup programs and brownfields redevelopment are currently hindered by the pervasive fear of federal CERCLA liability. We strongly support the provisions in S. 8 that encourage potentially responsible parties and prospective purchasers to voluntarily clean up sites and reuse and redevelop contaminated property, respectively. S. 8 achieves this goal by precluding subsequent federal enforcement at sites where cleanup has occurred under state programs and by providing needed liability protections for prospective purchasers and owners of property contiguous to contaminated sites. However, in the event EPA discovers an imminent and substantial threat to human health and the environment at a site, it should be able to continue using its emergency removal authority. Any assignment of liability, however, must be consistent with liability assigned under state cleanup laws.

STATE ROLE

The impacts of hazardous waste sites are felt primarily at the state and local levels. The Governors are very supportive of the efforts that Senators John H. Chafee and Robert C. Smith have made to strengthen the role of states in this program. We appreciate the inclusion of options for both noncomprehensive and comprehensive delegation in the bill and feel that this allows for maximum flexibility to meet state needs and objectives. We especially support allowing states to operate their programs in lieu of the federal program. States need to be able to apply state applicable standards at any site without any cost differential.

We cannot support allowing EPA to withdraw delegation on a site-by-site basis. Withdrawal of delegation should be consistent with the approval or rejection of a state's application for delegation. In addition, EPA should periodically review state performance instead of involving itself in site-by-site oversight.

The Governors strongly support a 10 percent state cost share for both remedial actions and operations and maintenance and appreciate the inclusion of this provision in S. 8. However, we do not support any change that would require a state cost

share for removal actions. States are not currently required to cost-share removals, and we would like to ensure that this remains the case.

In addition, the Governors would like to express concern about the provision for states to petition the Office of Management and Budget (OMB) as a mechanism to deal with any cost shifts resulting from changes in liability. States must have assurance that adequate funding is available and that cost shifts will not be an issue.

SELECTION OF REMEDIAL ACTIONS

The Governors believe that changes in remedy selection should result in more cost-effective cleanups; a simpler, streamlined process for selecting remedies; and a more results-oriented approach.

As you know, allowing state applicable standards to apply at both National Priorities List (NPL) and state sites is an area of great importance to the Governors. We greatly appreciate and strongly support measures to allow state applicable standards and promulgated relevant and appropriate requirements (RARs) to apply to all site cleanups.

The Governors agree with the importance of considering different types of land uses when determining cleanup standards and appreciate the inclusion of provisions in S. 8 that provide the opportunity for state and local control in making determinations of foreseeable land uses. We would like to ensure that, when appropriate, feasible, and cost-effective, the cleanup standards chosen allow for unrestricted use of the site. In addition, we would like to ensure that land-use decisions are not second-guessed by EPA.

The Governors believe groundwater is a critical resource that must be protected. The use of state applicable standards and the opportunity for state and local authorities to determine which groundwater is actually suitable for drinking are essential during the remedy selection process. We appreciate the addition of language in S. 8 offering greater protection for groundwater and surface water that is or could be used as a drinking water source and would like to recognize this provision of the bill as an area of significant improvement over last year's bill.

The Governors recognize that there are some records of decision (RODs) that should be reopened because of cost considerations or technical impracticability. However, we believe the Governor should have the final decision on whether to approve a petition to reopen a ROD in a state. As we understand the bill, a Governor's decision to reject a petition can be denied by EPA's remedy review board. This is a provision we cannot support.

Finally, as we understand Section 134(c)(1), EPA could release a responsible party from any and all future liability, including state and local laws, if a site is cleaned up and deemed available for unrestricted use. This represents a clear preemption of state law that we cannot support.

LIABILITY

The liability scheme employed in any hazardous waste cleanup program is critical to the success of that program. The current CERCLA liability scheme serves some purposes well. It has proved effective at encouraging better waste management, and it has provided resources for site cleanups. However, the current system has a history of leading to expensive litigation and transaction costs. Therefore, the Governors are not averse to changes in liability, though we are concerned with the resulting effects on the states.

In general, we support the elimination of *de minimis* and *de micromis* parties and believe the liability of municipalities needs to be addressed. However, we question broader releases of liability for other categories of responsible parties. In any case, we would like to see convincing analysis that any changes in the liability scheme are adequately funded so that sites can continue to be cleaned up and so that there will be no cost shifts to the states.

Further, we support the concept of an allocation process so that costs are assigned appropriately to responsible parties, but we need assurance that funding will be available for this process, including support for state allocation programs.

Finally, as I mentioned earlier, we fully support a release of federal liability at non-NPL sites where a release of liability has been granted under state cleanup laws protective of human health and the environment. We greatly appreciate the addition of language in S. 8 that addresses this issue.

FEDERAL FACILITIES

The Governors support legislation that ensures a strong state role in the oversight of federal facility cleanups. The double standard of separate rules applying to private citizens and the federal government has a detrimental effect on public con-

fidence in government at all levels. Therefore, the Governors believe that federal facilities should be held to the same process and same standard of compliance as private parties. We would like to make sure that this is the intent of language in the bill that we have interpreted as allowing state applicable standards to be applied at federal facility sites in the same manner that they apply at non-federal facility sites.

In addition, we believe that states should be able to obtain comprehensive delegation for federal facilities and that the self-certification process should be the same as for private sites. We believe this is not the case in S. 8 as written. Our interpretation is that federal facilities may be delegated to states, but that they must use the federal remedy selection process. We do not understand the justification behind this language.

In addition, in virtually every other environmental statute, Congress has waived sovereign immunity and allowed qualified states to enforce state environmental laws at federal facilities. A clearer, more comprehensive sovereign immunity waiver should be proposed that includes formerly used defense sites. Several states have proposed language for this waiver.

NATURAL RESOURCE DAMAGES

The current natural resource damage provisions of CERCLA allow federal, state, and tribal natural resource trustees to require the restoration of natural resources injured, lost, or destroyed as a result of a release of a hazardous substance into the environment. The Governors feel this is an important program that must be maintained.

Although this title is greatly improved from last year's bill, there are still a few issues of concern to the Governors. We urge you to strengthen the program by amending the statute of limitations to run three years from the completion of a damage assessment; removing the prohibition on funding natural resource damage assessments from the trust fund; and not eliminating the ability to receive compensation for nonuse damages.

MISCELLANEOUS

The Governors would like to respond to the provision in this title that limits new listings on the NPL to a specific number each year. Although this approach differs slightly from last year's provision to cap the NPL, we still feel that it greatly jeopardizes the intent of the Superfund program—namely, to clean up contaminated sites and protect human health and the environment. Further, by requiring the Governor's concurrence on any new listings, a sufficient and appropriate limitation is placed on new listings. We do not feel that further limitations are necessary. Because of differences in capacities among states, the complexities and costs of some cleanups, the availability of responsible parties, enforcement considerations, and other factors, the Governors are concerned about severe limitations on new listings. We need assurance that there will be a continuing federal commitment to clean up sites under such circumstances.

CONCLUSION

The National Governors' Association would like to thank you for your hard work on this important program and for providing me with the opportunity to communicate the views of the Governors on Superfund reform. Again, the Governors are very supportive of the direction you have taken with this legislation, and we look forward to working with you to develop a bill that enjoys broad bipartisan support.

TESTIMONY OF KAREN FLORINI, SENIOR ATTORNEY, ENVIRONMENTAL DEFENSE FUND

I. INTRODUCTION

On behalf of the Environmental Defense Fund and its 300,000 members, I want to thank Chairman Smith, Ranking Member Lautenberg, and the other members of the Committee for this opportunity to discuss S. 8, the "Superfund Cleanup Acceleration Act of 1997," amending 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, and testifying repeatedly on Superfund during the last two Congresses.

While EDF supports an improved Superfund program, we believe that S. 8 would weaken rather than strengthen the program. In many instances, the bill's "cures" are far worse than the problems they purport to address. S. 8 fails to acknowledge

that the Superfund program today is faster and more streamlined than was the case in earlier years. According to EPA, cleanups have been completed (except for ongoing groundwater treatment) at some 400 sites; at nearly another 500, construction is now underway. While many of these cleanups were too long in coming, S. 8 would either retard the pace of cleanups, or make them faster by cutting out essential safeguards.

The bill's most objectionable features include provisions:

- putting polluters in charge of cleanups without effective government or public oversight, both at Superfund sites and at so-called "voluntary" cleanups sites (which may themselves be Superfund sites);
- letting costs to polluters trump community health and resource protection in choosing remedies;
- dumping cleanup problems on States, regardless of whether they can handle them;
- further retarding cleanups by reopening hundreds of existing decisions; and
- creating new kinds of corporate welfare by rolling back liability even for many large industrial polluters who dumped waste at certain sites, and by requiring expansive "polluter paybacks."

Accordingly, EDF strongly opposes S. 8.[1] Some of our key concerns are detailed below.[2]

II. S. 8'S REMEDY SELECTION PROVISIONS: A RECIPE FOR CRUMMY CLEANUPS

Among the most critical features of any Superfund bill are the provisions governing what standards actually apply to cleanups, and how specific cleanup decisions are made. S. 8 comes nowhere close to being acceptable on this count. Procedurally, it largely puts polluters in control; substantively, it sets inadequate cleanup standards that are further weakened by a variety of loopholes. Each flaw aggravates the other.

A. Putting Polluters in Control of Cleanups.

One of the most startling aspects of the bill is its sweeping use of default provisions, including those for default approval of polluter-written cleanup plans. Parties who are potentially liable under the statute (Potentially Responsible Parties, or PRPs) may prepare the Remedial Action Plan (RAP) if they want to do so; if EPA fails to take action within 180 days of the RAP's submission, "the plan shall be considered to be approved and its implementation fully authorized" [SCAA § 404, adding CERCLA § 133(b)(5)(F)(ii), p. 121].

Because EPA will have extremely limited resources to review these highly technical RAPs, PRP-written RAPs will be implemented without receiving adequate oversight. PRPs naturally have an incentive to save themselves money; this bill creates no countervailing mechanism through which remedies will be selected that actually protect communities, not just polluters' pocketbooks. Such cleanups will lack public credibility, and deservedly so. To make matters worse, EPA is only allowed to review "the work plan, facility evaluation, proposed remedial action plan, and final remedial design" [§ 133(a)(1)(C), p. 107]. These limitations could preclude EPA from reviewing important underlying data, rendering effective oversight impossible.

It's as if taxpayers were invited to select their own tax bracket, with the IRS getting only 180 days to review the return. And if the IRS does reject a taxpayer's return, there are *no* penalties the taxpayer just has to prepare another return, which the IRS again only gets 180 days to review!

Simply put, default approvals of PRP-written plans are entirely unacceptable, particularly in a program as complex and controversial as Superfund. This "cure" is far worse than the delays sometimes occasioned by slow governmental review of cleanup proposals submitted by PRPs.

These concerns are especially acute because EPA must allow a PRP to take the lead if the PRP demonstrates financial resources and "expertise" [§ 404, adding CERCLA § 133(a)(1)(D)(i), p. 108–109]. Under these provisions, a PRP that hires a consulting firm could take the lead even if the company is under criminal indict-

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[1] There are certain elements of the bill we do support. These include dropping the existing requirement for matching contributions and allowing up-front payments for Technical Assistance Grants. [SCAA § 301(a), adding CERCLA § 117(f)(3)(A) & (B), p. 70].

[2] This testimony is by no means exhaustive. For example, EDF also has serious concerns about the Natural Resources Damages provisions in Title VII of S. 8; the structure of the allocation process and the number of sites at which it is mandated; the level of spending authorized by the bill, which is too low to permit the program to meet the additional burdens the bill imposes on it (e.g., orphan shares, allocations, etc.); and the 20% reduction that the bill imposes on the budget of ATSDR, which is charged with assessing public health at Superfund sites.

ment for illegal dumping at the site, or has a history of recalcitrance at other sites. Absolutely no consideration is given to whether the community has any confidence in the PRP.

Moreover, even after a cleanup plan is adopted, PRPs can disregard it at will, since PRPs need not get prior approval of RAP modifications. Rather, the bill provides that if a PRP "has deviated significantly" from a RAP, EPA notifies the PRP, who at the PRP's option either complies with the RAP or submits a notice for modifying the plan [SCAA § 404, adding CERCLA § 133(c)(1), p. 124].

In short, the PRP is at liberty to depart from the RAP: if it gets caught, it gets to choose whether to comply with the RAP or modify it. RAPs won't be worth the paper they're written on.

B. Inadequate Cleanup Standards

1. Overview

S. substantive cleanup provisions are extremely weak. The basic cleanup goals are inadequate, and various loopholes undercut even those limited goals. The inadequacies in the goals are critical, because EPA can select only those cleanups that are "cost effective" in meeting the narrowly formulated goals [SCAA § 402, amending CERCLA § 121(a)(l)(A), p. 84].[3] Particularly conspicuous is the absence of a goal of restoring land to productive use where doing so is practical.

2. The Overriding Role of Cost

Before turning to specific deficiencies in cleanup goals, it must be noted that the bill expressly provides that all goals—even protection of community health—can be overridden based on cost considerations. Specifically, the bill provides that cleanup goals need not be met if doing so is "technical infeasib[le]," i.e., if "there is no known reliable means of achieving at a reasonable cost" the specified goals [SCAA § 402, amending CERCLA § 121(a)(2), p. 94–95]. "Reasonable cost" is not defined.

This open-ended language is particularly outrageous given that the bill severely constrains EPA and public oversight of PRP cleanup decisions, leaving PRPs liberty to construe this term for themselves. In effect, PRP willingness to pay will become the determining factor in determining the stringency of remedies, including the level of health protection provided to communities. Such an approach is especially unacceptable with regard to health protection goals, as it is always possible to especially protect community health through relocation if by no other means.

3. Additional Factors that Undercut Strong Cleanups

Several additional factors further contribute to weak cleanups. First, the current preference for permanent treatment is wiped out, even for highly contaminated areas [SCAA § 402, striking CERCLA § 121(b), p. 83]. Instead, the bill expressly provides that institutional and engineering controls "shall be considered to be on an equal basis with all other remedial action alternatives" [SCAA § 402, amending CERCLA § 121(a)(5), p. 101]. Taken with the cost-effectiveness requirement, this means that put-up-a-fence remedies will prevail. Adding insult to injury, states may apply their own more-protective standards only by paying the incremental cost [SCAA § 201, adding CERCLA § 130(d)(3)(B)(ii), p. 44–45].

4. Weaknesses in Specific Goals

a. Health: Unprotective Goals Are Exacerbated by Flawed Risk Assessment Provisions.[4]

S. 8 fails to establish a national uniform cleanup goal that would assure communities around the country of a baseline level of protection. Instead, the bill sets an explicit cancer risk-range goal that spans two orders of magnitude (one in a million to one in ten thousand [SCAA § 402, amending CERCLA § 121(a)(1)(B)(i)(I), p. 85]. The requirement to use a "cost-effective" remedy option, along with the fact that cleaning up more-stringently is inherently costlier than cleaning up less-stringently, means that as a practical matter the one-per-ten-thousand standard will always prevail.

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[3] Although community views are to be taken into account, this applies *only* in choosing a remedial alternative "from among alternatives that achieve the goals" [SCAA § 402, amending CERCLA § 121(a)(1)(D), p. 93].

[4] The bill also fails to address the inherent underlying flaw in risk assessment as it is currently practiced: contaminants are presumed to be safe absent considerable information, both qualitative and quantitative, about toxicity. Current risk assessments also make no pretense at evaluating synergistic effects of multiple contaminants. These deficiencies mean that decisions based on risk assessments are, at best, of uncertain protectiveness.

In addition, the bill's risk-assessment provisions are written in a way that may undercut protection. For example, the bill requires use of "central estimates" of risk [SCAA § 403, adding CERCLA § 131(c)(3), p. 104–105]. This tilts risk assessment toward considering the average risk to the average individual and fails to assure protection of those who are highly exposed or highly susceptible, such as children, those with chronic diseases, and others such as subsistence farmers and fishers. Any legislation must expressly require evaluation of risks to groups with higher exposure or susceptibility than average, so as to ensure that cleanup plans—including those written by polluters—cannot "overlook" them.

Concerns also arise from the bill's emphasis on evaluating exposures "considering the actual or planned or reasonably anticipated future use of the land or water resources" in facility-specific risk evaluations [SCAA §403, adding CERCLA § 131(b)(1), p. 103]. While it may be appropriate to consider future land use, there are two major problems with the approach taken in S. 8. First, the bill apparently focuses solely on current and future use of the site itself, ignoring the uses of neighboring parcels even though many Superfund sites directly adjoin residential neighborhoods. Superfund must protect the health of site neighbors, not just individuals who will be present on the site itself, given the well-documented ability of contaminants to migrate off-site (e.g., as wind-blown contaminated dust or as vapors).

Second, the bill defines a "reasonably anticipated future use" as one that the local land use planning authority, in conjunction with the community response organization, determines has "a substantial probability of occurring based on recent (as of the time of the determination) development patterns in the area in which the is located and on population for the area" [SCAA § 401, amending CERCLA § 101(41)(B)(i)(II), p. 82]. As discussed below in section II.B.4.d, this is an unworkable standard—and one that may well lead to cleanups that turn out to be inadequate following land-use changes that were plausible but didn't rise to the "substantial probability" level.

More generally, the role of facility-specific risk assessments is also confusing at best and profoundly disturbing at worst. Under the bill, cleanups are to meet the specific cleanup goals and comply with other applicable laws "on the basis of a facility-specific risk assessment" [SCAA §402, amending CERCLA §121(a)(1)(A), p. 84]. The bill is silent as to what happens if a PRP's risk assessment purports to find that complying with applicable standards is not necessary in order to meet the cleanup goals. Even apart from these substantive concerns, allowing the validity of applicable standards to be rehashed at every Superfund site is a guaranteed way of delaying cleanups, increasing transaction costs, and infuriating communities.

Moreover, the bill provides PRPs with ample opportunities to manipulate risk assessments in a direction that minimizes their cleanup costs. The bill calls for use of "the most scientifically supportable" assumptions [SCAA §403, adding CERCLA § 131(c)(3), p. 105], potentially allowing challenges to default assumptions that are, as a matter of sound public health policy, intentionally crafted to be protective in the face of scientific uncertainty. Likewise, the bill calls for using "chemical and facility-specific data . . . in preference to default assumptions" [SCAA § 403, adding CERCLA § 131(b)(3), p. 103]. Even a single data-point, or data of questionable reliability, could be used to replace protective defaults. As a result, risk assessments could seriously understate risks.[5]

b. Environment: A Scientifically Unworkable Standard

The bill's stated environmental goal is protecting "ecosystems from significant threats to their sustainability" [SCAA § 402, amending CERCLA § 121(a)(1)(B)(ii), p. 85], and sustainability is defined as "the ability of an ecosystem to continue to function within the normal range of its variability absent the effects of a release of a hazardous substance" [SCAA § 401, adding CERCLA § 101(42), p. 83]. The bill thus puts on the government the burden of demonstrating that particular contaminants threaten ecosystem sustainability. That burden is likely to prove unmanageable in many instances, not only because of the scarcity of federal and state resources, but also because of current limits of scientific knowledge. As a result, resources will be written off during Superfund cleanups not because they truly lack value, but because there is not enough evidence to demonstrate their impact on sustainability.

[5] In addition, the bill calls for comparisons of "risks from the facility to other risks commonly experienced by the community" [SCAA § 403, adding CERCLA § 131(c)(4) p. 105]. The approach ignores critical attributes such as whehter those other risks are also involuntary, allowing PRPs to produce risk characterizations that ignore critical factors.

c. Groundwater: An Illusory Goal of Resource Protection

Although the bill nominally protects uncontaminated groundwater as a resource, this is illusory. Four provisions of the bill undercut the no-contamination provision:

- First, the "reasonable cost" loophole [SCAA § 402, amending CERCLA § 121(a)(2)(B)(i), p. 95], which will allow PRP-written cleanup plans to declare that avoiding contamination is too expensive;
- Second, the "natural attenuation" loophole, bill's provision that expressly allows natural attenuation where it won't interfere with anticipated future use [SCAA § 121(a)(4)(C), p. 97], despite the inherent uncertainties of predicting when groundwater will be needed;[6]
- Third, the bill's express proviso that engineering and institutional controls "to be considered on an equal basis with all other remedial action alternatives" [SCAA § 121(a)(5), p. 101]; and
- Fourth, the bill's express proviso allowing point-of-use treatment devices [SCAA § 121(a)(4)(D)(iv)(II), p. 99–100].[7]

The upshot will be that PRPs will be able to claim that preventing contamination is too expensive compared to waiting until the water cleans itself up, forbidding its use, or sticking a filter on the tap. In short, the bill fails to protect groundwater as a resource for future generations.

In essence, under the natural attenuation loophole, clean groundwater is allowed to get dirty in the hope that it will clean itself back up before the water is needed. This approach implicitly assumes that it is possible to reliably project (i) long-term groundwater flows, (ii) long-term attenuation patterns, and (iii) future groundwater needs. In actuality, each of these is uncertain at best; taken together, they amount to Congressional endorsement of gambling with groundwater. Decision makers can only reliably predict future groundwater movement, and future groundwater needs,[8] for a handful of years at a stretch. Absent the rare case where natural attenuation can confidently be predicted to restore groundwater within an equally short time frame, these "remediation" techniques should be used only if no others are available. These provisions are especially objectionable because they would apparently "trump" state groundwater laws that require protection of uncontaminated groundwater as a resource (i.e., without having to be specifically identified as a future source of drinking water within a particular time).

Finally, by weakening Superfund's groundwater cleanup provisions, the bill undercuts important incentives for currently managing wastes in a way that protects groundwater. Anyone familiar with the current hazardous-waste regulatory system is painfully aware that innumerable wastes, though hazardous in fact, are not now regulated as hazardous. Superfund's aggressive groundwater cleanup requirements help prompt responsible behavior today, and need to be maintained.

d. The Missing Goal: Restoring Land to Productive Use

An especially notable weakness of the goals is the one that simply isn't there: restoring land to productive use when doing so is feasible. Moreover, the interplay of several provisions will operate to *discourage* returning land to productive use. As noted above, in the absence of a land-resource goal, the requirement to use a cost-effective remedy and the proviso that institutional and engineering controls "shall be considered to be on an equal basis with all other remedial action alternatives" [SCAA § 402, amending CERCLA § 121(a)(5), p. 101] means that put-up-a-fence remedies are likely to prevail.

The fundamental problem is the bill's heavy emphasis on containment-based remedies—remedies that inherently limit a site's potential availability for future rede-

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[6] Even assuming *agruendo* that natural attenuation may sometimes be appropriate, the bill conspicuously fails to include appropriate safeguards, such as thorough characterization of all contaminants, ongoing monitoring to assure that attenuation occurs as expected, and designation of fall-back approaches if attenuation fails or if the water is needed earlier than was originally anticipated.

[7] Point-of-use systems (whether at individual homes or at municipal facilities) simply let contamination continue to spread unchecked, forcing public and private well owners to either conduct costly testing in perpetuity or gamble that their wells won't be hit by a contaminated groundwater plume. Should such contamination occur, it will persist for dozens or hundreds of years. While point-of-use devices may be the only practical option in some circumstances, they should be the last, not the first, resort. Moreover, At-tap treatment systems force homeowners to obtain and install replacement filters periodically, a chore many families lack time to add to their busy schedules.

[8] The "delisting" provisions of section 134 [p. 130] are ambiguous, but it is far from clear that PRPs would be responsible for securing alternate water supplies if groundwater covered by an attenuation remedy is needed earlier than initially anticipated.

velopment. Even assuming that such remedies effectively protect health if appropriately maintained, they restrict the community's flexibility to use that land over time: if a site is capped with contamination in place, that cap must then be maintained in perpetuity. Doing so generally rules out excavation and construction activities. While containment-based remedies may make sense in a limited set of circumstances, they should *not* be the remedy of first choice given that they deprive communities of future flexibility in using the site.

For instance, suppose a particular community wanted to be able to use a site that is now a Superfund site and, like most Superfund sites, not currently used—for an industrial park following a cleanup. Surrounding properties are also industrial, but no developer has expressed a specific interest in redeveloping that particular site. The PRPs have proposed a cleanup under which the site would be capped, with the cap maintained for the indefinite future, thus (supposedly) avoiding human exposure. The PRPs argue that such a plan is consistent with the land uses allowed to be considered under § 121: the actual use (here, no current use); the planned use (here, no current plans exist); or the "reasonably anticipated future use," defined as one that has a "substantial probability of occurring" (here, none specifically identified). Further, suppose that capping the site is substantially cheaper than to treating or removing the contaminated materials.

In such a scenario, the cap would apparently be selected as a cost-effective remedy that meets the bill's narrowly defined goals. At the end of the process, however, the community would be left with a permanent dead zone that cannot be put to productive use. The PRPs may be better off, but the community has not shared those benefits.[9]

The scenario spelled out here may well prove to be the rule rather than the exception. Many Superfund sites are abandoned industrial properties. Only rarely will a developer have proceeded far enough that a potential redevelopment will be the "planned" use for a site following cleanup. Similarly impractical is the criterion that a particular use has "a substantial probability of occurring."

Rather than this convoluted and unworkable approach, the bill should establish an explicit objective of returning land to productive use where technologically and economically feasible. That approach will provide communities with the flexibility they need to grow and prosper through redevelopment for years and decades into the future.

Such redevelopment often occurs in ways that may not be easily "anticipated" and even a few years ago would not have been viewed as having "a substantial probability of occurring." For example:

- The *New York Times* recently described significant urban redevelopment that was not envisioned, and indeed was sometimes marginally legal, under the City's zoning regulations (but occurred nonetheless and reportedly has proven largely beneficial).[10]
- Similarly, the Christian Science Monitor has reported on the growing phenomenon of "infill development."[11] A recent article cites efforts underway in San Jose, California; Portland, Oregon; Boulder, Colorado; and Minneapolis—St. Paul, where "[t]he idea is to shift growth to the inner part of a city, using vacant or underdeveloped areas for new housing and businesses."
- More generally, significant portions of the U.S. experienced more than 25% population growth in their metropolitan areas in the single decade following Superfund's enactment in 1980.[12]

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[9] As noted above, the "community acceptability" criterion for remedy section [SCAA § 402, amending CERCELA § 121(a)(1)(D), p. 93] does not alleviate this problem, because those criteria are to be used in selecting between remedies that meet the goals. In any event, individual criteria are not permitted to predominate in choosing from among alternatives.

[10] K. Johnson, "Where Zoning Law Failed, Seeds of a New York Revival. *New York Times,* p. 1, April 21, 1996.

[11] D. Sneider, "To Halt Sprawl, San Jose Draws Green Line in Sand," Christian Science Monitor, April 17, 1996.

[12] A few statistics help illustrate how dramatically land uses change in a few decades. Urban areas in America have expanded from 15.5 million acres in 1960 to over 56.6 million acres in 1987. U.S. Dept. of Agriculture, Economic Research Service (1991), *Major Uses of Land in the United States*: 1987, p. 33, Agricultural Economic Rep. No. 643.

During the first decade following Superfund's enactment, the population in the Western U.S. grew by 22.3%, an increase of nearly 10 million people. United States Bureau of the Census (1994), *Statistical Abstract of the United States*: 1994 (114th Edition), p. 27. The state of California alone accounted for 25% of the total national growth, increasing its population by over 6 million; its urban land area grew from 4.2 million acres to over 5.2 million acres. U.S. Department of Agriculture (1991), *Major Uses of Land in the United States:* 1987, p. 33.

Continued

In short, S. 8's narrow approach to future land use invites, and even forces, communities to be short-sighted. This may save PRPs money, but the costs thus saved are shifted to our children.

5. The "Voluntary" Cleanups Loophole for Superfund Sites

Under S. 8, site-specific state remedial action plans (RAPs) override all CERCLA enforcement authorities [SCAA § 103, adding CERCLA § 129(a), p. 18]. Apparently, such RAPs need not even be issued under a qualifying state voluntary response program [SCAA § 102, adding CERCLA § 128, p. 15],[13] but rather can be any document designated by any state as a RAP—regardless of whether there has been any public participation whatsoever in development of that RAP, regardless of whether there have been any effective state review of a polluter-written RAP, regardless of whether RAP will be protective, regardless of whether the RAP is actually being complied with, and even regardless of whether the state has the legal or practical capacity to enforce the RAP. Once a state RAP exists, EPA is barred from acting even where a site presents an imminent and substantial endangerment to health or the environment (save by using the Fund, without cost-recovery). This approach is indefensible. Apparently, even current Superfund sites (i.e., those already listed on the National Priorities List), as well as sites proposed for NPL listing, can be thus removed from Superfund's ambit.

There are no substantive standards whatsoever for state RAPs. Unless a state opts to establish regulations, each site's plan will be issued an ad hoc basis with no baseline standards to assure the safety or adequacy of cleanups,[14] meaningful public participation, judicial review, or any other safeguard. Tens or hundreds of thousands of sites may be dealt with on an ad-hoc basis, making effective public oversight completely impossible even apart from the fact that the bill makes no provisions for community technical assistance. And meanwhile, Superfund's authorities are banished.

We strongly oppose these sweeping and unjustifiable limits on Superfund authority. While carefully crafted liability relief for prospective purchasers may well be desirable (assuming community participation rights are assured), wholesale roll-backs of Superfund authorities for a large but amorphous range of sites are indefensible. They are also unnecessary: the private market is increasingly providing mechanisms for moving forward brownfield redevelopment today, with Superfund in place.[15]

On a more localized basis, the 10 years after Superfund became law saw the Los Angeles' metropolitan area population expand by 26% (3 million people), while the Phoenix metropolitan area increased by almost 40%, and the Las Vegas metropolitan area increased by 61.5%. U.S. Bureau of the Census (1994), *Statistical Abstract of the United States:* 1994, Fig. No. 42. Many smaller cities of the region also showed substantial expansion, with cities such as Reno, Modesto, Sacramento, and Tucson all experiencing growth between 25% and 40%. Ibid.

See also, Testimony of EDF on Superfund Reauthorization before the House Committee on Transportation and Infrastructure's Subcommittee on Water Resources and the Environment, June 21, 1995.

[13] In order to obtain technical assistance funds from EPA, state voluntary programs must meet certain criteria such as "adequate opportunities for public participation, including prior notice and opportunity for comment in appropriate circumstances, in selecting response actions," and "oversight and enforcement authorities or other mechanisms that are adequate to ensure that voluntary response actions will protect human health and the environment [SCAA § 102(b), adding CERCLA § 128(b)(2), (4), p. 15]. However, this provision is independent of the CERCLA override in section 129. To add to the confusion, states apparently may self-designate as having a qualifying voluntary response program; there is no mechanism for EPA review of whether state program actually has the required elements, nor any opportunity for public participation in determining the adequacy of a state program. Furthermore, the "as appropriate" qualifier for public participation means that the level of public participation is left to the State's whim.

[14] The only exception is that NPL and NPL-proposed sites must "implement applicable provisions [CERCLA] or of similar provisions of State law in a manner comporting with State policy" so long as the remedy protects health and the environment as specified in § 121 [SCAA § 102(b), adding CERCLA § 128(c), p. 17]—provisions that are non-protective, as discussed above. Moreover, nothing requires compliance with CERCLA's public participation mechanisms.

[15] See for example, Coffey, "Environmental Firms Assume Cleanup Risks," Seattle Daily Journal of Commerce, 02/11/97 [Retrieved from ttp://www.djc.com/data/news/19970211/10020180.htm 2/27/97]. The article describes a "radically different approach to soil and groundwater cleanups that is slowly catching on in the environmental industry. A handful of firms are guaranteeing cleanup costs for their clients and, in some cases, providing definite dates for when the cleanup work will be finished." The article continues, "Not only are these companies promising to bring sites up to [Washington] Department of Ecology standards within a certain amount of time, they also are assuming the financial risks involved if the schedules for site closures can't be met. This new approach is being hailed as the missing link needed to get the state's hundreds of abandoned contaminated properties, or "brownfields," cleaned up and redeveloped." Similarly, conferences with titles such as "Realizing Profits in Brownfields," which advertise a "unique opportunity for all parties involved with Brownfields properties to locate and initiate their next

III. SHUTTING THE PUBLIC OUT: WEAKNESSES IN S. 8'S PUBLIC PARTICIPATION PROVISIONS

Numerous provisions of S. 8 undercut meaningful and effective public participation in cleanup programs, such as the state delegation provisions of Title II (and, as discussed in section II.B.5 above, the "voluntary cleanup" provisions of Title I). Moreover, the explicit public participation provisions in Title III have a number of weaknesses. And ultimately, of course, public participation is meaningless if the bill's key provisions on the quality of cleanups are inadequate.

In addition to the problems noted below, S. 8 fails to strengthen public participation adequately. Specifically, it fails to require EPA to provide reasonable public notice and a public hearing (if requested) before critical steps in the cleanup process, including undertaking the health assessment, preliminary assessment and site investigation; and completing the facility work plan. S. 8 also fails to provide for the creation of state-wide organizations to ensure wide dissemination of information about toxic sites in a community-friendly manner. Creating citizen-run state-wide organizations would be an important step toward ensuring that those living next to or on toxic dump sites have the necessary tools at their disposal to make sound judgments about the future of their communities.

A. Shutting the Public Out of State Delegation Decisions

Under S. 8, states can obtain delegation of one or more of 5 categories of authorities[16] [SCAA § 201(a), adding CERCLA § 130(a)(2), p. 32–34]. EPA has 60 days to approve or disapprove a petition for delegation (120 days for 8 states without RCRA corrective action authority) [SCAA § 201(a), adding CERCLA § 130(c)(3)(A), p. 39]. If EPA doesn't act in that time, the delegation petition is approved by default [§ 130(c)(3)(B), p. 40].

Conspicuous by its absence is any provision for public participation in EPA review of state program adequacy, and the ridiculously short time limits preclude meaningful participation in any event. To make matters worse, once a state obtains delegated authority, EPA's hands are largely tied absent state concurrence even if the state is failing to act and thus delaying cleanup at the site, or if state actions are not protective [SCAA § 201(a), adding 130(e)(5), p. 54].[17] S. 8's delegation provisions are thus doubly deficient.

B. Shutting the Public Out through Inadequate Technical Assistance Provisions

Under S. 8, Technical Assistance Grants (TAGs) are limited to a $100,000 cap, with no exceptions [SCAA § 301(a), adding CERCLA § 117(f)(7)(B), p. 72] even though many of the remedies likely to be selected under the bill will be institutional controls or natural attenuation remedies for which long-term community oversight would be needed. In addition, TAGs are limited to sites listed on or proposed for the NPL, or on a State Registry [§ 117(f)(5), p. 70].[18] TAGs cannot be used for collecting field samples [§ 117(f)(8)(B), p. 73], so if PRPs take inadequate samples, the community will lack resources to collect appropriate samples.

Moreover, the "preferred" recipient of a technical assistance grant is the "Community Response Organization," if any [§ 117(e)(5)(A), p. 66].[19] This restriction may exclude local environmental or community groups with a greater need for, or ability to use, a TAG.

Finally, it appears that the funds made available for TAGs may be grossly inadequate. The authorization for Technical Assistance Grants is only $15 million through 2002 [SCAA § 906, adding CERCLA § 111(t), p. 258]. On average, that's $11,500 per site an amount clearly insufficient, particularly given the widespread availability of re-openers for many sites with already-decided cleanups. (This provision appears to be inconsistent with another under which 2% of annual appropria-

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profit making real estate deal," are increasingly common. [Flier for conference scheduled for April 10–11, 1997, Philadelphia, PA].

[16] These include investigation/evaluation; alternatives development/remedy selection; remedial design; performance of remedial action; information collection/liability allocation. EPA cannot delegate research and development, or issuance of community Technical Assistance Grant [§ 130 (a)(8), p. 36].

[17] Otherwise, EPA may act only upon determining that "an emergency * * * poses an immediate and significant danger" [SCAA § 201(a), adding 130(e)(4)(C), p. 54]. This is a new statutory standard of uncertain meaning that will give rise to litigation and retard swift preventive action.

[18] The term "State Registry" is not defined, but some states have very limited registries. In addition, nonlisted sites are limited to 1/8th of all TAGs [§ 117(f)(6)(B), pp. 71–72].

[19] CROs will have 15 to 20 members including local residents, local medical personnel, public interest groups, local governmental officials, and local businesses. "Local residents"—but not necessarily those most heavily affected by the site—are to comprise at least 60% of the members [§ 117(e)(6)(C) & (D), pp. 67 & 68].

tions, or roughly $28 million annually, may be used for TAGs [SCAA § 301, adding CERCLA § 117(f)(6), p. 70].)

C. Shutting the Public Out of Cleanup Decision Revisions[20]

As discussed in section IV.B below, provisions for widespread reopening of existing cleanup decisions essentially eliminate opportunities for meaningful public participation. Given that review boards are to complete their review within 180 days[21] [SCAA § 406, adding CERCLA § 135(b)(2)(A), p. 134], communities will not be able to participate meaningfully. This is particularly true at sites where no Technical Assistance Grant is currently in effect. Even where TAGs are already in place, the flood of simultaneous petitions will make it impossible for the limited number of community-oriented technical experts to provide effective support at the large number of sites where reopener petitions are likely to be filed.[22]

Similarly, as discussed in section II.A above, PRPs are at liberty to ignore RAPs until EPA catches them at it—and then have the option of changing the remedy or of conforming to the original one. Such provisions for after-the-fact changes to cleanup decisions render community participation little more than a mirage.

D. Shutting the Public Out through Silent Vetoes

Yet another way the public is shut out of meaningful participation arises from provisions under which new sites can be added to the Superfund list "only with the concurrence of the Governor of the State" in which the sites is located. [SCAA § 802, adding CERCLA § 105(i)(3), p. 253]. Similarly, State can block any administrative cleanup order under § 106 by failing to concur within 90 days (orders automatically expire after 90 days without state concurrence) [SCAA § 103, adding CERCLA § 129(a), p. 18].

While it may be appropriate to give states "first dibs" on cleanups at sites that will be appropriately addressed through state action, this provision goes much too far. A state could, through simple inaction, bar an NPL listing or a 106 order even though the site will not otherwise be cleaned up. The State need not even give any reasons for failure to concur, inviting potential abuses (if, for example, a major PRP at the site also happened to be a campaign contributor to a high-ranking State official). Moreover, these provisions invite creation of "pollution havens" by Governors seeking to lure business from other states by declaring an indefinite moratorium on NPL listings. EPA should defer to a state only upon affirmatively determining that the State will conduct an adequate, timely cleanup absent the listing or 106 order.

IV. SUPERFUND SLOWDOWN

A. Slowdowns Through Weak and Ambiguous Cleanup Provisions

Though styled the "Superfund Cleanup Acceleration Act," S. 8 ironically contains a host of provisions that will delay cleanups by introducing confusing (and weak) new standards for cleanups, as discussed in section II.B above. For example, the bill is replete with new terms that invite lengthy argument, e.g., whether assumptions used in the risk assessment are "the most scientifically supportable;" whether a particular projected land use has "a substantial probability of occurring based on recent development patterns"; whether particular substances pose "significant threats to [ecosystems'] sustainability." Cleanups will be delayed while these and other new terms are endlessly debated.

B. Slowdowns from "Re-opener" Petitions

S. 8 also expressly invites the filing of petitions to reopen (and weaken) existing cleanup decisions, potentially several hundred of them, with attendant diversion of resources from ongoing cleanup efforts. These reopener provisions are as unnecessary as they are poorly constructed. EPA already has ample discretionary authority to consider requests to modify existing cleanups decisions where particular circumstances warrant.

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[20] Even for future cleanup decisions, S. 8 unjustifiably provides differential access to decision makers. Specifically, although PRPs who prepared a cleanup plan or are implementing a cleanup can get the plan reviewed by the Remedy Review Board, the community is not able to initiate Board review [SCAA § 404, adding CERCLA § 133(a)(5)(E)(ii), p. 118]. White the PRPs are able to meet with the Board, the community is not [§ 133(a)(5)(E)(v), p. 120]—even though the Administrator is required to give "substantial weight" to the Board's determination as to whether the remedy meets the cleanup requirements, is feasible, and is reasonable in cost [§ 133(a)(5)(E)(iv) & (v)(II), pp. 119–120]. Such differential access is unjustifiable.

[21] The Administrator may extend this period "for good cause."

[22] As noted in section IV.A., EDF strongly opposes the ROD reopener provisions on a variety of grounds beyond public participation concerns.

The bill's reopener provisions are unwieldy and unworkable.[23] Within 90 days of the bill's enactment, the implementor of a current cleanup decision may petition to substitute an alternate remedial action. The petition must be granted if the proposal satisfies § 121 and meets certain cost thresholds [SCAA § 406, adding CERCLA § 135(b)(3) & (4), pp. 137–141]. For pre-construction sites, the cost threshold is $1.25–$2.5 million, depending on cost and type of cleanup [§ 135(b)(3)(B) & (4)(B), pp. 137 & 140], but no threshold applies "if the petitioner demonstrates that technical data generated subsequent to the issuance of the [ROD] indicates that the decision was based on faulty or incorrect information" [§ 135(B)(3)(D), p. 139].[24]

Hundreds of existing cleanup decisions may be eligible for reopening; at the least, PRPs will be able to flood EPA with petitions that will have to be reviewed to see if they in fact cross the cost thresholds, much less meet the other criteria. The associated resource drain will slow cleanups across the board; make it all the more likely that EPA won't be able to meet the 180-day turnaround for new RAPs thus triggering default approvals; and encourage PRPs to drag their heels in carrying out an existing cleanup at a particular site in hopes of getting it revamped.

Moreover, the generous opportunities given to PRPs to force EPA to reopen decisions and apply this bill's weaker standards forms a dramatic contrast with the lack of analogous reopeners when Superfund's standards were *strengthened* in the 1986 amendments. There, the bill as enacted expressly provided that the new standards "shall not apply to any remedial action for which the Record of Decision was signed, or the consent decree was lodged, before date of enactment," while RODs signed within 30 days of enactment were required to meet the new standards "to the maximum extent practicable."[25]

Simply put, S. 8's re-opener provisions should be dropped.

V. THE NPL CAP: DUMPING CLEANUPS ON COMMUNITIES AND STATES

Another highly objectionable feature of the bill is its inclusion of an arbitrary cap on the number of additional sites that can be added to the National Priorities List. Under S. 8, EPA cannot add more than 100 sites to the Superfund National Priorities List until 2001, and then 10 sites/year thereafter [SCAA §802, adding CERCLA § 105(i)(1)(A), p. 251–252]. A cap has profound consequences because, unless a site is listed, EPA cannot undertake cleanup activities (other than a short-term, low-cost emergency removal). In effect, this provision dumps the problem of Superfund site cleanups into the laps of the States—*regardless of whether they have the resources or capacity to conduct those cleanups.*

The General Accounting Office recently estimated that the cap could force States to accept responsibility for 1,400 to 2,300 sites (1,100 already identified by EPA, along with an estimated 300–1,200 yet-undiscovered sites). The estimated cleanup costs range from $8.4 to $19.9 billion.[26]

The GAO report makes painfully clear that the States are in no position to take on this added burden. Indeed, States are having difficulty securing resources for their current cleanup efforts. Of the states surveyed by GAO,

> "three of the seven states with active programs said that taking on these additional cleanups would exacerbate an already difficult financial situation. Two other states said that they expect to face funding shortfalls beginning in fiscal year 1997 that will make it difficult to absorb the additional cleanup responsibilities, at least for a few years subsequent to that time. Another two states said that while they had sufficient funds to manage their own inventories, funding the additional cleanups would be difficult."[27]

This provision also undercuts two of the valuable incentives created by Superfund: that which prompts voluntary cleanup of non-NPL sites in order to avoid a potential future NPL listing, and that which prompts careful management of wastes generated now.

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[23] Re-opener petitions are to be reviewed by "remedy review boards" comprised of "independent technical experts within Federal and State agencies" with cleanup responsibilities [§ 135(b)(1), p. 134, referencing § 133(a)(5)(E), p. 118–120].

[24] Factors that may be raised in such petitions include future land use [SCAA § 135(b0(3)(c), p. 138]; it is not clear what if any role the community would play in determining future land use.

[25] This provision, enacted as section 121(b) of the Superfund Amendments and Reauthorization Act of 1986, was not codified but appears as a note to 42 U.S.C.A. 9621. Pub. L. No. 499, 99th Cong., 2d Sess. 100 stat. 1613, 1678.

[26] U.S. General Accounting Office, Impact on States of Capping Superfund Sites. GAO/RCED–106R. March 1996.

[27] Ibid., p. 2.

An example of Superfund's effectiveness in the former arena emerges from a recent story in the *Cleveland Plain Dealer* about the Ashtabula River Partnership, a group that is working to avoid a potential Superfund listing by creating "a better-than-Superfund cleanup plan" for the river's heavy-metal and PCB contamination problems. The paper quoted Rep. Steve LaTourette (R–OH) as remarking that "[t]he prospect of a Superfund designation has proven to be a more effective tool than the Superfund itself. Without Superfund, however, most parties wouldn't even be at the table."[28]

Similarly, GAO noted that State program managers "pointed out that a major incentive for private parties to clean up sites is to avoid having their properties added to the list of the most contaminated sites in the country.[29] In short, a cap on the number of Superfund sites may have the perverse effect of creating a greater need for more Superfund listings, by reducing incentives for non-Superfund voluntary cleanups.

The NPL cap will also undercut incentives for sound prospective waste management. Facilities will be able to gamble that states will lack, or forego use of, cleanup enforcement authorities for tackling sites created after the NPL list is effectively closed. The continuing nominal availability of litigation authorities under § 107 is far from an adequate substitute, given that § 107 suits can only be brought to recoup expenditures thus requiring cash-strapped States to front all the cleanup money. Where they are unable to do so, today's polluters will evade cleanup responsibilities, and sites will remain unaddressed.

In short, the cap should be eliminated.

VI. OVERLY BROAD LIABILITY "REFORMS": CORPORATE WELFARE BY ANOTHER NAME

There is no dispute that Superfund's existing liability system has often been abused by some PRPs who have filed massive contribution actions against entities with minimal or no connection to the site. Curbing these abuses is necessary, but does not necessarily require legislation, since EPA clearly has ample authority to provide contribution protection to settling parties.

Even if legislation on this point were viewed as desirable, S. 8 goes far beyond the boundaries of common sense. The bill inappropriately rolls back liability for vast numbers of companies that are well able to help pay for cleaning up their own messes, and who should remain responsible for doing so. In several instances, these overly broad carve-outs apply to future as well as past conduct, undercutting Superfund's vitally important incentives for safely managing today's wastes.

A. Overly Broad Exemption for "Co-disposal" Sites: Letting Large Industrial Polluters and Dump Owners Off the Hook

S. 8 repeals polluter-pays liability for generators and transporters of wastes at hundreds of "co-disposal" sites at which industrial wastes were dumped along with municipal trash [SCAA § 501(b), adding CERCLA § 107(q), p. 148]. Even giant chemical companies will get entirely off the hook for wastes they sent to those sites. And even private dump-owners—those in business to make a profit—get their liability capped at 30% of cleanup costs (or the cost of closure) [§ 501(b), adding CERCLA § 107(t), p. 150].

B. Overly Broad Exemption for "Small" Businesses

While EDF does not necessarily oppose curtailing liability for truly small businesses with a limited connection to a site who have limited ability-to-pay in any event, the current exemption is ill-crafted. First, the $3 million annual-revenue threshold is simply too high [SCAA § 501(b), adding CERCLA 107(s), p. 150]. Moreover, the exemption applies to companies with either fewer than 30 employees, or less than $3 million gross revenues. This potentially exempts wealthy corporations that happen to have few employees.

In addition, the exemption applies to conduct in the future, thus eliminating incentives for small businesses to manage hazardous substances carefully in the future: an unjustifiable "pollute with impunity" clause for small businesses. In addition, any liability exemption for small businesses should be conditioned on cooperating with appropriate information-gathering and cleanup activities. Similarly, the exclusion should be inapplicable where the Administrator determines that the material has or may significantly contribute to the response costs at the site (cf. SCAA § 501(b), adding CERCLA § 107(r)(2), p. 149 (exception to exemption for *de minimus* contributors)).

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[28] "Toxic Cleanup: Ohioans Aim to Skirt Superfund Listing," Greenwire (electronic newsletter), June 14, 1995 (synopsis of story from June 11 Cleveland Plain Dealer).

[29] GAO, p. 3.

C. Overly Broad Exemption for "Recyclers" Including Mineral Wastes

In another unfortunate example of "corporate welfare," the partial exemption for certain recyclers inappropriately includes "metal byproduct[s] (such as slag, skimming or dross)" in the definition of scrap metal [SCAA § 510(a), adding CERCLA 101(48)(A)(ii), p. 214, and SCAA § 510(b), adding CERCLA § 107(w), p. 215]. While it may be appropriate to craft a narrow liability exemption to encourage the collection of post-consumer recyclables i.e., materials that otherwise become part of the municipal waste stream slags and drosses are industrial by-products that come nowhere close to fitting within that rationale.

D. "Polluter Paybacks" That Compete Directly with Cleanup Dollars

Although parties who have already received cleanup orders must carry out the cleanup, they get repaid for all costs attributable to a party whose liability is limited [SCAA § 502, adding CERCLA § 112(g)(1) & (2), p. 157]. These paybacks apparently apply even for all future costs incurred under existing settlements. Payback payments "shall be made upon receipt" of an application [§ 112(g)(3), p. 157–158], and must be made within a year [§ 112(g)(6), p. 158–159]. In addition, parties to an allocation are entitled to be promptly reimbursed for any costs they incur attributed to an orphan share [SCAA § 503, adding CERCLA § 136(o), p. 192–193].

This language creates a legal entitlement, as contrasted with discretionary authorization to use the Fund for cleanups and other purposes, so paybacks will have first claim on the funds. Because there is no "firewall" between funds for paybacks and funds for cleanups, all of the moneys in the Superfund could be exhausted providing polluter paybacks, leaving none for actual cleanups, oversight, and enforcement by EPA, as well as vitiating programs for Technical Assistance Grants. If moneys remaining in the Superfund are inadequate, one of three unacceptable outcomes will occur: taxes will have to be raised, cleanup standards will have to be further weakened, or cleanups will again slow to a snail's pace.

VII. CONCLUSION

Thank you for this opportunity to present our views. We would welcome an opportunity to work with you in crafting a Superfund reform bill that protects public health, particularly children and other vulnerable groups; preserve community land and water resources; holds polluters, rather than taxpayers, responsible for cleanup costs; assures meaningful community participation in Superfund decisions, while making the program more efficient and streamlined, and reinstating the Superfund Trust Fund taxes.

PREPARED STATEMENT OF LINDA H. BIAGIONI, VICE PRESIDENT, ENVIRONMENTAL AFFAIRS, BLACK & DECKER CORPORATION

Thank you Mr. Chairman and members of the Subcommittee for inviting me to testify on this important matter. My name is Linda H. Biagioni and I am Vice President for Environmental Affairs at The Black & Decker Corporation. In recent years I have also served as Chair of the Environment Management Council of the Manufacturers Alliance for Productivity and Innovation, a policy research organization with 500 members from among the leading manufacturers in America. I am currently Chair of the International Environment Forum of the World Environment Center, a global, non-profit organization whose purpose is to create bridges between participants from industry, government, and academic and non-governmental organizations to contribute to sustainable development worldwide. My professional training is in the field of chemistry. I am not a lawyer, but Superfund has taught me a great deal more about litigation and about this law than I ever expected to know.

The Black & Decker name is one of the most widely known brands in the world. Headquartered in Towson, Maryland, Black & Decker manufactures and markets products and services in more than 100 countries and is the world's largest producer of portable electric power tools, power tool accessories, residential security hardware, and electric lawn and garden tools. It is also the largest global supplier of engineered fastening systems to the automotive and other markets we serve. Our household products business is the North American leader and a major global competitor in the small electric appliance industry, and our plumbing products business is one of the three largest faucet manufacturers in North America. Black & Decker also produces products as diverse as golf club shafts and glass container making equipment. We employ several thousand people at more than 30 manufacturing facilities in 16 States in the United States and at Black & Decker Service Centers throughout the country.

Black & Decker's manufacturing operations are not heavy industry, and with one exception Black & Decker is not the owner, operator, or a predominant generator at any Superfund National Priorities List site. Nevertheless, because of our well-known name and the perception that we are a deep pocket, we have been forced to devote very substantial resources, in the range of tens of millions of dollars, to what often should be relatively straightforward or low priority environmental problems. A large part of our expenses and energies in this field have also been spent on litigation in connection with private cleanup sites that are not on the National Priorities List and with our insurance carriers over their contractual obligations to cover Superfund cleanup expenses.

I am pleased to participate in this Hearing because I believe that, for Black & Decker and for many other American businesses, the existing Superfund law frequently misdirects our energies and our resources. The problem of cleaning up old hazardous waste sites is important, but existing law causes us to proceed too slowly on many serious sites, while at the same time causing us all to spend too much time and money on low-priority environmental concerns and far too much money on legal proceedings. While the EPA has made increasingly vigorous efforts to reform Superfund by administrative action, apparently with some success, the most important failings of the Superfund law and program can only be cured by Congress.

Black & Decker has no Washington office and no full-time lobbyists, but we have devoted significant efforts to Superfund reform for the last several years, working with the Superfund Action Alliance, the National Association of Manufacturers, and other trade associations to promote comprehensive improvements in this law. Frankly, we are quite disappointed and frustrated by the failure of the 103d and the 104th Congresses to resolve these urgent issues. We hope the 105th Congress can find the middle ground and finish reauthorization this year, before electoral politics once again polarizes all discussion of this issue.

From what we can see, the Senate is off to a good start in 1997. Superfund has been identified as a high-priority objective by the Majority Leader, and the Members and staff of the Environment and Public Works Committee from both parties appear to be moving forward constructively. We hope that the early introduction of S. 8 by the Majority, followed closely by the introduction of S. 18 by the Minority, will set the stage for prompt action. Our own reading of S. 8 leads us to believe that it is a balanced and thoughtful attempt to resolve the crucial problems that bedevil the Superfund program. We understand that it reflects the months of negotiations between Majority and Minority staffs and the Administration last year. We commend the Committee and its staff for their diligent efforts to craft a workable approach that can attract bipartisan support.

Like every interested party in this process, we would of course prefer certain changes in S. 8, and I will mention a few of them in this testimony. But the desire for a more perfect bill should not obscure the fact that overall, S. 8, just as currently written, would be a vast improvement over existing law. We believe it deserves careful consideration by every Member of this Subcommittee, and prompt action to make whatever changes are necessary and reauthorize the law.

The two areas that I will address in some detail are the liability scheme and the remedy selection criteria. In each of these areas, the existing Superfund law is seriously flawed and needs immediate repair.

LIABILITY REFORM

With respect to liability reform, let me say at the outset that Black & Decker accepts that it should bear a reasonable portion of clean-up costs where it contributed hazardous substances to a disposal site that has become an environmental hazard. We also recognize the necessity for the business taxes that support the Superfund, and we urge their reauthorization as a reasonable means of financing the Superfund clean-up program. Black & Decker has not advocated an across-the-board repeal of retroactive liability. Moreover, we recognize that in some contexts the strict liability system has a salutary effect in facilitating cleanup; for example, to reinforce the viability of the allocation system proposed in S. 8.

But the price of the current retroactive strict joint and several liability system is simply too high. This Subcommittee has heard extensive testimony over the past 4 years about the adverse consequences that flow from the existing liability scheme, and I will not repeat those facts here. It is sufficient to say that in practice the structure of the current law delays cleanups, misdirects the focus of responsible party activities, and generates enormous transaction costs.

The liability title of S. 8 would significantly reduce those costs. First, it would free a great many small contributors from the legal tangle of strict joint and several liability. The exemptions for 1 percent (1 percent) *de minimis* parties, *de micromis*

parties, generators and transporters of materials sent for recycling, municipal waste, and certain small businesses, along with the limitations on liability for municipalities, will remove the threat of liability for thousands of parties at hundreds of Superfund sites. The small quantity exemptions are particularly appropriate because their volumetric contribution is virtually always of minimal environmental significance, and their participation in the planning and management of the site is non-existent.

These changes alone will eliminate an important part of the aggravation associated with Superfund for Black & Decker. We accept the necessity of participating in the cleanup of sites where we were a significant generator. But the necessity, because of joint and several liability exposure, to participate actively on clean-up committees at sites where Black & Decker has *de minimis* status is disproportionately expensive and a frustrating headache.

For the greater-than-one-percent responsible parties who remain liable for National Priorities List sites, the allocation system proposed in S. 8 promises to be an enormous improvement over the current litigation-laden approach to allocation. The explicit provisions for orphan-share funding should also greatly facilitate settlements on terms that responsible parties will consider reasonable. S. 8 would be fairer to responsible parties if it expanded the orphan share to cover fully the unallocable shares, not just shares of known insolvent parties and parties whose liability is capped or eliminated by the bill. But even as written S. 8 will ameliorate much of the unfairness inherent in the current system.

There is one aspect of the liability system that S. 8 does not address: as written, the small-party exemptions and the allocation system only apply to National Priorities List sites. Other sites, which have been the subject of a tidal wave of private litigation, would still be governed by the inequitable retroactive strict joint and several liability provisions of the existing law. We believe that for these sites the best solution to liability reform is to return this lawmaking power to the States. S. 8's provisions for expanded State responsibility and the proposed limitations on the number of sites that can be added to the National Priorities List reflect a congressional desire to transfer to the States as much of the hazardous waste cleanup responsibility as possible. As part of this objective, Congress should also turn over to the States the crafting of the liability scheme for non-NPL sites. It could accomplish this result by limiting the application of Section 107(a) to National Priorities List sites and other sites where the Federal Government has either conducted or ordered remediation or restoration activity under Superfund. Almost all States currently have Superfund-type legislation with similar, though not identical, liability provisions, so the short-term impact of this change would be relatively small. But over time, State legislators could decide for themselves the extent to which they believe that retroactive strict joint and several liability, with or without various exemptions, is appropriate. Without this change, the reforms in S. 8 will fail to address a large segment of the litigation that the existing law generates.

Again, our desire for changes to the proposed liability title of S. 8 does not detract at all from our enthusiasm for S. 8 as compared to the status quo, and we urge Congress to proceed as quickly as possible to mark up this title and enact the needed reforms.

REMEDY SELECTION

Selection of the most appropriate remedy for each site is the heart of the Superfund program. The choice of remedy determines what benefits will be achieved, how much will be spent, and what it will be spent on. When Superfund was enacted in 1980, Congress gave the EPA little guidance on how to determine the desired cleanup levels and how to relate those levels to cost and technical feasibility constraints. The Agency, itself relatively inexperienced in these matters, borrowed a variety of existing legal standards, some of which were designed for very different contexts, to fill this gap. Then in 1986 Congress codified those standards and added others, creating a series of arbitrary rules requiring a preference for permanence and treatment, compliance not only with applicable State and Federal laws but also with "relevant and appropriate regulations," and a groundwater requirement that has been read to mean that, with few exceptions, all potentially usable groundwater at Superfund sites must meet drinking water standards in the ground as soon as possible. These inflexible remediation standards have contributed significantly to the misdirection of resources into remedial activities that produce little or no benefit to public health or the environment.

In reality, Superfund sites vary widely in the nature of the risks they present and in the nature of the geological, land use, locational, and other circumstances that fundamentally shape what remedial technologies can usefully be employed. In many

cases, the EPA and State personnel know full well that the remedies they are now requiring have little practical utility, but they are driven by the requirements of the Act to impose them anyway.

S. 8 fundamentally changes this approach by dropping most of these arbitrary requirements. It directs the EPA and the States to focus on the real risks to public health and the environment posed by each site using site-specific data wherever possible, and to ameliorate those risks and meet the protectiveness standards within the bounds of technical practicability and reasonable cost, taking into account reliability, effectiveness, public acceptability, the nature of existing land and water uses and the nature and timing of reasonably anticipated future uses.

In particular, the role of cost considerations in remedy selection is, with a few exceptions, appropriately addressed in S. 8. Cost is one of several co-equal factors to be balanced in the good judgment of the Agency in selecting the remedy. It is not an overriding consideration, and there is no mandate to choose the most cost-effective solution, but neither is it a subordinate or irrelevant factor in remedy selection, as is so often the case under the present law.

Unfortunately, S. 8 does not appear to carry through fully with this risk-based approach with respect to groundwater. While it is true that, unlike soil, groundwater moves and that in the long run many aquifers are interconnected, the same intellectual inquiry and the same criteria should apply to remediation of groundwater as apply to other media and other exposure risks; namely, what real risks to existing and reasonably anticipated uses of the resource can be identified, and what remedial measures should be employed to ameliorate those risks within the bounds of technical practicability and reasonable cost. The notion that certain natural resources should be preserved for their own sake independent of any measurable risk to human health or the environment or entirely without regard to cost or feasibility considerations is a prescription for irrational expenditure of funds, whether public or private. We urge the Subcommittee to take a hard and skeptical look at inflexible rules for remedy selection, whether with respect to groundwater or any other medium.

Finally, the provisions in S. 8 for the review of remedies already selected for Superfund sites under the existing law are a crucial element of remedy selection reform. Having learned from more than a decade of experience that our existing remedy selection criteria are not well suited to the task, it would be foolish not to direct the EPA to reconsider previously selected remedies, at least where significant cost savings could result from applying the new criteria that this Congress establishes. While we cannot recover funds already misspent, there is no reason to extend the mis-expenditure into the future. The EPA has recognized this fact in its recent administrative reform on "relooking at existing remedies." The provisions for objection by the State Governor in case of unreasonable delay provide additional, though perhaps not necessary, protection against abuse.

COMPREHENSIVE REFORM

As it should, S. 8 also addresses brownfields, State roles, community participation, Federal facilities, natural resource damages, government contractors and funding. None of those issues has a particular impact on Black & Decker, but each of them deserves your attention as part of a coherent reshaping of this program. Attention should also be directed to those elements of the program that will grow in importance in the future, such as long-term operation and maintenance costs, delisting, and site reuse.

As I mentioned, Black & Decker is participating actively in the Superfund Action Alliance, which recently adopted the attached "Superfund Fundamentals," a set of principles that address many of these concerns. We believe that the SAA Superfund Fundamentals are practical, well-reasoned policy recommendations, and we encourage the Congress to use them as a guide in its work on Superfund reauthorization.

CONCLUDING COMMENTS

In conclusion, let me reiterate the important point: it is time for Congress to act. We need to get past polarization and on to consensus and compromise. The years of serious criticism of the existing Superfund program from virtually every segment of the political spectrum have damaged its credibility and periodically paralyzed its progress. While the EPA's administrative reforms have helped in some respects, only Congress can correct crucial deficiencies and put the Superfund Program back on track. The Superfund Program needs a new congressional imprimatur, public support, and assured funding. I hope that this Subcommittee and the 105th Congress can finally succeed in this effort where the 104th Congress and 103d Congress could not.

I commend the Subcommittee for its work and thank you again for this opportunity to present our views.

SUPERFUND ACTION ALLIANCE

SUPERFUND FUNDAMENTALS

The 105th Congress has the opportunity to pass legislation that will accelerate cleanup of Superfund sites across the country. After 4 years of deliberation on Superfund reauthorization, this is the time to make comprehensive reform happen.

The following document outlines some of the key provisions that need to be included when Superfund is reauthorized.

Remedy Selection

- Human health and the environment must be protected by Superfund response actions which balance reasonable cost and technical feasibility and which accelerate the progress of remediation.
- Remedy selection should reflect actual and reasonably anticipated future uses of land and water resources, taking into account the nature and timing of that use.
- The remedy selection process should be simplified and performance goal-driven.
- Site-specific risk assessments should be used to guide selection of remedies rather than generic relevant and appropriate standards (RARs) and preferences for permanence and treatment.
- Substantive applicable state standards should be considered and their implementation balanced by such factors as reliability, community views, cost, technical feasibility, short-term risk, effectiveness.
- In selecting remedies to protect usable groundwater or remediate contaminated ground water needed for drinking in the future, due consideration should be given to the nature and timing of the use of the groundwater and the cost and technical feasibility of remediation.
- Consistent with timely protection of health and the environment, the benefits of reform should be available at existing sites.
- Early and informed local community involvement should be encouraged and supported with technical resources where needed.

Liability

- Superfund's liability system should be reformed to maximize the flow of resources to cleanup, not lawyers.
- Reforms that eliminate inequities and reduce transaction costs, including allocation mechanisms that ensure cooperative parties are not forced to pay more than their own share of cleanup costs, are critical.
- Liability limitations or exclusions for any group should be contemplated only as part of the meaningful Superfund reauthorization described in this paper.
- Liability limitations or exclusions granted any party should be assumed by the Fund and not reallocated to other parties at sites.

Brownfields

- The revitalization of cities is a critical national issue worthy of efforts by, and funds appropriated to, a number of federal agencies. Efforts to redevelop brownfields cannot, and should not, be funded from the Superfund cleanup fund but instead should represent a broader national effort.
- Finality is important. Reluctance by U.S. Environmental Protection Agency to issue a statement indicating work is complete and liability extinguished, and the inability of states to do so in lieu of the Federal Government, have discouraged property owners (potential "sellers"), developers and other potential buyers from investing in brownfields. Liability protection for prospective purchasers is also necessary.
- Incentives should be provided to encourage states to develop and enhance voluntary cleanup programs which reflect due consideration for current and future use of resources.

State Role

- Devolution of Superfund authority to the states is desirable, and the appropriate roles of the Federal and State governments at future remediation sites should be addressed in reauthorization.
- It is important that each Superfund site have a "single master" overseeing remediation in order to encourage cleanup by providing certainty and eliminating duplication.

Funding

• Superfund's business taxes should be dedicated to cleanup of NPL sites, and the program's administration funded from the existing Trust Fund surplus as well as general revenues, just like the Clean Air and Clean Water Acts.
• Consistent with future NPL cleanup needs, limits should be placed on the duration and amount of tax responsibilities.
• Taxes for Superfund must be accompanied by legislative reform that improves the program. Both the legislative reforms and the examination of taxes must be consistent with fundamentals outlined in this paper.

Natural Resources Damages

• It is important to clarify the scope of natural resource damage claims and to limit them to restoration of services provided by injured public resources.
• NRD restoration plans should be cost-effective, based on ecosystem/population impacts, and achievable over a reasonable period of time.
• NRD liability should apply equally to private and public PRPs.

SUPERFUND ACTION ALLIANCE

3M
Aerojet
Allied Signal Inc.
American Automobile Manufacturers Association
American Car Rental Association
American Crop Protection Association
American Iron & Steel Institute
American Textile Manufacturers Institute
American Trucking Associations
AMP Inc.
Apex Environmental, Inc.
Association of American Railroads
Associated Builders and Contractors, Inc.
The Bankers Roundtable
Bayer Corporation
Bethlehem Steel Corporation
Biotechnology Industry Organization
The Black & Decker Corporation
BP America, Inc.
Browning-Ferris Industries
Burlington Northern Sante Fe
Chemical Manufacturers Association
Chevron Corporation
Chrysler Corporation
Ciba Specialty Chemicals
The Dow Chemical Company
Dresser Industries, Inc.
DuPont
Electronic Industries Association
Environmental Industry Association
The Flexible Packaging Association
FMC Corporation
Ford Motor Company
General Electric
General Motors
Georgia Pacific
Gulfstream/Stablex
Harris Corporation
Hazardous Waste Action Coalition
Hercules Incorporated
Hoechst Celanese Corporation
Hughes Electronics
Independent Lubricant Manufacturers Association
Institute of Scrap Recycling Industries
The Int'l Assoc. of Environmental Testing Laboratories
The Int'l Assoc. of Independent Tanker Owners
Lockheed Martin Corporation
LTV Steel Company

Mobile Corporation
Monsanto Company
Motorola
National Association of Convenience Stores
National Association of Manufacturers
National Automobile Dealers Association
National Electrical Manufacturers Association
National Realty Committee
National Rural Electric Cooperative Association
National Steel Corporation
Northrop Grumman Corporation
Olin Corporation
Petroleum Marketers Association of America
Philips Electronics
PPG
The Raytheon Company
Rohm and Haas Company
Society of Independent Gasoline Marketers of America
Union Carbide Corporation
Union Pacific
United Technologies Corporation
Westinghouse Electric Corporation
WMX Technologies, Inc.
Zeneca Inc.

RESPONSES OF LINDA H. BIAGIONI TO ADDITIONAL QUESTIONS FROM SENATOR SMITH

Question 1. Ms. Biagioni, our bill includes an allocation process which attempts to fairly determine how much a company is responsible for at a toxic waste site. It allows small business and individuals out of the process, but larger companies would stay in most cases. Do you think the allocation process in S. 8 would reduce the litigation which surrounds the current Superfund process?

Response. Definitely yes. The Superfund Fundamentals adopted by the Superfund Action Alliance state that "Reforms that eliminate inequities and reduce transaction costs, including allocation mechanisms that ensure cooperative parties are not forced to pay more than their own share of cleanup costs, are critical."

As I noted in my written testimony, the establishment of an allocation system would be "an enormous improvement over the current litigation-laden approach to allocation." Moreover, the exemptions for small businesses and for all *de minimis* contributors will dramatically reduce the number of parties, often to a much more manageable level, at many National Priorities List [NPL] sites. Together, these two changes, which have been supported in concept by Members from both political parties and by the Administration for several years, hold great promise for rapid and efficient resolution of the "who pays how much" question at multi—party NPL sites.

Question 2. You stated in your testimony that you were uncomfortable with the groundwater cleanup provisions contained in S. 8. Could you please expand on these comments.

Response. The Superfund Fundamentals state that "In selecting remedies to protect usable groundwater or remediate contaminated groundwater needed for drinking in the future, due consideration should be given to the nature and timing of the use of the groundwater and the cost and technical feasibility of remediation."

One important result of enacting S. 8 would be the elimination of several inflexible rules on remedy selection in the current law that prevent the EPA from acting on a rational evaluation of the risks presented by an NPL site and the relative desirability of possible remedies to ameliorate those risks.

Unfortunately, with respect to groundwater, certain provisions in S. 8, such as the language about protecting "uncontaminated groundwater," seem to impose equally inflexible new rules on remedy selection, undercutting the inclusion of natural attenuation as an acceptable remedy and ignoring the real feasibility limits on our technological capability to remove contaminants. We have learned over the past decade that for various contaminants the expenditure of large sums for active groundwater pump-and-treat systems does not produce significantly faster remediation than would reliance on natural processes. Black & Decker believes that the overall approach to evaluation of the remedial alternatives in S. 8, based on the balancing of factors set out in the bill, should be applied to groundwater remediation as well.

Question 3. Ms. Biagioni, currently it is common that industrial sites are cleaned up to residential standards, even if it is known that the site will be zoned industrial in the future. Is it possible to justify cleanup standards based on future-use site-risk?

Response. The Superfund Fundamentals state that "Remedy selection should reflect actual and reasonably anticipated future uses of land and water resources, taking into account the nature and timing of that use."

Black & Decker believes that it is irrational to expend funds to clean up hazardous waste to levels in excess of those necessary to safely allow the foreseeable human uses and environmental functions of the affected properties (whether or not they are formally designated as part of the "site.") Limitations on future use can and normally are reinforced with zoning restrictions and deed restrictions, thus necessitating the involvement of government officials and the public in any change from the anticipated future uses and placing the burden of further cleanup that may be necessary on those who wish to use the property in a manner that was not foreseeable at the time the remedy was selected.

S. 8's overall remedy selection scheme takes a rational approach to this matter, and we support that approach. As noted in response to Question 2, this approach is equally applicable to groundwater, and the same policies should apply.

Question 4. You stated in your testimony that you thought this bill required a more moderate approach to Superfund reform. Do you know of any reasons why any member of this Committee, or the Senate for that matter, should not be a cosponsor of this legislation?

Response. As I noted in my written testimony, "[T]he desire for a more perfect bill should not obscure the fact that overall, S. 8, just as currently written, would be a vast improvement over existing law." While we recognize that Superfund reform is an extremely complex, multi—faceted subject, we believe that S. 8 is a balanced bill that carefully addresses the central issues of Superfund reform in a manner that largely reflects the consensus of the affected communities. We hope that the Committee will be able to proceed soon to mark up S. 8 to refine and reinforce that consensus. After 6 years of hearings and debates on Superfund reform, Congress should move quickly to a bipartisan consensus on legislation to accomplish this vital objective this year.

Response of Linda H. Biagioni to an Additional Question from Senator Lautenberg

Question. Your written testimony indicated that you are affiliated with the Superfund Action Alliance. Were you testifying on behalf of Black & Decker or were you also testifying on behalf of the Alliance? Does the Alliance endorse the positions taken in your testimony?

Response. As the membership list attached to my testimony indicates, the Superfund Action Alliance is a broad—based organization representing a large number and wide variety of businesses and trade associations who agree on the necessity for prompt Superfund reform. The Alliance has been in existence for some years, but it has only recently taken substantive positions on specific elements of Superfund reform. Black & Decker has been an active participant in the Superfund Action Alliance and participated in the process of formulating the Superfund Fundamentals.

Beyond the Superfund Fundamentals, however, Black & Decker's testimony was not formally endorsed by the Alliance. It reflects our own experience as a company that has been named as a responsible party at a number of sites, but with one exception is not the owner, operator, or a predominant generator at any NPL site. Other members of the Alliance might have given greater priority to other issues.

Prepared Statement of Barbara Williams, Owner of SunnyRay Restaurant, Gettysburg, PA

Welcome to how Superfund "works" for the people of the Gettysburg-Hanover Area of Pennsylvania, specifically the "Keystone Landfill."

- 1982—Local residents and the Commonwealth of Pennsylvania were aware of offsite residential water supply contamination. The Commonwealth of Pennsylvania allowed dumping to continue at the site.
- 1984—Environmental Protection Agency (EPA) Field Investigation.
- 1987—Site placed on the National Priority List of Superfund Sites. Pennsylvania-Division of Environmental Resources and US-Environmental Protection Agency allowed dumping to continue at the site.

• 1990—Site ceased to accept waste because it was filled to capacity.
• 9/27/93—EPA filed suit against site owners and 11 original/generator defendants.
• 8/30/94—The original/generator defendant site owners, NOT THE EPA, filed suit against 180 small businesses, boroughs and school districts.
• 10/5/95—The third part defendants, NOT THE EPA, filed suit against over 550 other small businesses and individuals.
• 2/5/97—EPA discovered buried waste outside the area listed for capping. Clean-up was delayed again.
• Current Keystone Status: The site cleanup has not started YET. No one is out of the lawsuits YET.

I sincerely thank the chairman and members of the committee for inviting me back.

I am Barbara Williams. My business is SunnyRay Restaurant in Gettysburg, Pennsylvania. I have been a member of the National Federation of Independent Business (NFIB) since 1982. Joining NFIB was one of the best business decisions I have ever made. Every small business needs all the help it can get. NFIB has been my coach and cheerleader. You cannot beat teamwork like that.

Speaking of teams, I want to thank my staff. They know that I am fighting to save their jobs. Some of these great people have been with me since I opened almost 16 years ago. I am proud of the tremendous job they do. I am grateful for their loyalty.

I am a fourth party defendant at Keystone. I have been sued by my friends and neighbors. Why did they do this? Because the only options they were given by their attorneys was to either pay the exorbitant amount of money that the first and second parties had sued for, or to sue others in order to lessen the amount they would be forced to pay for settlement.

My being brought into this suit defies common sense. I have recycled for years. I have used the trash hauler that was approved and permitted by my borough government. I am told that my trash was then dumped into the Keystone landfill, a site permitted by the Commonwealth of Pennsylvania. I would appreciate someone explaining how I have become liable even after I obeyed all State and local regulations. What was I supposed to do with the food scraps? What have I disposed of that is not found in every household?

I am being sued for $76,253.71. That is a lot of money to me, more money than I pay myself a year. The continuing cost of legal representation is not included in that figure.

I want clean air and water for myself and the generation that will follow me. I am not the enemy of the environment. My trash is not the problem. Small businesses are not the enemy of the environment. I am here to tell you again that your wonderful idea of cleaning up our country's environment through the EPA and CERCLA does not work in the real world. Your intentions were not followed. You legislated for results. You got bureaucracy, regulations and litigation. Legions of environmental attorneys, not environmental solutions, were created.

I fight not only the unjust burden of this lawsuit, but the injustice of a landfill on the Superfund National Priority List—10 years, and still NO CLEANUP HAS STARTED.

I have no graphs or charts, no auditors reports. I am not here to toss about facts, figures and percentages. I do not intend to enter the fray over the number of sites cleaned, the time it takes to clean them or even to debate the number of billions spent on litigation and administration. All day could be wasted on whose figures are correct. I believe we can all agree on this: TOO MUCH TIME. TOO MUCH MONEY. TOO FEW RESULTS.

I want to tell you how Superfund impacts lives in south central Pennsylvania. This area has many extremely frustrated people for many reasons. People who live in the area of the landfill are physically sick, frustrated and still waiting for the promised cleanup from 10 years ago. People who recently bought and built houses in the area and are just now finding out their neighbor is an uncleaned Superfund site and they are livid.

I would like to share some quotes from Mary Minor, a Hanover Pennsylvania women, who has fought to have the pollution problem resolved long before the EPA was involved. She has lived daily with the effects of pollution and the stress of waiting for the promised cleanup.

• "Living near a Superfund site is very stressful."
• "Stress is a global disease."
• "Stress and the mind and body's responses can shatter individuals, communities, entire societies."

• "Dealing with agencies and institutions who have power over people and are most often non-responsive or inefficient only exacerbates the stress, resulting in psychophysiological health effects."
• "We cannot afford this as a society."
• "It is unjust for these problems not to be resolved."
• "Everyone in our communities suffer."

These remarks were taken for the paper *There Is No Away,* presented at the International Conference on the Effects of Hazardous Waste on Human Health and the Environment in Atlanta, Georgia.

Take it from me, the third and fourth party defendants in the Keystone case are extremely stressed and frustrated and we are still waiting for a solution.

Please remember the more than 700 third and fourth party defendants are not businesses which regularly produce hazardous or toxic waste. We are in this suit not because of what we discarded, but because of how much waste someone has estimated we threw away. We simply and legally put out the trash according to local and State regulations.

CERCLA is unfair because it imposes strict liability on the public without any real notice as to what we should or should not put in the trash. I am told that ball point pens are hazardous waste. However, I still have not purchased a ball point pen with directions for hazardous waste disposal. Present CERCLA prohibits disposal of hazardous substances, but there is no evidence that any third or fourth party defendants sent hazardous substances to the site.

Our guilt is based on an expert's report which assumes some hazardous material is in all garbage, but there is no real evidence. We simply put out the garbage. And even though that is not what CERCLA was aimed at, we are told we are guilty and expected to meekly write our checks without even being given total and complete indemnification against further claims for additional money.

For small businesses this suit can be devastating. It is an uninsured loss. After years of premiums for liability and umbrella liability policies, we are told we are not covered for our attorney fees or for possible settlement costs. The money for settlement is considered a penalty so it will not be deductible as a business expense. Small businesses will have to make enough money to pay this on top of our other bills and payroll.

Allow me to introduce you to some of my fellow defendant: restaurants, like myself, campgrounds; apartment owners; antique shops; furniture stores (not furniture manufacturers); motels; laundromats; dress shops; pizza shops; department stores; trailer parks; convenience stores; ice cream shops; book stores; pet shops; flower shops; groceries; theaters; delis; and gift shops. We are small business owners. Another example is the Vietnam Vet who's dream was to own a neighborhood tavern. But now he is fighting the government that he not long ago fought for.

We, our employees, and our children live with this cloud over us every day. A child should not have to worry about what's going to happen to her family's business. A 9-year old, Sierra Bair of Hanover Pennsylvania, in her letter to President Clinton says, "My family owns restaurants and they serve food not hazardous stuff. Since when is food bad for us. Isn't it a shame so many are getting punished for a few."

Why is this happening? What are we doing to our children? Do you think they will want to grow up and own a small business after they have seen their parents' hopes and dreams destroyed. Our legal battle has been a never-ending expensive roller coaster ride. And the ride is not over yet. Everyone is still paying local and liaison attorneys.

So here we are: The landfill is not cleaned up and the litigation goes on. Now it is the time to change. If we do not change our actions we will never change our results.

When I testified last April, I was encouraged by your statement that you understood our situation and were resolved to remedy it. That hope was reinforced when I read S. 8. I am very pleased to see that S. 8 addresses many areas I was concerned about: municipal solid waste, small business defendants and co-disposal landfills. I believe you listened and responded. It means a great deal to learn that our voices were heard.

I believe that you know how critical the wording of this bill is. The best example is that current and former Members of Congress have told me that they did not write CERCLA to force people like myself and my fellow third and fourth party Keystone defendants to pay cleanup costs for Superfund sites. Yet the law, or its interpretations by the courts, and the EPA now hold us liable.

In the small business exemption section, should "30 employees" be amended to read "30 employees or the full time equivalent of 30 employees?" I would emphasis the importance that the bill continue to read "employees or" NOT be changed to

read "employees and 3,000,000 gross revenue." I would respectfully request that the manner of proving $3 million gross revenue be explained. Will the definition of Municipal Solid Waste begin more lawsuits? It appears plain to me that your intentions are to resolve the issues that have been used to allow litigation to take precedence over cleanup.

But my concern is that others will not see it so clearly. I am concerned that there will always be a well-meaning EPA official who believes he knows better than you what you meant when the law was written or an attorney upset to see his potential life's work evaporating before his eyes. My fear is that these officials will challenge the authority and intentions of Congress and the President; that some judge somewhere will listen and rule that you did not write the law to say what you meant, and their course of action will continue indefinitely.

I would also like to see work on public awareness and education. If we continue the same action, how will we ever get different results? What, if any, incentive is there to industry business, science, education and research to creatively reduce, eliminate or resolve the problem of pollution? I believe we have the creative minds and entrepreneurial spirit that could revolutionize the technology of clean air and water. The public and businesses need to be encouraged and educated, not penalized for obeying existing laws—as we are being penalized for operating legally.

I have been told that I am too old to be naive enough to believe that the system works. If the nay sayers who tell me I am wasting my time are right, if one American citizen crying out against injustice cannot make a difference, if regulations are more important than rights and results, then sadly we do no longer live under a government of the people, by the people and for the people—and the thousands who have given their lives to protect this grand experiment of government truly died in vain.

When Lincoln came to Gettysburg he expressed concern for our system of government . . . of the people, by the people, for the people shall not perish from the earth. My concern is that we are perilously close to losing the government Lincoln described, not because of outside enemies but because of an ever-growing, all-powerful bureaucracy.

You are our hope. Thank you.

NFIB
National Federation of
Independent Business

STATEMENT FOR THE RECORD BY
NATIONAL FEDERATION OF INDEPENDENT BUSINESS

Before: Senate Environment and Public Works Committee
Subcommittee on Superfund Waste Control & Risk Assessment

Date: March 5, 1997

Subject: Superfund

Mr. Chairman, the National Federation of Independent Business (NFIB) is pleased to have the opportunity to submit comments concerning S.8, the Superfund Cleanup Acceleration Act of 1997. The NFIB is the nation's largest small business advocacy organization, representing 600,000 small business owners in all fifty states. The typical NFIB member employs five people and grosses $350,000 in annual sales. Our membership reflects the general business profile in that we have the same representation of retail, service, manufacturing and construction businesses that make up the nation's small business community. NFIB sets it legislative positions and priorities based upon regular surveys of its membership.

Superfund's Unintended Effects

When Superfund was originally passed in 1980, it was believed that the number of hazardous waste disposal sites and the costs to clean them up were relatively simple. Unfortunately, that has not been the case. Over the past seventeen years this program has proved to be one of, if not the worst, environmental programs on the books. It has failed to meet its mission of cleaning up hazardous waste sites and instead has encouraged wasteful, excessive litigation that can last for years and cost billions of dollars. Today's system is fraught with the wrong incentives: incentives to prolong clean up, continue expensive litigation and to drag even the smallest contributor through the lengthy process.

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.

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Congress may have envisioned a system that would only catch the few, large, intentional or irresponsible polluters, however, the reality has been very different. There have been over 100,000 different potentially responsible parties (PRPs) identified at Superfund sites. Obviously, a majority of these are not Fortune 500 companies, 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. 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 aspect of Superfund reform. 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 when you examine small business owners' 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 for their children. They also expect the goverment 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 or the truck company owner who was named as a potentially responsible party and was not even in business during the operation life of the Superfund site. 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 study surveyed small business PRP's and asked numerous questions about their experiences with Superfund. Approximately 70 percent of the 5,000 small PRP's surveyed indicated that the liability system was the major burden of Superfund. And at the 1996 White House Conference on Small Business, reform of Superfund's liability was voted by the conference as the group's fifth highest priority. 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? NFIB members have

identified three major problems. First, the nature of Superfund encourages litigation. In most cases, our members are dragged into the process by being named as a PRP in a third party lawsuit. They are forced to spend thousands of dollars and an excessive amount of their time defending themselves when they have done nothing wrong or illegal or have no records to prove their innocence.

Second, they are forced to remain in the liability scheme when many times small businesses could and should be eliminated from the lengthy settlement process through exemptions or de minimus settlements. These businesses contributed a minute amount of waste and it frankly is a waste of time and money to include them in the process. Nothing is gained -- either for the economy or the environment -- when businesses are forced to close their doors due to the lack of reasonable settlement offers. Unfortunately, the Environmental Protection Agency (EPA) has not placed an emphasis on offering such setlements. Most small business owners would qualify for such settlements and the fact that they are not encouraged or utilized increases the bottleneck in cleaning up sites.

Third, the retroactive joint and several liability scheme is what our members find most unbelievable and unfair. The fact that they can today be held responsible for past actions that were legal at the time they were undertaken and could be forced to pay for 100 percent of the cleanup costs is un-American and outrageous. It forces our members to choose between two equally bad and unfair decisions: either pay for the cleanup even though you did nothing wrong or face years of litigation, huge legal fees, loss of credit and the threat of bankruptcy.

With the large number of small businesses already intwined in this web and with the increasing threat of thousands more in the future, NFIB's goal is to achieve meaningful reform in the Congress this year. Small businesses cannot afford to wait any longer.

Superfund Reform Proposals

Chairman Smith's bill, S.8, is an important step forward to eliminating the liability nightmare for small business. It contains some excellent reforms and we appreciate the steps he has taken to eliminate some of the inequities and burdens placed on small business.

For the first time, a small business exemption is applicable to those businesses with fewer than 30 employees or less than $3,000,000 in gross revenues. This will provide much needed relief and an early exit to the truly small businesses who, in most cases, do not deserve to be caught up in the Superfund litigation morass. By identifying an employee and monetary threshold, S. 8 approaches reform from a standpoint that NFIB has long advocated.

This legislation also takes positive steps to reform the current liability system by eliminating the liability for those parties involved in co-disposal municipal landfill sites and those parties who contributed only municipal solid waste to a site. Many NFIB members will benefit from this reform.

In addition, S. 8 makes strong improvements in the current program by including a one percent "de minimus exemption." As mentioned earlier, these minuscule contributors serve no purpose but to delay the process and hinder the ultimate goal of cleaning up our nation's most polluted sites. By eliminating these small contributors, you streamline the process and encourage those who contributed the large amount of waste to expeditiously work out a settlement and cleanup the sites.

Small Business Improvements to S. 8

These liability reforms move in the right direction; however, there are several areas that NFIB would like to see clarified or that we have concerns with.

NFIB has consistently supported creating an "ability to pay" definition that would become a required criteria when assessing a small business's contribution. We feel that a strong definition that does not leave the burden on the small business owner to bring forward information and initiate the process is necessary. Notification to small business parties should be an automatic requirement in which all small businesses are requested to provide necessary financial documents and then the burden should be on the government to determine small business' ability to pay.

In addition, NFIB has advocated that EPA and the allocator 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. To ensure that EPA and the allocator meet these imposed deadlines, we suggest that incentives be included.

Finally, we applaud the exemption for recyclers. NFIB would suggest that the elimination of liability provision be broadened to include oil recycling or refining centers. The parties that sent their oil to these types of sites were not only following the direction of their local governments, they were attempting to improve the environment. They should not be penalized for acting responsibly.

Conclusion

Mr. Chairman, we feel that S.8 in combination with our suggested changes would address most of the concerns that our members have expressed. If passed, these reform suggestions will dramatically reduce unnecessary litigation, ensure that money will go towards its intended purpose, and most importantly, ensure that sites will be cleaned up in a timely manner. We thank you for this opportunity and for your interest in the small business concerns with Superfund.

PREPARED STATEMENT OF KAREN O'REGAN, ENVIRONMENTAL PROGRAMS MANAGER, CITY OF PHOENIX, AZ

Chairman Smith and members of the Subcommittee, the International City/County Management Association, the National Association of Counties, the National League of Cities, the National Association of Towns and Townships, the U.S. Conference of Mayors, the Municipal Waste Management Association, and the American Communities for Cleanup Equity respectfully submit this testimony on S. 8 and ask that it be made part of the hearing record.

Collectively, our organizations represent thousands of cities, towns, and counties across the United States. Hazardous waste sites impact the health of our citizens and the environmental and economic viability of our communities. As a result, we are well qualified to provide the Subcommittee with a truly representative view of how local governments and their citizens have been affected by Superfund and to offer some suggestions as to how the program may be improved.

My City is a member of the International City/County Management Association and has been substantially involved with formulating the ICMA and Phoenix's Federal and State Superfund policy. We are currently involved in reforming the State of Arizona's Superfund program and have faced many of the same challenges being addressed at the Federal level. Despite the competing interests of different Arizona stakeholders, we are developing a growing consensus on a fair and streamlined cleanup program.

Like many other local governments, the city of Phoenix has many Superfund roles. At various sites, we are a generator of municipal solid waste and an owner and an operator of a co-disposal site; a water provider charged with protecting drinking water aquifers; expected to represent our citizens on local hazardous waste concerns; asked to offer up streets and rights-of-way for wells and remedies; and charged with revitalizing brownfields and blighted areas. We also experience economic and environmental impacts because there are four Federal Superfund sites and nearly a dozen state Superfund sites within or adjacent to the city of Phoenix. Many of those sites are large areas of regional groundwater contamination that have caused closure of drinking water wells.

In our many roles, the city of Phoenix has, since passage of the original Superfund statute in 1980:

- paid approximately $20 million for response costs at Federal and state Superfund sites;
- been a plaintiff in Superfund cost recovery actions regarding two landfills; and
- commented on numerous proposed Superfund remedies onsites within our borders.

While these experiences were not enjoyable, they did give us ideas of what the most pressing needs and concerns of local governments are with respect to Superfund and how to resolve them. We have reviewed S. 8 and would like to offer suggestions, beginning with its proposed liability scheme.

LIABILITY RELIEF

Across America, unjustified litigation is saddling local governments with expensive legal cons and exposing us to millions of dollars of threatened liability simply because we owned or operated municipal landfills or sent garbage or sewage sludge to landfills that were also used by generators and transporters of hazardous wastes. This problem has severely affected hundreds of communities and school boards and their citizens. Many of us have seen our budgets for essential services threatened and reduced.

Simply put, local governments are in a unique situation that justifies statutory relief. Local governments are required to provide waste collection and disposal services for public health purposes and as a service for our citizens.

It is also undisputed that Municipal Solid Waste contains, at most, a *de minimis* amount of Superfund hazardous substances. Most local governments are drawn into Superfund because of the past co-disposal of municipal trash with more toxic industrial hazardous waste.

There is a strong consensus in support of the position that local governments should be provided relief. We appreciate the attention that has been given to this issue by the Subcommittee and believe the municipal liability provisions outlined in S. 8 are a step in the right direction. After the date of enactment local government generators and transporters—as well as private parties—will be relieved of costs incurred attributable to all municipal solid waste and sewage sludge activities and any waste activities at co-disposal sites. In addition, local government owners and operators at co-disposal sites would receive a liability cap based on population.

We appreciate the committee's efforts to address our concerns, and the proposals in the bill are positive steps. However, there are some shortcomings in the liability relief proposal that will leave some local governments exposed to significant liabilities and many others bearing significant transaction costs. The following are our overall comments:

• Limiting the application of the local government owner and operator and generator/transporter relief provisions to costs incurred after the date of enactment leaves local governments open to potentially large payments and transaction costs related to clean up expenses incurred prior to the date of enactment. For example, if a PRP incurred costs to clean up a site and is now suing local governments for recovery, the bill provides no relief from liability exposure. This means that the exposure of generators and transporters could be significant and in the case of owners and operators, much greater than 20 percent. For instance, the city of Phoenix's estimated response costs already incurred at two co-disposal sites it owned or operated is at least $17 million. Although the city has recovered some of those costs through litigation, none of the costs incurred will be credited toward the 20 percent cap.

Recommendation: For these reasons, any liability relief that is provided to local governments for activities related to municipal solid waste and sewage sludge should include relief for costs incurred prior to the date of enactment that have not yet been settled. We hope that any local government liability relief provisions will be structured to provide certainty and limits on the amount of liability. For example, a cap or some type of limit on local government generator and transporter liability for cleanup costs incurred prior to the date of enactment of the bill and crediting cleanup costs already incurred by local government owner and operators against the 20 percent cleanup cap, would go a long way to alleviate.transaction costs and provide effective relief for local governments. We will be happy to provide the Subcommittee with further information on these suggestions for possible options to achieve effective liability relief for local governments.

• The conditional nature of the relief for Subtitle D facilities is also troubling. S. 8 would make the Subtitle D liability cap at co-disposal sites unavailable to a facility that was not operated in "substantial compliance" with local laws and permits. Nor would a local government receive liability relief if it violated regulations related to vector control.

Recommendation: We suggest that the language be crafted in a more specific manner to ensure that local governments are not penalized. The legislation should ensure that the cap will not be subject to minor infractions having no impact on public health and safety or the integrity of the environment.

• Under S. 8, local governments who were owners and operators of co-disposal sites would be asked to pay up to 20 percent of the cleanup costs, while private industries who generated hazardous waste that many times caused the contamination at these sites would be asked to pay nothing. Local governments, who often had to accept the hazardous waste at their landfills, do not believe that such a liability scheme is properly balanced.

Recommendation: We suggest that you develop an allocation system, with a percentage for the private generators and transporters of hazardous waste at sites owned or operated by municipalities.

We hope that the committee will ensure that whatever liability relief program is enacted into law is workable within the financial limits of the trust fund and the demands of the cleanup program. This will warrant that sites are cleaned up in an effective and timely manner.

Finally, an area of importance to local governments not addressed in the legislation is the potential liability arising from municipal ownership and operation of public sewer systems and related treatment works. Citizens generally take for granted the existence of a functional, convenient sewer systems; indeed, most people believe they have a right to such systems. Accordingly, municipalities and other public bodies provide these facilities to protect the public health and welfare of the community.

The operation of a sewer system can require a municipality to maintain and repair hundreds of miles of unseen, underground pipeline. Because the underground grid of pipes making up sewer systems can be so extensive and because it is essentially invisible, detection of leaks or releases from the system can be difficult. In addition, because a municipality cannot police every sewer drain connection, it has limited control over the type of materials illegally disposed into the system.

Nevertheless, local governments became liable for releases of hazardous materials, which were improperly discharged to the receiving sewers in the first place or for discharges from POTWs in excess of permitted limits caused by improper industry discharges to the sewers. For instance, the Washington Suburban Sanitation Commission was found by a Maryland Federal court to be liable for leaks from its sewer

pipes of hazardous substances that were improperly disposed of by a dry-cleaner. This finding of liability was made despite the fact that the disposal of the hazardous substances into the sewer was prohibited by the Sanitation Committee. These are recurring liability problems that need to be addressed by the legislation.

Recommendation: We believe S. 8 should extend the same liability relief to owners and operators of publicly owned treatment works as it does to municipal owner and operators of co-disposal sites.

REMEDY SELECTION

The current system frequently discourages parties from implementing timely source control and containment because of the threat that impossible measures such as fill aquifer restoration will be required. By demanding the impossible, we frequently fail to get the reasonable.

Cleanup standards should be site-specific, where appropriate, and based upon actual or reasonably foreseeable risk. Where more relaxed cleanup standards are used, permissible property uses should reflect the level of cleanup. Institutional standards should also be considered to supplement risk-based decisions.

S. 8 endorses many of these concepts; however, we are concerned that the bill's focus upon treatment at the point of use does not adequately protect the groundwater resource. We urge the Subcommittee to require containment of contaminant plumes when drinking water is threatened. As growth continues, and water supplies become even more precious, we will need to rely upon aquifers with water of lesser quality. Allowing migration of contaminants into lesser quality aquifers will only increase local governments' treatment costs when that day arrives.

In addition, the proposed Remedy Review Board appears to have broad powers, and without further information on its members and structure, we have reservations about the need for another regulatory body. We are concerned that this Board would overturn agreements reached after years of negotiations and undermine hard-fought remedy selection decisions made by stakeholders, including citizens and local governments. We propose instead that an Advisory Board be established to provide guidance on remedy selection and monitor the Superfund program on a national basis. We urge that local governments be a mandatory part of any advisory or Remedy Review Board.

BROWNFIELDS

Revitalization of brownfields is a critical issue for local governments around the country. We applaud the efforts made in this bill regarding brownfields revitalization. Many urban centers contend with environmental, public health, and economic threats posed by abandoned and contaminated industrial and commercial properties.

The grants proposed in the bill are critical to assisting local governments remediate and reuse brownfields sites, and enhance and promote redevelopment activities. However, grants are only a piece of the brownfields puzzle. Because many communities want to encourage private investment activities, other incentives, including Federal tax incentives, should be considered.

We look forward to working with the community to further refine these proposals.

COMMUNITY PARTICIPATION

Local government officials are the elected representatives of the communities directly accountable to citizens. Our role in the decisionmaking process should be commensurate with our representative status. S. 8 does not recognize local governments' authorities for the determination of reasonably anticipated uses of land and water resources.

For example, S. 8 establishes the Community Response Organization (CRO) as the conduit of information between the community and the Federal and state regulators and PRPs. The CRO serves as the representative of the local community during the remedial action planning and implementation process. Yet, representatives of local governments are designated as only one of many groups included for membership on the CRO. Local governments do not oppose the CRO, but we are concerned that the bill establishes the CROs as the only formal mechanism for local governments to participate in the decisionmaking process.

Recommendation: Local governments should have a separate and distinct route for input on decisions affecting their communities.

S. 8 requires that the Administrator "shall consult with the [CRO] in developing and implementing the remedial action plan." However, there is no language indicating that local governments represent the affected the community.

Recommendation: S. 8 should be amended to require the Administrator to directly consult with the affected community as represented by the local government in developing and implementing the remedial action plan.

CONCLUSION

In conclusion, the Superfund program must ensure that sites are cleaned up quickly and effectively without threatening the economic viability of our communities. To achieve those goals, the Superfund program must provide adequate funding for site remediation and establish cleanup standards that are protective of human health and the environment. This will ensure that sites are not continuing problems for communities in the future. Further, it will ensure that local governments will not be left with sites that are not remediated, contributing to an already overwhelming brownfields problem.

We appreciate the opportunity to comment on the bill. We thank you for giving attention to local government liability relief. We hope that any reauthorization will include effective liability relief for local government activities related to municipal solid waste, sewage sludge and publicly owned treatment works incorporate the recommendations that we raised in our testimony.

We again thank you for your attention to this matter and we look forward to working with you and your staff on this matter.

RESPONSES OF KAREN O'REGAN TO ADDITIONAL QUESTIONS FROM SENATOR SMITH

Question 1. S. 8 includes a remedy review board with more power than that created by the EPA. In your statement, you say that you believe that local governments should have a role in this process. Do you support the use of remedy review boards that are included in S. 8?

Response. As stated in my oral and written testimony, local governments have reservations about the broad authority apparently given to the proposed Remedy Review board in S. 8. Without additional information on its structure, members and scope, the local governments that I represent have reservations about the need for yet another regulatory body. Those local governments are also concerned that this Board could overturn agreements reached after years of negotiations, and undermine hard-fought remedy selection decisions made by stakeholders, including citizens and local governments. We propose instead that an Advisory Board be established to provide guidance on remedy selection and monitor the Superfund program on a national basis. We also urge that local governments be part of any Advisory or Remedy Review Board.

Question 2. It is my understanding that there is legislation moving through the Arizona legislature to modify the State hazardous waste cleanup statute (hearings were held in February) which: (1) repeals joint and several liability; (2) limits small business and *de minimis* contributor liability; and (3) provides that any PRP who voluntarily accepts its cost allocation will have 25 percent of its cleanup cost paid for by the Water Quality Assurance Revolving Fund—a fund derives from taxes on hazardous waste disposal, industrial discharge fees, corporate taxes and landfill tipping fees.

Do you agree that parties should only be held responsible for their own waste, not the pollution caused by someone else? (In other words, not subject to joint and several liability).

Included in S. 8 is an allocation system that would similarly have the effect of eliminating joint and several liability. Do you agree that this should result in much less litigation than under the current system?

Response. Senate Bill 1452 and related amendments, which reform Arizona's Water Quality Assurance Fund (WQARF), were developed through a long and arduous consensus-based process by a state-wide Groundwater Task Force and Legislative Study Committee. The legislature plans to adjourn by April 18 of this year and we expect additional revisions prior to final passage. Draft Senate Bill 1452 repeals joint liability in favor of allocated proportionate share liability; has special settlement provisions for "qualified" small businesses and those facing financial hardship; and, subject to certain criteria, provides a 25 percent early settlement discount to Responsible Parties who accept their share of cleanup costs based upon the Arizona Department of Environmental Quality's allocation. I have attached a brief Fact Sheet prepared for Arizona legislators which provides an overview of the bill's major components, and would be pleased to provide the Committee with additional information on the bill.

Currently, WQARF's primary revenue source is a statewide per gallon assessment on water purveyors, which includes municipalities and irrigation districts. This assessment is charged to our citizens on their water bills. The next major revenue sources for WQARF are the State's general fumd and cost recovery actions, followed by miscellaneous fees on pesticide /fertilizer/ landfill registrations, interest on the fund, hazardous waste fees, and several discharge permit fees. Currently, corporate taxes do not fund WQARF, although that funding source is proposed under Senate Bill 1452.

Like Congress, Arizona stakeholders have debated whether parties should be subject to a proportionate or fair share liability scheme instead of joint and several liability. The fairness of joint liability was hotly contested both this year in the Task Force and during last year's legislative session. The removal of joint liability was only agreed upon by many of the participants if, and only if, adequate, dedicated funding for the WQARF program is concurrently provided for in the law. A municipal coalition representing cities in the Phoenix metropolitan area took the position that, if joint liability were to be removed, the WQARF program funding level would need to be greatly increased to provide funding for the resultant orphan shares (i.e. shares of responsibility attributable to unknown or non-viable responsible parties).

As a result of the proposed WQARF reforms, including the elimination of joint liability, the current annual funding level for WQARF is proposed in Senate Bill 1452 to be raised from around $3 million to an annual amount of about $18 million. Under the consensus version of the current WQARF bill, the additional funding will be provided by earmarking existing corporate income tax revenues, which are not currently a WQARF revenue source.

With respect to a national local government position on the Federal Superfund liability scheme, local governments understand that joint liability can be criticized as not necessarily fair; however, it is an effective enforcement mechanism to ensure that remedial activities and orphan shares will be funded. We are concerned that if joint liability is eliminated, and adequate funding for orphan shares is not provided, cleanups may not be accomplished, further exacerbating environmental and public health problems associated with Superfund sites. Therefore, many cities would only support the removal of joint liability if adequate, dedicated funding for orphan shares is provided for in the Federal Superfund statute.

The second part of your question asks if an allocation system will result in less litigation than the current system. As you know, the proposed Arizona WQARF reform bill proposes an allocation system with incentives for early settlement and disincentives for litigation. For example, parties that settle early with ADEQ based upon the agency's determination of their share are entitled to a 25 percent early settlement discount. Conversely, all parties, including the State, who choose to litigate rather then accept the allocation, can be held responsible for all attorneys' fees and litigation costs. While the proposed system has not been tested, the varied and numerous stakeholders hope that it will streamline and clarify what has been a contentious, slow, and undefined process.

Question 3. It is my understanding that a committee of the Arizona Legislature that recently reviewed the State hazardous waste cleanup law recommended that all the revenues from the State Water Quality Assurance Revolving Fund be dedicated solely to the hazardous waste program. As you may know, even though Superfund is funded with corporate taxes, and although the Superfund trust fund has a surplus of $3 billion, the effect is that these moneys are being utilized to balance the Federal budget. Do you agree with the Arizona committee's recommendation that tax revenues collected for hazardous waste cleanup should actually be used for that purpose? If so, shouldn't we also do that in regards to Superfund?

Response. The parties that have been reforming WQARF have generally agreed that the State Superfund program needs to have adequate funding which is dedicated to WQARF program activities, including administration of the program, site characterization activities, legal support, removals and remedial activities, and other WQARF-related activities. We believe that the Federal Superfund should also have adequate funding dedicated to performing all of the necessary Superfund activities.

SENATE BILL 1452—WQARF PROGRAM AMENDMENTS

Senate Bill 1452 is a comprehensive overhaul of the Arizona Water Quality Assurance Fund ("WQARF") program, also known as the Arizona Superfund program. It is the product of the ongoing work of the Groundwater Cleanup Task Force (appointed by the Arizona Department of Environmental Quality "ADEQ" and the Arizona Department of Water Resources "ADWR") and the Joint Select Committee on

WQARF (appointed by the Legislature pursuant to Chapter 290, 1996 Laws a/k/a HB 2114).

SB 1452 represents significant headway toward a true consensus on WQARF reform; however, it must be viewed as a "work in progress." Some important issues are yet to be resolved. However, the SNRAE amendment embodies the following key elements of a developing agreement:

- Permanent elimination of joint liability for hazardous substance cleanup;
- Non-litigation procedures for determining the fair share of each responsible party, with incentives for quick settlement and disincentives to litigation;
- Relief for qualified, small businesses that cannot afford to pay even their fair share of cleanup costs;
- Dedicated funding ($18 million annually—$3 million from existing dedicated sources and $15 million from corporate income tax collections) for ADEQ site investigation, responsible party identification, remedy selection, and orphan shares;
- Limitation on the State's ability to bring lawsuits under Federal law, to the extent inconsistent with State law;
- Prioritization of sites with greater emphasis on risk to human health;
- Enhanced community involvement and public participation at all stages of the cleanup process;
- Flexibility and common sense in determining appropriate cleanup methods;
- Removal of regulatory & liability barriers to transport and use of remediated water;
- Inspection and remediation or abandonment of wells contributing to groundwater contamination;
- Ongoing review of the WQARF program by a new WQARF Advisory Board and periodic Program Authorization Review ("PAR").

The Groundwater Cleanup Task Force and the Joint Select Committee on WQARF believe that the revisions proposed SB 1452 will result in a more fair and effective WQARF program. The stakeholders will continue to work through the details to implement GCTF and Joint Select Committee recommendations. We urge your support of SB 1452.

PREPARED STATEMENT OF TERRY D. GARCIA, ACTING ASSISTANT SECRETARY FOR OCEANS AND ATMOSPHERE, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

Good morning, Mr. Chairman and Members of the Committee. I am Terry Garcia, the acting Assistant Secretary for Oceans and Atmosphere for the National Oceanic and Atmospheric Administration (NOAA) of the Department of Commerce. I am here today representing the interests of the U.S. Department of Commerce, the U.S. Department of the Interior (DOI), the U.S. Department of Agriculture (USDA), the Department of Defense, and the Department of Energy in their role as natural resource trustees.

I would like to reassert for the 105th Congress the Clinton Administration's steadfast commitment to protecting and restoring the Nation's valuable natural resources. My testimony begins by reviewing recent progress made by the trustees toward restoring natural resources under the existing laws and rules governing damage assessment activities. I will then highlight reforms to the natural resource damage (NRD) provisions of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund) that this Administration proposes. The final portion of my testimony will focus on provisions in the Superfund Cleanup Acceleration Act of 1997 (S. 8) that would impede the efforts of State, tribal and Federal natural resource trustees to protect and restore the Nation's natural resource heritage.

CERCLA was enacted to address the legacy of hazardous substance contamination created by over 100 years of harmful disposal practices in this country. The statute provides important authorities not only to protect human health, but also to protect and restore this Nation's natural resources. These natural resources represent a critical component of our Nation's commerce—and the foundation of our future. Harm to the public's natural resources from years of improper handling and disposal of hazardous substances at sites throughout the country persists to this day. Losses to society and the U.S. economy from the public's inability to use and enjoy natural resources are potentially enormous. Over 76 million Americans enjoy birdwatching, photography and other nonconsumptive uses of wildlife, contributing $18 billion a year to the economy. Annually, 50 million anglers contribute nearly $70 billion to the Nation's economy. Moreover, these and other citizens gain an enjoyment, serenity, and sense of community and national pride from unspoiled natural resources that transcend such economic impacts. The original drafters of CERCLA

made a commitment to the American people that waste sites would be cleaned up and natural resources restored.

The natural resource damage provisions of CERCLA allow us to reclaim our environment and restore those natural resources that have been degraded or destroyed by years of harmful hazardous waste disposal. CERCLA provides that natural resources that have been lost as a result of the disposal of hazardous waste into the environment will be restored for the people of the United States. To curtail the ability of trustees to be fully effective in their efforts is to deprive the people of this Nation of the right to have their natural resources fully restored to health and productivity.

Hazardous substances can be toxic to fish and wildlife at extremely low concentrations. Common effects of hazardous substances include death, cancer, impairment of reproduction, disruption of normal fetal development, impairment of growth, reduction of central nervous system functions, and impairment of normal behavior patterns essential for survival. Very low concentrations of dissolved zinc or copper in water are highly toxic to developing fish larvae. Some of the more serious contaminants in the environment are those that persist for long periods of time and buildup in the tissues of fish and birds. For example, the bioaccumulation of dioxins, PCBs, and DDT can disrupt delicate hormonal systems and prevent normal reproduction. Relatively low concentrations in soil or sediment can accumulate and increase in concentration up through the food chain, causing harm in higher level animals. Effects can extend far beyond individual organisms, resulting in the collapse of populations, food chains, or even entire ecosystems, as the substances are transferred from one level of a system to another over long periods of time. With these potential losses at stake, and knowing how strongly Americans feel about protection of their natural resources, CERCLA's NRD provisions should only be revised if the changes strengthen the trustees ability to ensure effective restoration of the public's natural resources.

Significant progress has been and is being made by State, tribal, and Federal trustees toward restoring natural resources injured by hazardous substances. By working within the U.S. Environmental Protection Agency's (EPA) remedial process, trustees have reached agreements with responsible parties to restore habitat and injured resources at more than 25 hazardous waste sites as part of negotiated comprehensive government settlements. For these sites, trustees have been able to obtain small restoration projects that provide significant cumulative benefits for natural resources. Trustees have also obtained settlements and advanced restoration as a direct result of natural resource damage assessment activities. I'd like to highlight some of the restoration that has occurred since we last testified before this Committee:

• *Baytown, Texas.* Restoration is complete at the French Limited Superfund Site, where a sand pit was used to dispose of enormous quantities of sludge and sediment contaminated with polychlorinated biphenyls, polycyclic aromatic hydrocarbons and other organic compounds between 1966 and 1971. Chemical residues from the pit contaminated groundwater and subsoils near the site, injuring trust resources such as migratory birds and crabs. Working within the EPA cleanup process, Federal trustees reached a settlement with the responsible parties to restore a marsh that would provide for the replacement of natural resources that had been injured, destroyed or lost. To achieve this end, the responsible parties worked cooperatively with the city of Baytown, Texas, to create a 60-acre wetlands reserve, including: 40 acres of saline to brackish marsh; 10 acres of forest land containing freshwater pools; and 10 acres of stream channels. Natural resources that previously used the area for food and shelter are returning to the restored marshland and local residents can now use the restored area for nature walks and fishing.

• *New Castle County, Delaware.* A restoration plan has been completed for the Army Creek Superfund site, where a sand and gravel pit was used as a landfill for municipal and industrial wastes during the 1960's. Untreated groundwater was discharged into Army Creek, a tributary of the Delaware River, to prevent additional contamination of private drinking water wells. Working within EPA's remedial process, trustees protected natural resources during the cleanup and reached a settlement that provided for recovery of injured natural resources, including migratory birds, anadromous fish and their habitats. Two offsite habitat enhancement projects are proposed in the restoration plan: the first involves improving and restoring fish and wildlife habitat in Lower Army Creek through modification of an existing water control structure; and the second project involves the acquisition and rehabilitation of approximately 60 acres of marsh and upland habitat to compensate for the loss of similar upland acreage.

• *Tacoma, Washington.* Efforts continue to restore and enhance habitat for fish and wildlife injured by years of pollution in Commencement Bay. Two seasons of

planting have been completed at the Middle Waterway Shore Restoration Project, converting 4.7 acres of industrial uplands to a mix of clean, replanted upland habitat, intertidal salt marsh and intertidal mud and sand habitats. The goals of this project were to create productive and diverse estuarine habitats for fish and wildlife and to provide a model for the use of volunteer assistance in carrying out coastal restoration. In October 1995, volunteers planted over 600 native upland trees and shrubs as part of this effort. In October 1996, an additional 300 trees and shrubs were planted by natural resource trustees.

• *New Bedford, Massachusetts.* Cleanup is ongoing in New Bedford Harbor and the trustees are moving forward aggressively with restoration efforts. The trustees have issued a Restoration Plan/Environmental Impact Statement for restoration actions not directly dependent on the progress of the cleanup and have undertaken an extensive outreach effort to solicit public input. The plan was developed by the trustees in cooperation with local citizens, businesses, academic institutions, State and local governments and non-profit organizations. It identifies 12 preferred restoration actions to restore a broad range of natural resources and human uses throughout the New Bedford Harbor environment. The trustees are proposing restoration priorities that include marshes and wetlands, recreational areas, water quality, fish and shellfish, and endangered species, and expect project implementation to begin within the next 6 months.

• *John Day River, Oregon.* Restoration of the John Day River is ongoing in response to the February 1990 spill of 3,500 gallons of hydrochloric acid into this river in north central Oregon. A final restoration plan has been issued that identifies 12 potential restoration projects for improving spawning and rearing habitat for both resident and anadromous fish. In addition to the restoration funding provided under the settlement, the trustees have successfully solicited matching funds for habitat restoration from the Bonneville Power Administration, the Forest Service and the Nature Conservancy. Two projects currently underway will improve spawning and rearing habitat for salmonids by reducing erosion and the buildup of sediment in the river, increasing streamside vegetation and restoring the natural pond and riffle characteristics of the streams.

• *Lake Charles, Louisiana.* Natural resource trustees and Conoco are formalizing two agreements that will enhance habitats for fish and wildlife to compensate for natural resource injuries associated with a March 1994 release of ethylene dichloride into the Clooney Island Loop area of the Calcasieu Estuary. A cooperative effort between trustees and Conoco will result in the creation and long-term protection of more than 200 acres of habitat on former farmland in the Hippolyte Coulee-Black Bayou area. More than 60,000 1-year old native tree saplings have recently been planted to restore habitat that provides sanctuary to many wildlife and fish species. Conoco is also voluntarily funding a Louisiana State University study to evaluate the success of the restoration project.

• *Salmon, Idaho.* As part of a 1995 natural resource damage settlement for the Blackbird Mine case, responsible parties agreed to restore the water quality in Panther Creek to support all life stages of salmonids by the year 2002. Pending restoration of water quality onsite, the responsible party is pursuing offsite compensatory restoration under the provisions of the consent decree. Specific reaches of stream have been identified for habitat improvement through livestock exclusion. The responsible party is now negotiating with land owners to exclude cattle from seven miles of potentially excellent habitat for salmon and other fish in the Snake River basin. In addition, detailed plans for restocking and improving habitat in the Panther Creek watershed are under review for immediate implementation once water quality improvement is confirmed by monitoring.

• *Central California Coast.* Significant progress has been made to reestablish common murre colonies in the areas where colonies were extirpated or severely injured by the 1986 Apex Houston oil spill. Decoys and other attractants have been deployed at historic breeding sites: Murres have landed and have already bred at these sites. The common murres will be monitored to further refine and evaluate the recolonization effort. As part of this restoration effort, work began in 1995 to purchase old growth forest as nesting habitat near current populations of marbled murrelets. Trustees are in the process of negotiating a purchase with the property owner.

To accelerate restoration, Federal trustees have adopted several administrative changes aimed at expediting the restoration of injured natural resources. These include new natural resource damage assessment regulations and proposed amendments to CERCLA's natural resource damages provisions. In 1994, the Department of the Interior finalized revisions to the CERCLA natural resource damage assessment regulations. The new regulations require trustees to focus their assessment work and base their claims on a publicly reviewed plan for restoring injured re-

sources to their baseline condition (i.e., the condition that would have existed in the absence of the release). In January 1996, NOAA issued final natural resource damage assessment regulations under the Oil Pollution Act of 1990. The OPA rule extends the restoration-based approach of the 1994 CERCLA regulations. Before trustees present a claim for an oil spill under the OPA rule, they must develop a plan not only for restoring baseline, but also for restoring the services lost in the interim until baseline is re-established. The OPA rule specifies that for the vast majority of oil spills, the trustees will no longer assess monetary damages for interim losses based on economic values. Responsible parties then have the option of either implementing the plan or funding the trustee's implementation of the plan.

This new paradigm is being used for the North Cape oil spill, where natural resource trustees and the responsible party continue to work cooperatively to assess the effects of the spill and to determine appropriate restoration actions for Rhode Island's coastal environment. Four teams of experts have examined impacts to salt pond communities (fish, shellfish and vegetation), marine communities (lobster and surf clams), birds, and human uses (charter boat fishing, tourism and recreation). The restoration planning efforts of these teams are nearing completion, and a draft restoration plan will be released for public review and comment in late spring of 1997.

The Department of the Interior is working to further improve the assessment process during the ongoing biennial review of the CERCLA regulations. DOI is currently evaluating public comments and expects to issue a proposed rule by January 1998. The Department is examining how the mechanics of up-front restoration planning for interim losses can be adjusted at hazardous waste sites to minimize the cost of assessment work while at the same time ensuring that such work produces reliable results. The Department is also carefully reviewing the injury determination provisions of the regulations, which establish specific injury thresholds that must be met before trustees can pursue a claim. The Department is conducting an extensive technical review to determine how these provisions should be revised to reflect the current level of scientific knowledge.

These developments demonstrate that State, tribal, and Federal trustees are making progress toward restoring natural resources harmed by releases of hazardous substances. As confirmed by the recent General Accounting Office (GAO) report "Status of Selected Federal Natural Resource Damage Settlements," trustees across the Nation are using funds recovered from responsible parties for restoration. The GAO report also notes that restoration takes time and is often delayed by many factors beyond the control of the trustees. Nevertheless, the Federal trustees have been working hard to effect changes that accelerate the restoration of injured resources.

THE ADMINISTRATION'S PROPOSAL FOR NATURAL RESOURCE DAMAGES UNDER CERCLA

Last October, the Administration forwarded to this Committee, and other committees with jurisdiction, a proposal for reforming the natural resource damage provisions of CERCLA (Administration proposal). Federal trustees carefully considered criticisms of NRD that had been raised during previous reauthorization efforts. Our proposal for reform is specifically designed to shift the emphasis away from spending money on litigation and toward restoring injured natural resources. The proposal also contained changes that are based on our practical experience with the natural resource damage assessment and restoration process. These reforms are designed to improve the NRD programs by providing greater clarity concerning restoration, by assuring more timely and more orderly presentation of claims and by discouraging premature litigation. NOAA and the other Federal trustees encourage you to consider this proposal as the foundation for reform of Superfund's NRD provisions during the 105th Congress.

The Federal trustees believe that revision of CERCLA's NRD provisions should be based on the following principles:

- Restore injured resources to baseline; and
- Restore the losses that the public suffers from the impairment of natural resources from the time of injury until restoration is complete.

The Administration proposal embodies these principles and was intended to achieve two critical goals: strengthen the focus on restoration; and reduce the costs associated with damage assessment claims by eliminating or reducing unnecessary litigation. Specific reforms include:

Adopt the Restoration-based Approach Developed in The Natural Resource Damage Assessment Regulations: The Administration's proposal shifts the emphasis of CERCLA damage assessment efforts toward restoration and away from arguing over the value of, or method for, calculating economic damages. This fundamental shift will avoid litigation and expedite the restoration of injured resources. The proposal

contains definitions for primary restoration (return to baseline) and compensatory restoration (replacement of resources and services lost pending return to baseline) that parallel the concepts used in the natural resource damage assessment regulations promulgated under the Oil Pollution Act of 1990. This approach should eliminate disagreements over the valuation of natural resources by refocusing on CERCLA's overriding goal of restoring injured natural resources and establishing the cost of restoration as the primary measure of damages—not the monetary value of the lost resource.

Reduce Uncertainty and Ensure the Orderly Presentation of Claims: The current statute of limitations provisions have created a lack of certainty both for responsible parties and for natural resources trustees. To preserve claims, natural resource trustees have been forced to file natural resource damage claims before the completion of restoration planning or prior to effective coordination with EPA. To address this uncertainty, the Administration's proposal contains provisions that would require a claim for damages to be presented within 3 years from the date of completion of a damage assessment by a trustee in accordance with the regulations, or the completion of a restoration plan adopted after adequate public notice. In addition, it ensures that claims can be filed in an orderly sequence, by specifying that a natural resource claim may be brought after an initial action to recover response costs. These revisions would clarify the sequential claims issue to reduce premature filings, protect against claim splitting, and provide time for effective restoration planning, thus preserving important public trust rights.

Require Fair and Cost-Effective Restoration: The trustees agree that restoration should not be gold plated and our proposal requires a cost-effectiveness test to maintain that priority. "Cost-Effective" is defined as the least costly activity among two or more restoration measures that provide the same or comparable level of benefits. In addition, the Administration proposal constrains compensatory restoration to replacing only those services that were lost as a result of the release under consideration, thereby providing protection against open-ended liability for responsible parties. These changes mirror the definition of cost-effectiveness in the CERCLA and OPA regulations, and ensure that the American public is adequately compensated for their losses while responsible parties are protected from unreasonable demands for restoration.

Provide for Judicial Review of Restoration Plans Based on an Administrative Record: The present standard for judicial review of natural resource damage assessments under CERCLA is unclear, providing an incentive for all parties to keep their information confidential. In the absence of clear guidance, trustees have generally assumed that their assessments will be used as evidence at trial and will not be afforded great deference. Consequently, the incentive is for trustees to keep their assessment studies confidential except to the limited extent that disclosure to parties is required in litigation discovery, and for private parties to delay providing information during litigation, rather than during the assessment process. This approach has generated more costly assessments, increased transaction costs, and inhibited the open review and debate that the trustees would like to foster.

The Administration's proposal recommends the designation of a lead administrative trustee to establish a publicly available administrative record to guide the selection of a restoration plan. This is coupled with provisions to limit judicial review of the restoration plan to review of the administrative record with an "arbitrary, capricious or contrary to law" standard of review. The process would be facilitated by new regulations for public participation in the development of the administrative record. Providing for judicial review of an administrative record would enhance public participation; increase certainty, predictability and trustee coordination; support the focus on restoration-based claims; reduce litigation costs; and allow adequate time for proper assessment and restoration planning.

Impose Requirements on the Performance of Damage Assessments: The Administration's proposal would require damage assessments to be performed, to the extent practicable, in accordance with regulations and generally accepted scientific and technical standards and methodologies. The proposal also recommends that injury determination, restoration planning, and quantification of restoration costs be based on facility-specific information to the extent practicable. These revisions codify the approach currently used by natural resource trustees to conduct damage assessments. This provision is designed to ensure the validity and reliability of assessment results.

Other changes to CERCLA's NRD provisions recommended by the Administration are designed to facilitate the process for both trustees and responsible parties. These changes include: improved coordination between damage assessment and remedial activities; restrictions on the use of damage recoveries; and contribution protection.

The Association of State and Territorial Solid Waste Management Officials, the National Governors' Association, and the National Association of Attorneys General have voiced support for revisions similar to those contained in the Administration's proposal for reforming CERCLA's natural resource damage provisions.

NATURAL RESOURCE DAMAGE REFORM AND THE SUPERFUND CLEANUP ACCELERATION ACT OF 1997 (S. 8)

The Federal natural resource trustees applaud the efforts of this Committee to move the Superfund reauthorization debate forward and appreciate the thought and hard work that went into drafting S. 8. While there are provisions in S. 8 that reflect the concerns of the natural resources trustees, the Administration believes that S. 8 does not present an acceptable basis for achieving bipartisan consensus on Superfund Reform. Several of S. 8's provisions would severely impede the efforts of the natural resource trustees to protect and restore the Nation's natural resource heritage. We strongly urge the Committee to substitute the Administration's proposal for the natural resource damage provisions contained in S. 8. Our specific concerns with S. 8 are as follows——

S. 8 Precludes Restoration of Non-Use Values. Non-use values are real, though difficult to measure. For example, non-use values are based on knowing that a river exists, that our children will be able to swim and fish in that river in the future, and that the river will continue to be an integral part of our natural environment. S. 8 provides that there shall be no recovery for impairment of non-use values. This provision limits the ability of trustees to restore the full value of injured resources by prohibiting the consideration of the full range of values in determining restoration actions.

The Administration sees no reason to exclude the non-use component of resource values. If CERCLA imposes a cost-reasonable standard for restoration recoveries, the Administration feels that all components of value should be represented in applying the cost-reasonable test. To exclude non-use values, as specified in S. 8, means that the public will not be fairly and fully compensated for loss of resources.

Restrictions on The Recovery of Interim Loss: CERCLA currently prohibits recoveries for hazardous substance releases where the damage occurred wholly before December 11, 1980 (i.e., the injury occurred and the resource recovered before 1980). S. 8 appears to prevent the recovery of any interim loss at sites where injury first occurred prior to 1980, regardless of the magnitude of those losses or whether those injuries persist today. If interpreted in this way, S. 8 would dramatically restrict the recovery of interim losses at sites where the injury started prior to 1980 and continues to this day, benefiting responsible parties at some of the biggest sites of contamination, and blocking compensation for loss of public resources. The Administration's reform proposal contains a better approach to restricting the recovery of restoration costs for pre-1980 losses.

Cost Effective Instead of Cost "Reasonable" Restoration. S. 8 would only allow trustees to restore injured natural resources if the restoration project has a "reasonable cost," and does not define "reasonable." This provision apparently assumes that the existing protections against the use of excessively expensive restoration option are inadequate. However, the D.C. Circuit recently reached exactly the opposite conclusion in *Kennecott Utah Copper Co.* v. *Department of the Interior,* holding that the trustees' obligations under damage assessment regulations to evaluate a range of alternatives in a public process, and to consider cost-effectiveness, are enough to ensure that appropriate projects will be selected. Instead of introducing a new "cost reasonableness" requirement that will need to be defined through litigation, and that may prevent or delay needed restoration, the Administration urges the adoption of a cost-effectiveness standard for evaluating restoration alternatives.

Installment Payments Based on Restoration Needs, Not on Duration of Injury. S. 8 requires that responsible parties be allowed to pay for natural resource restoration over time, based on "the period of time over which the damages occurred." Trustees often agree to installment payments in negotiated settlements to reflect a responsible party's limited ability to pay or the time that will be needed for restoration. However, the amount of time over which the damage to resources occurred should not be considered in a payment schedule.

CONCLUSION

The natural resource trustees are firmly committed to implementing CERCLA's directive to restore injured natural resources in a timely and efficient fashion. This Administration has been working diligently to implement administrative changes that would facilitate the process for responsible parties and trustees while advancing the mission of fully restoring natural resources for the use and benefit of the

American public. The efforts of State, tribal and Federal trustees are starting to show real restoration results across the country. The Administration's proposal for reforming NRD addresses many concerns that were voiced during previous reauthorization discussions, as well as provisions that would clarify and expedite the natural resource damage assessment process. S. 8's natural resource damage provisions, by contrast, would severely impede the efforts of State, tribal and Federal natural resource trustees, and deprive communities of their right to full restoration of the natural resources that support their economies and their way of life.

Thank you for providing me with the opportunity to present the Clinton Administration's position on reforming CERCLA's NRD provisions. The trustees look forward to working with this Committee to develop a proposal that truly will strengthen the natural resource damage assessment and restoration provisions of CERCLA so that all affected constituencies can support Superfund reform in the 105th Congress. I will be pleased to answer any questions that you might have.

RESPONSES OF TERRY D. GARCIA TO ADDITIONAL QUESTIONS FROM SENATOR SMITH

Question 1. Last November, the GAO issued a report on selected Federal natural resource damage settlements. According to the report, as of July 1, 1996 of the $33.8 million awarded for NRD settlements at 62 sites, only approximately 19 percent (about $5 million) has been spent on damage assessments, planning or restoration. Thus, most of the money was just sitting waiting for something to spend it on. Can you explain why these moneys have been lying dormant?

Response. Under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), natural resource trustees are required to use recovered damages only to restore or replace injured resources or to acquire the equivalent. The GAO report "Superfund: Status of Selected Federal Natural Resource Damage Settlements" (November 1996) presented the following results: As of July 1,1996, in addition to the settlements for the five largest cases, settlements had been reached at 62 sites, resulting in $33.8 million in awards to Federal trustees. Of the $33.8 million awarded, about 80 percent had been collected. Of the collected funds, about 19 percent had been allocated for performing damage assessments, planning, or restoration. One site had been restored, and seven were in various stages of restoration. The trustees' use of the remaining 81 percent of the collected funds was awaiting the completion of restoration plans or other activities, such as cleanups or settlements with other responsible parties at the same site.

GAO's report objectively characterizes the time-consuming obstacles that trustees encounter when a restoration action is needed subsequent to clean up. As the report states, these time-consuming factors may include:

- waiting for final selection of a remedy;
- waiting for implementation of a cleanup before onsite restoration proceeds;
- the need to collect information for restoration planning that wasn't procured through the remedial process;
- the need to conduct separate public review and permitting processes for restoration activities;
- the need to plan and design restoration projects; and
- the actual collection of damages from responsible parties.

Despite these obstacles, there are numerous examples of restoration projects that are proceeding. Here are two:

New Bedford Harbor: The trustees have evaluated and solicited public review of offsite actions to restore lost human uses. This represents a small percentage of the total restoration effort that will be conducted, but onsite restoration must await implementation of the remedy at this NPL site.

Blackbird Mine: While awaiting selection and implementation of the remedy at this NPL site, the Trustees are focusing on offsite projects that will benefit the endangered chinook salmon by removing livestock from 7 miles of prime salmon habitat in the Salmon River basin. This represents a small portion of the restoration package, but only planning can be done for the onsite work until the water quality in Panther Creek is restored.

The GAO report clearly shows that the trustees are diligently pursuing meaningful restoration with funds recovered from those who injured the resources. Recovered moneys have not been used for any purposes other than those allowed: restoration, replacement or acquisition of the equivalent injured natural resources. Trustees are carefully managing the use of recovered funds to ensure that moneys are applied in a way that is consistent with the legislative intent to protect and restore natural resources for future generations of Americans.

Question 2. I am concerned That NRD restoration may overturn remediation decisions. For example, natural attenuation and biodegradation are two promising techniques for dealing with groundwater contamination [for which currently there are no effective cleanup solutions. I can foresee a situation where The remediation and the restoration decisions could be contradictory. Is this an acceptable situation?

Response. Trustees do not "overturn" EPA decisions. CERCLA's coordination requirement, which applies to both EPA and the trustees, was designed to provide safeguards against inconsistencies or conflicts between remedial and restoration decisionmaking. Memorandums of understanding are in place or are being negotiated to ensure effective coordination between EPA and the natural resource managers on remedial decisions. In most EPA regions, there are biological technical assistance groups (BTAGs) composed of scientists from resource management agencies which work closely with EPA when EPA conducts ecological risk assessments. For example, NOAA has placed a staff person in each one of the coastal EPA regional offices to work with Superfund project managers on a day-to-day basis, and biologists from the Department of the Interior have long been involved in the BTAGs advising EPA.

However, restoration decisions and remediation decisions, while clearly related, are not necessarily identical. The goal of remediation is to protect the public and the environment from being harmed or threatened by releases or potential releases of hazardous substances. To reach this goal, remediation focuses on reducing the risks posed by hazardous substances releases. The goal of restoration, on the other hand, is to return natural resources that have already been harmed by hazardous substance releases to the State they would have been in if the release had not occurred. At sites such as NPL sites, where remediation is already focusing on the necessary measures to reduce risk, restoration focuses not on risks associated with exposure to hazardous substances but rather on the condition of natural resources.

Close coordination between EPA and the natural resource managers helps ensure that the risks to both human health and ecological resources are evaluated thoroughly during remediation and that EPA designs a remedy that eliminates, reduces or controls risks to human health and the environment. The elimination, reduction or control of risks caused by contamination, however, while usually stopping additional natural resource injuries directly caused by hazardous substances, does not necessarily redress past injuries to natural resources. Additional actions, whether onsite or offsite, sometimes are necessary and appropriate for restoration. Generally, these additional actions not only serve a different goal but are also of a different type than remedial actions. For example, they may involve reseeding plant life or restocking fish. This type of restoration simply complements EPA's remedial actions.

At sites where EPA is selecting a remedy under CERCLA and the NCP, trustees have no authority to second-guess EPA's decision on cleanup. However, as recognized by the Court of Appeals in the recent Kennecott decisions, trustees separate decisions on restoration may, in some circumstances, lead to actions to address contamination that the remedial action has left in place. See *Kennecott Utah Copier* v. *DOI,* 88 F. 3d 1191, 1218–19 (D.C. Circuit 1996). Effective natural resource restoration requires that this authority be preserved for trustees. Nevertheless, it would be an unusual development for a trustee action to address contamination left in place by a remedial action because of existing constraints on trustee activities. For example, under the CERCLA natural resource damage assessment regulations, in selecting a restoration alternative trustees must consider a range of restoration alternatives, including natural recovery, and must justify their selected restoration plan after considering the respective cost, benefits, degree of consistency with response actions, and degree of technical feasibility posed by each alternative. If EPA were unable to justify taking certain actions to remove contaminants from the groundwater, it is unlikely that a trustee would be able to justify taking the same actions as restoration. The most likely result would be that the trustee would rely on natural recovery to restore the groundwater to its baseline condition and then seek compensation for the losses, if any, that the public incurs pending completion of natural recovery.

Question 3. I am interested in understanding what happens in instances where a trustee and The EPA disagree over cleanup levels. If a party undertakes a cleanup satisfying EPA's standards, or settles with the EPA and has a convenant not to sue, the trustee could overide the EPA remedy and file an NRD claim? If EPA does a cleanup, or determines that no cleanup is necessary, The trustee cannot require additional cleanup for natural resources.

Response. For reasons stated in our response to Question 2, coordination between EPA and the trustees to ensure that the remedy adequately addresses ecological risks makes it unlikely that EPA would choose a cleanup level that fails to satisfy the trustees concerns about residual contamination causing injuries to natural re-

sources. If, despite full coordination and consultation, EPA and the trustees cannot agree on the appropriate cleanup level to eliminate, reduce or control unacceptable risk from hazardous substances, the EPA-selected cleanup level is implemented. It is EPA's job to pick protective cleanup levels, remedies that protect human health and the environment, and to ensure the reduction of risk to acceptable levels. Subsequent to the cleanup, the NRD claim focuses on actions necessary to restore or replace resources that were injured by contamination. CERCLA directs trustees to act on behalf of the public to restore, replace, or acquire the equivalent of injured natural resources. Trustees would be neglecting their fiduciary responsibilities if they did not pursue actions that would restore or replace the public's natural resources. If the continuing presence of contaminants after cleanup affects natural resources, in choosing a restoration plan the trustees could face the same constraints as EPA in selecting restoration actions, including technical feasibility and cost effectiveness.

PREPARED STATEMENT OF LARRY L. LOCKNER, ON BEHALF OF THE AMERICAN PETROLEUM INSTITUTE

The American Petroleum Institute (API) strongly supports reform of the Superfund program. Comprehensive reform of Superfund is important to accomplish during this Congress; a mere refunding of the program is insufficient. API members believe that S. 8, the "Superfund Cleanup Acceleration Act of 1997," incorporates many important and necessary reforms to the program. It is an appropriate vehicle to continue the Superfund reform process.

Petroleum companies—as community members, as potentially responsible parties (PRPs), and as taxpayers—will be greatly affected by the changes that Congress elects to make to the Superfund program. Moreover, the petroleum industry has a unique perspective with regard to Superfund. It is estimated that the petroleum industry is responsible for less than 10 percent of the contamination at Superfund sites; yet the industry has historically paid over 50 percent of the taxes that support the Trust Fund. This inequity is of paramount concern to API members and has caused the industry to focus on those elements that affect the costs of the program and the authorized uses of the Trust Fund.

When Superfund was enacted in 1980, Congress envisioned a program that would cost $1.6 billion and be complete within 5 years. Almost 17 years later, however, billions have been spent, but relatively few sites on the National Priorities List (NPL) have been cleaned up. The program appears to be without end.

API members are pleased that the Senate bill would reduce the number of sites to be added to the NPL and commend the sponsors for taking this important step. Limiting new additions to the NPL ensures a more reasoned Federal program with reduced future funding requirements. Additionally, we support the bill's provisions that would delegate Superfund remedial authority to the States at non-Federal NPL sites. In general, the States have well established programs and have demonstrated capability at cleaning up sites. We urge subcommittee members to add provisions to the bill limiting the Federal program to emergency removal actions at newly discovered sites.

The following sections of this testimony provide specific comments on liability/funding reform, remedy selection, natural resource damages as well as exploration and production wastes.

LIABILITY/FUNDING REFORM

API member companies support liability reform. Reform in this area will expedite cleanups and reduce transaction costs. Clearly, under current law, too much money is wasted on high legal costs. However, as an industry that has borne a highly disproportionate share of the taxes that support the Trust Fund, the petroleum industry is concerned about the impact that any liability changes would have on program costs.

At this point, we do not know how much the liability reform outlined in S. 8 will cost. For example, under the liability provisions contained in S. 8, the Fund would pick up orphan-share costs as well as post-enactment response costs at co-disposal landfills for generators, transporters, and arrangers who contributed wastes prior to January 1, 1997. Moreover, municipal owners' and operators' liability would be capped at such landfills. In addition, *de micromis*, *de minimus* parties and others would be exempt.

We need to understand whether the cost savings associated with the remedy selection and the administrative-process provisions are sufficient to offset the additional costs arising from the shift in liability from PRPs to the Fund or, whether the program as envisioned under S. 8, would place increased demands on the Fund.

As the largest group of taxpayers to the Fund—which is expected to cover most of the future costs of the Federal Superfund program—API members cannot conclude their evaluation of the legislation without fully understanding these cost ramifications.

Without substantial reform of the underlying Superfund program and the tax system supporting the fund, API opposes authorization of any Superfund taxes. It is critical that Congress restructure the taxes that support the Fund. Superfund sites are a broad societal problem, and taxes raised to remediate these sites should be broadly based rather than focused on specific industries.

EPA has found wastes from all types of businesses at most hazardous waste sites. As consumers, as residents of municipalities, and as residents and taxpayers of a nation, our entire economy benefited in the pre-1980 era from the lower cost of handling waste. To place responsibility for the additional costs resulting from retroactive CERCLA cleanup standards on the shoulders of a very few industries when previous economic benefits were widely shared is simply unfair.

The additional costs to the Fund from exempting parties from liability must be offset by other reform measures including remedy selection reform. Thus, API offers the following comments on several additional reform provisions.

REMEDY SELECTION REFORM

API members have long advocated remediation standards that are site-specific and risk-based. The remediation process should provide protection of human health and the environment through methods that are practical and achievable in a cost-effective fashion. The remedy reform measures contained in the S. 8 largely reflect these attributes, and API members endorse many of the approaches taken in the bill. Specifically, API members support the provisions in S. 8 that would:

- Eliminate the preference for permanence and treatment (a major factor in delay of cleanups);
- Establish a protective risk range of 10^{-4} to 10^{-6} for all remedies;
- Establish facility-specific risk evaluations;
- Allow PRPs to prepare facility evaluation work plans for sites;
- Establish the reasonableness of cost as a remedy selection criterion;
- Give consideration to future land and water use;
- Consider all remedial alternatives on an equal basis, including engineering and institutional controls; and
- Streamline the current remedy selection process.

API also endorses the use of the remedy selection balancing criteria and is pleased to see that S. 8 would establish the reasonableness of cost as a remedy selection criterion. In selecting a remedy, the incremental benefits of the remedy should justify any additional costs. The balancing criteria are the keystone of the remedy selection process, and API thinks that all remedy selection procedures and applications should be subject to them.

The bill would also allow the use of "applicable" Federal and State laws and State standards in selecting remedial alternatives. In our view, "applicable" laws should be subject to the balancing factors and technical practicalities; otherwise, there will be diminished savings, increased costs and little appreciable benefit to human health and the environment. Clearly, the Fund should pay for remediation only when applicable laws have been subject to the balancing criteria.

Finally, the bill requires protection of uncontaminated groundwater and restoration of contaminated groundwater. It needs to be made clear that the requirement to protect or restore groundwater is subject to the balancing criteria and considers natural attenuation or biodegradation.

API's detailed comments on the remedy selection provisions contained in S. 8 are outlined in an attachment to this testimony.

NATURAL RESOURCE DAMAGES (NRD)

API is an active member of the Coalition for Legislative NRD Reform and strongly supports the coalition's positions and testimony they may submit. API believes that legislation should confirm and clarify existing statutory limitations on liability for natural resource damages. API's five core principles with respect to NRD reform would:

- Reestablish the focus of the NRD program on restoring the functions of public natural resources in the most cost-effective manner;
- Eliminate liability for damages in excess of the reasonable costs of restoration (i.e., so-called "lost use" and "non-use" damages);
- Clarify NRD limitations adopted in 1980 to provide
  - prospective application of NRD,

• a $50 million cap on recoveries,
• prohibition of double recovery;
• Repeal the rebuttable presumption by requiring the courts to treat NRD claims in the same manner as other damage claims; and
• Require consistency between the environmental component of remedy selection and the NRD program.

API is pleased that many of these provisions are addressed in the bill. We are concerned, however, that the bill does not clarify the strict $50-million cap on recoveries that Congress intended when CERCLA was originally enacted.

EXPLORATION AND PRODUCTION WASTE

API believes that the exploration and production waste language in the law needs clarification. Some court opinions have misinterpreted congressional intent to exempt high volume, low-toxicity wastes, which EPA has determined do not need to be treated as hazardous wastes. Congress should clarify that these wastes are excluded under Superfund.

CONCLUSION

In summary, API commends members of the Subcommittee for their efforts to craft and to advance meaningful Superfund reform. The cost constraining measures contained in S. 8 are fundamental, and any weakening of these provisions may jeopardize Superfund reauthorization. We believe it is important that the reauthorization process continue, and we look forward to working with subcommittee members to accomplish this goal. We would like to provide additional comments to staff as we continue our review of the bill

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ATTACHMENT: COMMENTS ON REMEDY SELECTION PROVISIONS

PROTECTION OF HUMAN HEALTH

• The bill says that a remedial action shall be considered to protect human health if a residual risk from exposure to threshold carcinogenic and noncarcinogenic hazardous substances does not exceed a hazard index of 1. This is overly prescriptive. API recommends using the wording "shows no appreciable risk of deleterious effects" as opposed to a specific index number.

STATE APPLICABLE STANDARDS

• The bill allows for the application of more stringent State standards. States should have the flexibility to impose—where appropriate—less stringent State standards.
• States may apply more costly remedies at delegated NPL sites but should not be able to recover incremental costs from PRPs, other agencies, or the Fund.
• Waiver provisions are established where the Administrator determines that it is not appropriate for a remedial action to attain a Federal or State standard. Historically, waivers have been difficult to obtain. Rather than being established as conditions for a waiver, these provisions should be set out as conditions where Federal and State standards would not apply.
• New State laws that may create standards with general applicability should be subject to a rulemaking process.

LAND AND WATER USE CONSIDERATIONS

• In determining reasonably anticipated future land use, the appropriate local authority should consult with the broadest spectrum of stakeholders including facility owners and operators as well as potentially responsible parties.
• Governmental units would determine the reasonably anticipated future use of water resources. A broad group of stakeholders including CROs and PRPs should be consulted in this process.

GROUNDWATER

• The bill would require protection of uncontaminated groundwater that is suitable for use as drinking water by humans or livestock. The term livestock should be deleted because it would require regulation of extremely saline groundwater that could not be consumed by humans.
• The bill also needs to make clear that the requirement to protect uncontaminated groundwater or restore contaminated groundwater is subject to the balancing criteria and considers natural attenuation or biodegradation.

• The bill requires contaminated groundwater to be restored if technically practicable. Does technical practicability include cost considerations?

JUDICIAL REVIEW

• Provisions should be made that would allow pre-enforcement judicial review.

RISK ASSESSMENTS

• The bill establishes requirements for facility-specific risk evaluations. Such requirements are supported by API members.
• The bill should also include language to clarify that facility-specific risk evaluations are tiered. A full risk assessment may be unnecessary at every site.
• Additionally, the bill should make clear that PRPs have the right to conduct risk assessments in States with comprehensive delegation authority.

ROD REOPENERS

• API supports the concept of reviewing proposed remedies and previously negotiated RODs as expressed in the bill. However, qualifications for members of the remedy review board and PRP participation must be clarified.

PRESUMPTIVE REMEDIAL ACTIONS

• A PRP should have the right to conduct a risk-based response action in lieu of a presumptive remedy.

FUTURE USE OF A FACILITY

• The bill provides that a facility deemed suitable for unrestricted use would be subject to no further liability while a facility available for limited use would be reviewed every 5 years and potentially required to conduct additional remedial action. A facility available for reuse of any type should be subject to no further liability or review; otherwise the bill may have a negative impact on brownfield programs.

RESPONSES OF THE AMERICAN PETROLEUM INSTITUTE TO ADDITIONAL QUESTIONS FROM SENATOR SMITH

Question 1. One of the criticisms raised about S. 8 is that 180 days is an insufficient amount of time for EPA to decide whether to approve or disapprove of a cleanup plan prepared by a PRP. Do you agree? Would a delay longer than this be an acceptable practice in private industry?

Response. API believes that the 180-day provision for Agency review of a cleanup plan is reasonable. The focus of S. 8 is to streamline and to improve the efficiency of remediation. Limiting EPA's review of cleanup plans to 180-days helps achieve this goal. Since EPA is involved in reviewing each step of the remediation planning process (including the work plan and facility evaluation) prior to review of the remedial action plan, API believes that a 180-day review period is sufficient. Moreover, cleanups reviewed by the Remedy Review Board are subject to a 180-day (or longer) review period in addition to the EPA 180-day review period. To extend the review any longer would unduly delay the remediation process.

Question 2. You have stated that S. 8 should be modified to address the issues of exploration and production wastes. Could you expand on that position.

Response. API members believe that the statutory language relating to exploration and production (E&P) waste should be clarified during Superfund reauthorization. E&P waste currently is exempt by reason of its exemption from RCRA subtitle C regulation. After an extensive study, EPA confirmed the exemption because generally such waste is high in volume but low in toxicity and poses little or no threat to human health and the environment when properly managed. The current regulation of E&P waste and waste sites under Federal and State authority is effective and efficient. State oil and gas regulators have developed programs to address abandoned E&P sites. Additionally, the Interstate Oil and Gas Compact Commission, working with EPA, has developed guidance for these State programs.

The complexity of the manner in which the exemption is stated has raised litigation issues at a number of sites, and clarifying the law would help minimize such litigation. As a practical matter, without the E&P waste exclusion under CERCLA, existing regulatory agencies and emergency response authorities would be overwhelmed by the reporting of routine operations already controlled by State programs.

We would be happy to meet with you to discuss the intricacies of this issue and API's position.

Question 3. Do you believe that the allocation system in S. 8 will help to eliminate some of the unnecessary litigation at these sites?

Response. The allocation system in S. 8 creates so many litigation disincentives that it would, as a practical matter, virtually eliminate PRP litigation challenging the allocation. While we believe that excessive litigation could impede the cleanup process, we do not agree that all litigation is unnecessary. The judicial system provides checks and balances to Agency action by ensuring that the allocation process is applied equitably. Penalties which have the practical effect of prohibiting PRPs from exercising their right to seek judicial review should be eliminated.

Question 4. I would like to get your position on the ROD reopener provisions contained in S. 8. Do you think that these provisions are too expansive and will result, as some would suggest, in virtually every ROD being reopened?

Response. APl believes that the ROD reopener provisions in S. 8 are already subject to numerous checks and balances. Rods can only be reopened if specified cost saving are achieved and the ROD satisfies the remedy selection criteria in S. 8. Moreover, State Governors can veto a ROD reopener if they think such an action will cause unreasonable delay and adversely affect human health and the environment or cause a disruption of planned future use of the site. In fact, in our opinion, there may be circumstances where the ROD reopener provisions need to be made more flexible.

PREPARED STATEMENT OF
TOM UDALL
ATTORNEY GENERAL OF NEW MEXICO
HEARING ON THE PROPOSED
SUPERFUND CLEANUP ACCELERATION ACT OF 1997 (S. 8)
BEFORE THE SUBCOMMITTEE ON
SUPERFUND, WASTE CONTROL, AND RISK ASSESSMENT
OF THE SENATE COMMITTEE ON
ENVIRONMENT AND PUBLIC WORKS

Presented by Charles de Saillan
Assistant Attorney General
March 5, 1997
9:30 AM

INTRODUCTION

Mr. Chairman, members of the Subcommittee: I am Tom Udall, Attorney General of New Mexico. I am Immediate Past President of the National Association of Attorneys General ("NAAG"). I am also a member of the NAAG Environment and Energy Committee and Legislative Subcommittee. I appreciate the opportunity to appear before you today on behalf the State of New Mexico and provide our views on Senate Bill 8, the proposed Superfund Cleanup Acceleration Act of 1997 ("SCAA" or "S. 8"),[1] which would amend and reauthorize the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), commonly known as Superfund. This proposed legislation is of extreme importance to the State of New Mexico, and to many of the state attorneys general.

The Superfund program has recently been criticized as a failed program. I disagree with that characterization. The Superfund program has accomplished a great deal, in New Mexico and nationwide. Fifteen years ago, the problem of uncontrolled

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[1] S. 8, 105th Cong., 1st Sess. (Jan. 28, 1997) (hereinafter S. 8).

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hazardous waste sites was frighteningly pervasive. Today, the immediate threats have been eliminated at virtually all of the 1300 or so sites on the National Priorities List ("NPL"), and at most of these sites cleanup is well underway.

A. *The Interests of the Attorneys General*

The state attorneys general have a major interest in Superfund reauthorization legislation. As chief legal officers of our respective states, we have a duty to ensure that the laws of our states are complied with. We are necessarily concerned that the health and welfare of our citizens are protected, and that our environment and natural resources are preserved and restored.

Moreover, many steps in the CERCLA cleanup process necessarily involve legal issues. Throughout the process, we are called upon to advise our client agencies -- both response agencies and natural resource trustee agencies -- on how the law should be interpreted, and how the law can be implemented to achieve the desired cleanup or restoration goals. We are also responsible for negotiating settlements. Most of the progress we have made under CERCLA has been through negotiated settlements, either consent decrees filed in federal district court or administrative orders on consent. When a settlement can not be reached, it then becomes our responsibility to commence and litigate an enforcement action. We have considerable experience in CERCLA litigation. Finally, we must sometimes defend a state agency when it is a responsible party under CERCLA.

For these reasons, the state attorneys general have been actively involved in the CERCLA reauthorization process since it began in the 103rd Congress. Last year my colleague, Christine Gregoire, Attorney General of the State of Washington, testified before the full Committee on S. 1285, an earlier version of Superfund reauthorization legislation.[2] Joe Mazurek, Attorney General of Montana, also submitted written comments on the natural resource damage provisions of that bill.[3] In addition, the leadership of NAAG's Environment and Energy Committee submitted detailed comments on the legislation.[4] I fully support

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[2] *Accelerated Cleanup and Environmental Restoration Act: Hearings on S. 1285 Before the Senate Comm. on Environment and Public Works*, 104th Cong., 2d Sess. 592 & 695 (1996) (statement of Washington Attorney General Christine O. Gregoire).

[3] *Id.* at 712 (statement of Montana Attorney General Joseph P. Mazurek).

[4] Letter from Washington Attorney General Christine O. Gregoire, New Jersey Attorney General Deborah T. Poritz, and

the positions that my colleagues have stated in correspondence with and hearings before this Committee.

This year, we are pleased to note that many of our concerns have been addressed and several of our suggestions have been adopted in S. 8. We greatly appreciate the Subcommittee's consideration of our comments. We strongly support certain aspects of S. 8, and we believe it is a significant improvement over S. 1285. Nevertheless, we continue to have many serious concerns with S. 8.

B. *Overall Concerns*

Before moving on to detailed comments on S. 8, we want to raise two overall concerns with the bill from New Mexico's perspective.

Our first overall concern is the bill's length and complexity. S. 8 is 259 pages long. It would completely rewrite CERCLA. The cleanup standards, the remedy selection process, the liability scheme, and the natural resource damage provisions, are all changed radically and in innumerable ways. Yet every change in the law will need to be interpreted, first by the implementing agency, and second, in many instances, by the courts. The result, we fear, will be the shifting of limited agency resources from cleanup to writing regulations and guidance; the nullification of fifteen years of hard-fought judicial precedent; more litigation and transactions costs; and further delays in cleanup. We strongly urge the Subcommittee to focus on those provisions of CERCLA that truly need revision, and to draft narrow, concise, straightforward legislation to put those revisions into place.

Our second overall concern is the bill's general weakening of the standards for protection of groundwater. We cannot emphasize enough the importance of groundwater resources, especially for arid states like New Mexico. Let me illustrate my point with an example. The City of Albuquerque, New Mexico lies in the Middle Rio Grande Valley atop a large alluvial aquifer. The aquifer, which is the sole source of drinking water for the City, was once thought to be an inexhaustible resource. We now know that we are effectively mining the aquifer; the water table is receding at a rate of approximately one foot per year. At the current rate of consumption, the City will soon run out of water -- literally.

Not only do we have a supply problem, we also have a contamination problem which exacerbates the supply problem. We have several Superfund sites in the Albuquerque valley, and scores of other, smaller sources of groundwater contamination.

Minnesota Attorney General Hubert H. Humphrey III to Senator John Chafee (Feb. 27, 1996).

Occasionally, the responsible parties maintain that they should not be required to clean up the contamination problems that they created, that natural attenuation or dispersion will eventually solve the problem. We find such a position unacceptable. Only two weeks ago, the State of New Mexico, together with the City of Albuquerque and Bernalillo County, took the unfortunate but necessary step of filing a lawsuit against one such responsible party.[5] As we state in our complaint, the defendant is responsible for a huge plume of trichloroethylene ("TCE") contamination, extending at least one-half mile from the facility, and containing TCE concentrations at more than 300 times the drinking water standard. Obviously, we can not simply "write-off" this aquifer.

We are very concerned that the provisions of S. 8 would weaken our commitment to protection of our groundwater resources. Similar provisions will find their way into other state and federal environmental laws. Responsible parties will be emboldened to litigate, relying on the weaker standards. It will become increasingly difficult for us to protect our precious groundwater resources such as the Albuquerque aquifer.

Our comments on the specific provisions of S. 8 follow. Although we have attempted to be fairly comprehensive, we do not address every issue we have identified in the bill. We anticipate providing you and your staff with more extensive and detailed comments, including proposed revisions to the bill, in the coming weeks.

I. BROWNFIELDS REVITALIZATION (TITLE I)

We support the concept of encouraging the use and development of abandoned industrial sites, or so-called "brownfields."

II. STATE ROLE (TITLE II)

We strongly favor the delegation of Superfund authorities to qualified states, as we have stated previously.[6] S. 8 would

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[5] *City of Albuquerque v. Sparton Technology, Inc.*, No. CIV-97-0206-LH (D.N.M. filed Feb. 19, 1997); *New Mexico v. Sparton Technology, Inc.*, No. CIV-97-0208-JC (D.N.M. filed Feb. 19, 1997).

[6] *E.g., Hearings on S. 1285, supra* note 2, at 696-97 (statement of Washington Attorney General Christine O. Gregoire); letter from Washington Attorney General Christine O. Gregoire, New Jersey Attorney General Deborah T. Poritz, and Minnesota Attorney General Hubert H. Humphrey III to Senator John Chafee 2 (Feb. 27, 1996); letter from New Jersey Attorney General Deborah T. Poritz to Senator Robert C. Smith, signed by 43 attorneys general, at 2 (Apr. 27, 1995).

provide for such delegation, and we are generally pleased with the bill's relatively streamlined delegation process. We strongly support that aspect of the bill. However we have several comments on the details of the state role title.

A. *Delegation Process*

Section 201(a) of SCAA would provide for EPA to delegate CERCLA authorities to qualified states.[7] The delegation provisions would afford states considerable flexibility to receive comprehensive delegation, delegation for particular sites, or delegation for certain phases of cleanup.

We support the bill's flexibility. We nevertheless have some comments on these provisions. First, although the bill includes a variety of delegation options, it does not expressly allow delegation of a portion of a Superfund site, such as an operable unit. Such an approach would allow federal and state agencies to make the most efficient use of their collective resources.

Second, and most importantly, the bill does not provide for authorization of a state program as an alternative to delegation. Other federal environmental statutes, such as RCRA,[8] allow EPA to authorize qualified states to implement their own program in lieu of the federal program.[9] Authorization would allow states with successful, effective cleanup programs to implement those programs at all sites, including NPL sites, within their borders. Last year, we proposed statutory language providing for state authorization for the Committee's consideration.[10] We continue to recommend such a provision.

B. *Preemption of State Law*

Section 201(a) of SCAA would require a state that has received partial delegation to perform its delegated authority "in the same manner" as would EPA.[11] It would allow a state that has received comprehensive delegation to select a remedial action that is more costly than that required under the revised remedy

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[7] S. 8 § 201(a) (proposed § 130 of CERCLA).

[8] The Resource Conservation and Recovery Act, formally called the Solid Waste Disposal Act, 42 U.S.C. § 6901-6992k.

[9] RCRA § 3006(b), 42 U.S.C. § 6926(b).

[10] Letter from Washington Attorney General Christine O. Gregoire, New Jersey Attorney General Deborah T. Poritz, and Minnesota Attorney General Hubert H. Humphrey III to Senator John Chafee 1-3 (Feb. 27, 1996).

[11] S. 8 § 201(a) (proposed § 130(d)(3)(A) of CERCLA).

selection provisions, provided that the state pays the incremental costs of the remedy.[12] Moreover, such a state would be precluded from recovering those costs under CERCLA or any other state or federal law.[13]

We object to these provisions, which we view as inappropriately preempting state law. These provisions are particularly troublesome for those states that are most likely to qualify for delegation because of their demonstrated success in implementing their own cleanup programs. These state cleanup programs have succeeded based upon remedy selection and liability provisions chosen by the states to meet the needs and desires of their citizens for adequate protection of health, safety and the environment -- areas in which states have traditionally exercised significant authority. These programs are fully capable, as currently implemented, to take over cleanup of NPL sites. Requiring states with highly successful cleanup programs to change their liability and cleanup standards to fit the federal mold is both unnecessary and wasteful.

III. COMMUNITY PARTICIPATION (TITLE III)

Although NAAG has not taken a position on this issue, we in New Mexico generally support efforts to increase public participation in the Superfund process. We support statutory provisions for the establishment of community response organizations. We also support expanding the program for technical assistance grants. We are concerned, however, that the community participation provisions are much too complex. Because community groups have very limited financial and legal resources, the provisions of this title should be especially simple and straightforward. We urge the Subcommittee to greatly simplify the community participation provisions.

IV. SELECTION OF REMEDIAL ACTIONS (TITLE IV)

Although NAAG has not taken an official position on remedy selection issues, we in New Mexico are very concerned that the proposed remedy selection provisions of S. 8 would result in cleanups that are less than adequate to protect public health and the environment. We are particularly concerned over how these provisions would apply to groundwater cleanups. We strongly urge the Subcommittee to reconsider these proposals.

A. Remedy Selection Standards

Perhaps no other part of the bill represents such a complete rewrite of CERCLA as does Title IV. Sections 121(a), 121(b), and 121(d) of current law would be stricken in their entirety. They

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[12] S. 8 § 201(a) (proposed § 130(d)(3)(B)(ii)(I) of CERCLA).

[13] S. 8 § 201(a) (proposed § 130(d)(3)(B)(ii)(II) of CERCLA).

would be replaced by a very complex, confusing, and lengthy new subsection. The result would be a great deal of uncertainty and disagreement, and new rounds of transaction costs incurred in interpreting the new provisions.

1. **General Cleanup Standards.** The bill requires remedial actions to be selected based on a multiplicity of different and potentially conflicting criteria. Under section 402 of SCAA,[14] a remedy must meet the goals of protecting human health and the environment as set forth in one provision of the bill; comply with applicable federal and state laws as set forth in another provision of the bill; be based on a facility-specific risk evaluation as set forth in another provision of the bill; be based on the remedy selection criteria set forth in another provision of the bill; and meet the requirements on technical impracticability set forth in yet another provision of the bill. Additionally, the remedy must be based on actual or planned or reasonably anticipated future land use as set forth in still another provision of the bill.

These provisions are very poorly integrated and terribly convoluted. Meeting all these assorted requirements would place an enormous burden on the decisionmaker. Even more troubling, there is no way to resolve the inevitable conflicts among the various requirements. For example, applicable state cleanup standards might require cleanup of contaminated soil to one level, while a facility-specific risk assessment might mandate a very different level. Similarly, applicable state standards might require cleanup of groundwater to a certain level regardless of its actual or anticipated use. Which of the bill's requirements would control in these and countless other situations? Emphatically, the result of these provisions would *not* be to streamline the cleanup process, contrary to one of the primary goals of reauthorization which we all share.

2. **Consideration of Costs.** Section 402 of the bill would require selection of "*a* cost-effective remedial action."[15] We agree that remedial actions should be cost-effective, as is required under current law.[16] The bill's requirement is a significant improvement over S. 1285, which required selection of "*the most* cost effective remedial action," language that we opposed. We appreciate the Subcommittee making this revision.

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[14] S. 8 § 402(1) (proposed § 121(a)(1)(A) of CERCLA).

[15] S. 8 § 402(1) (proposed § 121(a)(1)(A) of CERCLA).

[16] CERCLA § 121(a), 42 U.S.C. § 9621(a) ("The President shall select appropriate remedial actions . . . which provide for cost-effective response").

However, the bill would eliminate from current law the requirement for consideration of the potential for future remedial action costs if the remedial action fails.[17] Moreover, the bill does not clearly require consideration of life cycle costs, including long-term operation and maintenance.[18] We are concerned that the bill would place too much emphasis on short-term costs, without providing for adequate consideration of long-term costs. This concern is magnified by the bill's increased reliance on "institutional and engineering controls" -- meaning containment remedies (discussed below) which have greater long-term costs.

3. Consideration of Future Land Use. Sections 402 and 403 of the bill provide for consideration of the "actual or planned or reasonably anticipated future use of land or water resources" in remedy decisions. We are puzzled, however, as to how this consideration would be applied under the bill. It is not clear whether the provision is intended to be a controlling factor in selecting remedial actions, or simply another factor that the decisionmaker must consider and balance against other competing factors.

We believe that future land use should be a factor in selecting remedial actions, but not a controlling one. The statute should not require that all cleanup decisions be strictly based on the most probable future land use. EPA, or a delegated state agency, should be allowed the flexibility to consider less likely but plausible future land uses. The Love Canal property, it should be remembered, was used for the disposal of some 22,000 tons of chemical waste in the 1940's and 1950's, yet it eventually became a residential neighborhood and public school.[19] EPA or a state agency should also be allowed to compare the relative costs of more complete cleanup free of any institutional controls versus the costs of a less complete cleanup necessitating long-term institutional controls. Otherwise, an inflexible requirement might prohibit EPA or a state agency from conducting a more stringent cleanup even when the added cost of doing so was limited, the cost of maintaining long-term oversight was substantial, and the risk that institutional controls might

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[17] CERCLA § 121(b)(1)(F), 42 U.S.C. § 9621(b)(1)(F).

[18] *See* CERCLA § 121(b)(1)(E), 42 U.S.C. § 9621(b)(1)(E).

[19] *United States v. Hooker Chems. & Plastics Corp.*, 722 F. Supp. 960, 961-62 (W.D.N.Y. 1989).

fail was significant.[20]

4. Containment Versus Treatment. Section 402 of SCAA would completely eliminate the preference for remedial actions that treat hazardous substances to "permanently and significantly reduce the volume, toxicity or mobility of" such substances, as required under current law.[21] The bill omits any provisions for treatment even for "hotspots," a provision included in the 1994 bill.[22] The bill further discourages treatment remedies by expressly requiring remedial actions based on "institutional controls" and "engineering controls" -- meaning containment remedies -- to be considered on an equal basis with treatment remedies.[23]

Congress added the preference for treatment remedies in the 1986 SARA amendments.[24] Congress then recognized that containment remedies, such as caps, liners, and slurry walls designed to contain hazardous substances in place, often do not work.[25] As Senator Chafee noted at the time, "a major goal" of these 1986 provisions was to "establish a statutory bias toward the implementation of permanent treatment technologies and permanent solutions whenever they are feasible and achievable."[26]

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[20] *See* George Wyeth, *Land Use and Cleanups: Beyond the Rhetoric*, 26 ENVTL. L. RP. 10,358 (July 1996).

[21] CERCLA § 121(b), 42 U.S.C. § 9621(b).

[22] S. 1834, 103d Cong., 2d Sess. § 502 (Aug. 19, 1994).

[23] S. 8 § 402(1) (proposed § 121(a)(5) of CERCLA).

[24] The Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (Oct. 17, 1986).

[25] In 1985 the Congressional Office of Technology Assessment criticized EPA for showing "a consistent bias toward containing waste," although "[c]ontainment structures can only temporarily reduce the inflow of water into the waste or retard the migration of contaminants from the site." Congressional Office of Technology Assessment, Superfund Strategy 226-27 (Apr. 1985). Similarly, in 1986, the General Accounting Office reported on several findings of serious problems with containment technologies. General Accounting Office, EPA's Consideration of Permanent Cleanup Remedies 9-10 (GAO/RCED-86-178BR) (July 7, 1986).

[26] 132 CONG. REC. 28,438 (Oct. 3, 1986) (statement of Sen. Chafee).

We believe it would be inappropriate to place remedies that merely contain hazardous substances, or that limit access to hazardous substances with a fence or a deed restriction, on equal footing with remedies that actually clean up hazardous substances. Clearly, total and permanent elimination or immobilization of hazardous substances is of far greater benefit to the local community and to society at large. The environment is restored, future health threats are eliminated, and property is opened up for development or other useful purposes. These benefits must be taken into consideration.

Furthermore, containment remedies require greater expenditures for long-term monitoring and operation and maintenance than do treatment remedies. Containment remedies are much more prone to failure than treatment remedies, as Congress recognized even in 1986. We fear that years after this bill is passed, when the Superfund program has been phased out of existence and the responsible parties have left town or gone out of business, the states will be left to bear the brunt of the costs of monitoring, of operation and maintenance, and of repairing many failed containment remedies.

5. **Protection of Human Health.** The bill would substantially rewrite current law on protection of human health. Section 402 of the bill provides that a remedial action must protect human health by reducing the risk from nonthreshold carcinogenic hazardous substances to a one in 10,000 to one in 1,000,000 (10^{-4} to 10^{-6}) lifetime cancer risk,[27] and reducing the risk from threshold carcinogenic and noncarcinogenic hazardous substances to a hazard index not exceeding one.[28] This provision would seriously weaken the standards for protection of human health as compared to current law set forth in the 1990 National Contingency Plan ("NCP").

The NCP provides that risk from known *or suspected* carcinogens should be reduced to a one in 10,000 to one in 1,000,000 lifetime cancer risk, and that the one in 1,000,000 risk level "shall be used as the point of departure."[29] The NCP also provides that risk from noncarcinogens should be reduced so that "the human population, including sensitive subgroups, may be exposed without adverse effect . . ., incorporating an adequate margin of safety."[30] Moreover, these standards apply *in addition*

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[27] S. 8 § 402(1) (proposed § 121(a)(1)(B)(i)(I) of CERCLA).

[28] S. 8 § 402(1) (proposed § 121(a)(1)(B)(i)(II) of CERCLA).

[29] 40 C.F.R. § 300.430(e)(2)(i)(A)(*2*).

[30] 40 C.F.R. § 300.430(e)(2)(i)(A)(*1*).

to applicable or relevant and appropriate requirements ("ARAR's") which are often more protective.[31]

The result of this amendment, we fear, will be that the one in 10,000 risk level for carcinogens will normally be applied; the effects of suspected carcinogens will not be considered; a less protective standard for noncarcinogens will be applied; the effects of noncarcinogens on sensitive subgroups, such as children and pregnant women, will not be considered; and no margin of safety for noncarcinogens will be incorporated. Consequently, remedial actions will be selected that are much less protective of human health.

6. Protection of the Environment. The bill states in much simpler terms the goal of protection of the environment than did S. 1285. It provides that a remedial action must protect the environment by protecting ecosystems from significant threats to their sustainability resulting from releases of hazardous substances.[32] We appreciate that the Subcommittee has deleted from S. 8 the various confusing and circular definitions of "ecosystem" contained in S. 1285,[33] as we had suggested.

7. Protection of Groundwater. The bill's goal for protection of groundwater actually does little to protect groundwater *per se*. It provides that a remedial action must protect groundwater by preventing or eliminating "actual human ingestion" of water contaminated with hazardous substances in excess of maximum contaminant levels set under the Safe Drinking Water Act.[34] This goal addresses protection of human health, not protection of groundwater; groundwater could remain severely contaminated so long as no one drinks it.

8. Compliance with Applicable Laws. Section 402(1) of SCAA would require remedial actions to comply with the substantive requirements of all applicable state and federal environmental and facility siting laws.[35] The bill would also eliminate from current law the requirement that remedial actions comply with all "relevant and appropriate requirements."[36]

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[31] 40 C.F.R. § 300.430(e)(2)(i)(A).

[32] S. 8. § 402(1) (proposed § 121(a)(1)(B)(ii) of CERCLA).

[33] S. 1285, 104th Cong., 2d Sess. § 401 (Mar. 21, 1996) (proposed § 101(43)-(47) of CERCLA).

[34] S. 8 § 402(1) (proposed § 121(a)(1)(B)(iii) of CERCLA).

[35] S. 8 § 402(1) (proposed § 121(a)(1)(C)(i) of CERCLA).

[36] CERCLA § 121(d)(2)(A), 42 U.S.C. § 9621(d)(2)(A).

Further, the bill would eliminate from current law the requirement that remedial actions attain cleanup of groundwater to maximum contaminant level goals ("MCLG's") set under the Safe Drinking Water Act and water quality criteria set under the Clean Water Act.[37]

We are very pleased that the bill retains applicable state and federal requirements, which we view as a major improvement over S. 1285 as it was originally introduced.[38] We generally do not object to the elimination of "relevant and appropriate requirements," which would serve to streamline the remedy selection process. We are very troubled, however, by the elimination of the requirement in current law that cleanup must attain MCLG's and water quality criteria. MCLG's, and the less stringent maximum contaminant levels ("MCL's") also set under the Safe Drinking Water Act, are drinking water standards, not cleanup standards. Water quality criteria similarly are not cleanup standards. Thus, although these standards and criteria are relevant and appropriate, they are not clearly applicable. Under the bill, MCL's and MCLG's would not govern groundwater remediation, and water quality criteria would not govern surface water remediation, unless they were adopted as cleanup standards under state law. We believe this is a serious flaw in the bill.

In addition, as explained above, it is not clear how the requirement for compliance with applicable standards meshes with the requirement for a facility-specific risk assessment, or the requirement to consider future land use. If, for example, cleanup levels determined by a risk assessment would preempt any conflicting applicable cleanup standards, we would strongly object.

9. State Acceptance. Section 402 of the bill lists several factors to be considered in remedy selection.[39] Although the listed factors include acceptance of the remedial action by the affected community, they do not include acceptance by the state. Under current law, acceptance by both the community and

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[37] *Id.*

[38] See S. 1285, 104th Cong., 1st Sess. § 402(1) (Sept. 29, 1995)
(proposed section 121(a)(5) of CERCLA), which provided that a remedial action "shall not be required to attain any standard that . . . would be legally applicable under any other Federal or State law."

[39] S. 8 § 402(1) (proposed § 121(a)(1)(D) of CERCLA).

the state are factors to be considered in remedy selection.[40] We see no reason for this omission; we believe state acceptance should be retained as a factor.

10. Technical Impracticability. The bill would add several new provisions governing the determination that a remedial action is technically impracticable to implement. Many of these provisions apply particularly to remediation of contaminated groundwater. Most significantly, for groundwater remedies the bill would require that technical impracticability be determined, prior to implementation of the remedy, based on projections or modelling.[41]

We are concerned that this provision will foreclose taking any action to reduce groundwater contamination if a modelling study shows that it is technically impracticable to attain applicable cleanup standards. Under current law, EPA generally makes a finding of technical impracticability of a groundwater remedy only after a "pump and treat" remedy has been largely implemented and contaminants have been reduced to asymptotic levels -- that is, until continued pumping no longer appreciably reduces contaminant concentrations. Such levels are usually much lower than the original concentrations. Under the bill's provisions, EPA or a delegated state would make an initial finding of technical impracticability and no further cleanup would be required. Moreover, the provision seems inconsistent with other provisions of the bill, that require EPA to select a technically practicable remedy that most closely achieves cleanup standards.[42]

11. Groundwater. As with the general standards for remedy selection, section 402 of the bill provides a multitude of poorly integrated and potentially conflicting standards for groundwater remedies.[43] In many cases, it would be virtually impossible to comply with all of the bill's cleanup requirements.

Furthermore, although the bill's groundwater provisions represent an improvement over S. 1285, we are nevertheless *very* concerned that the bill would fail to adequately protect groundwater. Several of its provisions are particularly troubling. First, as mentioned above, the bill would eliminate the requirement that groundwater remedies must attain MCLG's, or

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[40] 40 C.F.R. § 300.430(e)(9)(iii)(G) and (H).

[41] S. 8 § 402(1) (proposed § 121(a)(4)(D)(ii)(II) of CERCLA).

[42] S. 8 § 402(1) (proposed § 121(a)(2)(A) of CERCLA).

[43] S. 8 § 402(1) (proposed § 121(a)(4)(A) of CERCLA).

even MCL's. Second, the bill places unnecessary emphasis on natural attenuation, dilution, dispersion, and biodegradation. Third, as also mentioned, the bill allows a finding of technical impracticability for remediation of groundwater contamination to be based merely on modelling, and, once such a determination is made, no measures to reduce the contamination are necessary. Finally, the bill suggests that where restoration of contaminated groundwater is technically impracticable, point-of-use treatment devises -- meaning filters under the sink -- are all that is needed.

12. Five-Year Review. Section 402(2) of SCAA would retain the five-year review requirement in section 121(c) of CERCLA.[44] Under this provision, after implementation of a remedial action which leaves hazardous substances in place, EPA must review the remedy every five years to ensure that human health and the environment are protected. S. 1285 would have extended this the review period to every seven years, and we are pleased that the five-year review period would be retained under S. 8.[45]

B. *Remedy Selection Procedures*

1. Remedial Action Plan. Section 404 of SCAA would completely rewrite the remedy selection procedures in the current NCP.[46] The bill would replace the record of decision process with a "remedial action plan" to be prepared by EPA or presumably an authorized state, or by the potentially responsible parties. It would also seriously limit agency oversight of response actions conducted by responsible parties.

We are quite troubled by these revisions. We do not believe they are necessary. EPA promulgated the current NCP based on considerable public comment and careful consideration. It was largely upheld by the court of appeals.[47] We believe its procedures are working reasonably well. We are concerned that

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[44] 42 U.S.C. § 9621(c).

[45] Significantly, the General Accounting Office recently concluded that EPA's five-year review had discovered and corrected serious problems with a number of remedial actions in the operation and maintenance phase, and that EPA has a significant backlog of such reviews.General Accounting Office, Superfund: Operation and Maintenance Activities Will Require Billions of Dollars 10-11 & Appendix III (GAO/RCED-95-259) (Sept. 29, 1995).

[46] *See* 40 C.F.R. §§ 300.430 and 300.435.

[47] *Ohio v. EPA*, 997 F.2d 1520 (D.C. Cir. 1993).

the bill's revisions would result in unnecessary delay and transaction costs. EPA, state agencies, and remediation contractors would need to learn and interpret the lengthy new rules. EPA would be required to conduct a long and tedious process of wholesale revisions of the NCP. The NCP revisions, unquestionably, would be challenged and litigated.

Moreover, although we recognize that the provisions have been improved somewhat, consistent with our comments on S. 1285, we are still very troubled by the substance of the bill's procedures. It provides that the responsible parties would prepare the remedial action plan by which the remedy is selected.[48] Furthermore, it would significantly limit EPA or state oversight over development and implementation of the remedial action. The bill would limit agency review and approval to the work plan, the "facility evaluation," the proposed and final remedial action plan, and the remedial design.[49] For the most important of these items, the remedial action plan, agency oversight would still be quite limited; the bill provides that the remedial action plan *must* be approved unless it fails to contain certain minimal information, or does not meet the requirements of revised section 121(a).[50] Moreover, if the agency fails to disapprove a proposed remedial action plan within 180 days after it is submitted, it is automatically considered approved.[51]

We continue to object to these provisions. EPA and analogous state agencies have a statutory responsibility to protect the health and environment of their citizens. The responsible parties have no such responsibility; indeed, in many instances the responsible parties' financial interests are inconsistent with protection of health and the environment. Moreover, the responsible parties often are not technically qualified to select the remedial action or to implement it without careful oversight. Further, continuous agency oversight and review enables the responsible parties to work cooperatively with the agency to ensure that the final work plans will be acceptable, thus avoiding costs and delays as unqualified responsible parties are forced to go back to the drawing board.

It is therefore critical in our view that the responsibility to select the remedial action remain with EPA or the authorized

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[48] S. 8 § 404 (proposed § 133(a)(1)(D) of CERCLA).

[49] S. 8 § 404 (proposed § 133(a)(1)(C) of CERCLA).

[50] S. 8 § 404 (proposed § 133(b)(5)(F)(i) of CERCLA).

[51] S. 8 § 404 (proposed § 133(b)(5)(F)(ii) of CERCLA).

state agency, and that responsible party response actions be subject to thorough agency oversight. Moreover, while we do not favor unnecessary delay in selecting remedial actions, we believe it is bad public policy to require that a defective remedial action plan is automatically approved, and may be unilaterally implemented by the responsible party, if the agency does not disapprove it within 180 days.

2. Preenforcement Review. We are very pleased that the bill would retain the bar in current law on preenforcement review.[52] This provision in CERCLA limits litigation and allows remedial actions to proceed expeditiously. We view the retention of this provision as a major improvement over S. 1285, and we appreciate the Subcommittee's consideration of our comments on the issue.

C. *Transition*

Section 406 of the bill would require EPA to reopen final remedy decisions made prior to the bill's enactment, and to re-examine such decisions applying the bill's new remedy selection standards.[53] The bill would require EPA to reopen decisions for sites for which the Record of Decision ("ROD") has been signed; sites for which the remedial design has been completed; and, under certain circumstances, even sites for which the construction has been completed and operation and maintenance is underway.

We are very troubled by this requirement. It would divert EPA resources to reviewing remedial decisions at a great many sites for which a ROD has been signed but the remedy is not yet complete. The requirement would also delay cleanup at many of these sites. In New Mexico, for example, which has thirteen NPL sites, cleanup for at least three of those sites would likely be delayed by this requirement.

It is significant to note that the 1986 SARA amendments, which then established new and more stringent cleanup standards, applied those new standards only to ROD's signed after the date those amendments were enacted. Section 121(b) of SARA expressly provided that the new cleanup standards of section 121, added by SARA, did not apply to any ROD signed before the date of enactment. It further provided that such standards applied only "to the maximum extent practicable" to ROD's signed during the thirty-day period immediately following enactment.[54]

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[52] CERCLA § 113(h), 42 U.S.C. § 9613(h).

[53] S. 8 § 406 (proposed § 135 of CERCLA).

[54] Pub. L. No. 99-499, 100 Stat. 1613, 1678 (Oct. 17, 1986) (section 121(b) of SARA was not codified in CERCLA).

We strongly oppose section 406, and recommend that it be deleted in favor of a provision similar to that in section 121(b) of SARA.

V. LIABILITY (TITLE V)

A. *"Retroactive" Liability*

We strongly support retention of so-called "retroactive" liability, as we have repeatedly stated.[55] The term "retroactive" liability, we should point out, is in our view a misnomer. CERCLA imposes liability on responsible parties for past disposal activities resulting in current, ongoing, uncontrolled releases of hazardous substances.[56] We commend the Subcommittee for largely retaining in the bill liability based on pre-enactment disposal activities.

B. *Exemptions From Liability for Certain Parties*

SCAA contains an assortment of new exemptions from CERCLA liability. We generally support limitations on liability for small contributors, such as *de minimis* and *de micromis* parties, and generators of municipal solid waste. We believe, however, that many of the exemptions in SCAA are overly broad and poorly defined. We are also concerned that these exemptions may place a serious burden on the Fund.

Furthermore, it is important to emphasize that EPA is dealing effectively with the issue of fairness to small parties. It is proceeding aggressively with *de minimis* settlements, having now settled the liability of over 14,000 such parties. It has also implemented a policy for quickly addressing the liability of truly *de micromis* parties. Through *de minimis* and *de micromis* settlements, these parties attain a degree of finality that is not possible under a statutory exemption. We support EPA's efforts to address the liability of these parties, and anticipate that delegated states will follow EPA's lead. We therefore believe many of the proposed statutory exemptions may be unnecessary.

1. **Municipal Solid Waste.** Section 501(b) would exempt from liability generators and transporters of municipal

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[55] *E.g., Hearings on S. 1285, supra* note 2, at 700 (statement of Washington Attorney General Christine O. Gregoire); letter from New Jersey Attorney General Deborah T. Poritz to Senator Robert C. Smith, signed by 43 attorneys general, at 2 (Apr. 27, 1995).

[56] *See, e.g., United States v. South Carolina Recycling & Disposal, Inc.*, 653 F. Supp. 984, 996 (D.S.C. 1984), *aff'd sub nom. United States v. Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989).

solid waste.[57] Because municipal solid waste is inherently less hazardous than industrial waste, we agree with the concept of limiting liability for the disposal of municipal solid waste. We have no comments on this exemption at this time.

2. *De Minimis* Parties. Section 501(b) of SCAA would also exempt from liability certain "*de minimis*" parties that contributed less than specified quantities of waste to a site.[58] This exemption would apply to parties that contributed less than one percent of the total volume sent to a site, or less than 200 pounds or 110 gallons of waste materials sent to a site.[59]

We have generally supported revisions that would make it easier for EPA or a delegated state to enter into *de minimis* settlements. We have also supported an exemption for truly *de micromis* parties that sent minuscule quantities of waste to a site. We believe, however that the determination of *de minimis*, or *de micromis* levels should be left to the discretion of EPA or the delegated state on a site-by-site basis. We are therefore troubled by the provisions exempting from liability parties that sent no more than certain specified volumes of waste; in many cases these volumes would be most inappropriate.

First, at many sites one percent of the total volume of waste represents a tremendous quantity of hazardous waste. For example, 21 million gallons of waste were disposed of at the Hardage site in Criner, Oklahoma. Under this bill the *de minimis* level for Hardage would be 210,000 gallons of liquid hazardous waste! We do not believe such a large quantity of waste should qualify for an exemption. Moreover, at many sites, no parties sent more than one percent of the total. The exemption would thus swallow the liability rule. The one percent level also fails to account for toxicity, mobility, and other hazardous characteristics that are, in some cases, very significant.

Second, at many sites 200 pounds or 110 gallons represents a very substantial proportion of the total. For example, under this exemption a party improperly disposing of 110 gallons of trichloroethylene (TCE), a common industrial solvent, would be exempt from liability. Yet 110 gallons of TCE can contaminate *16 billion gallons* of pure drinking water at a concentration of 10 micrograms per liter, which is twice the health-based MCL of 5 micrograms per liter set under the Safe Drinking Water Act. Again, we believe exempting such a party would be inappropriate.

Moreover, the "*de minimis*" levels of liquid and solid wastes

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[57] S. 8 § 501(b) (proposed § 107(q) of CERCLA).

[58] S. 8 § 501(b) (proposed § 107(r) of CERCLA).

[59] S. 8 § 501(b) (proposed § 107(r) of CERCLA).

established in the proposal are incongruous. Assuming a density of water (most hazardous liquids will have a density fairly close to that of water), 110 gallons of liquid weighs 880 pounds. Thus, a much higher quantity of liquid hazardous waste (880 pounds) than solid hazardous waste (200 pounds) would qualify for the exemption. Yet liquid hazardous waste is likely to be much more mobile in the environment, much more bioavailable, and much more difficult and expensive to remediate.

3. Small Businesses. Section 501(b) would also exempt "small" businesses with 30 or fewer employees or earning less than $3 million annual gross revenues per year.[60] The exemption would apply only to liability for response costs incurred after the date of enactment of SCAA.

We foresee several difficulties in attempting to determine whether a business qualifies for this exemption. For example, the number of employees may fluctuate. It is not clear whether part-time employees, seasonal employees, contract employees, and even managers should be included. Moreover, an accountant can usually provide several different figures for gross revenues, using different but accepted accounting methods. Thus, we fear that interpretation and implementation of this exemption would be quite troublesome.

Further, under long-standing EPA and state policy, a responsible party's ability to pay is taken into consideration in entering cleanup and cost recovery settlements. We believe this is sound policy. While we are certainly sympathetic to the plight of small businesses potentially liable under CERCLA, we believe this problem is better addressed through consideration of ability to pay, use of *de minimis* settlements, and providing for a (more limited) *de micromis* exemption.

4. "Codisposal" Landfills. Section 504(b) would create a broad exemption for parties that sent wastes to so-called "codisposal landfills -- defined as landfills at which municipal solid waste is a "substantial portion" of the total volume of waste disposed.[61] Section 504(b) would also cap the liability of the owners and operators of codisposal sites at various levels, depending on whether the landfill is owned and operated by a small municipality, a large municipality, or a private party.[62]

We have several serious concerns with this exemption. First, it is not clear what is meant by a "substantial portion"

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[60] S. 8 § 501(b) (proposed § 107(s) of CERCLA).

[61] S. 8 § 501(b) (proposed § 107(t)(1) of CERCLA).

[62] S. 8 § 501(b) (proposed § 107(t)(2) of CERCLA).

of the total volume of waste. Arguably, a substantial portion could be as little as one percent, or as much as fifty-one percent. Second, we question whether such an exemption is necessary, given the exemption for disposal of municipal solid waste. Third, we believe this exemption is far too broad. A great many industrial waste and hazardous waste landfills accepted substantial quantities of municipal solid waste. The parties responsible for the disposal of industrial and hazardous wastes at these landfills should not receive a blanket exemption from CERCLA liability simply because some municipal solid waste was also disposed of at the landfill. Such an exemption would inappropriately shift the cost of cleaning up these landfills from the responsible parties to the taxpaying public.

5. Recyclers. Section 510 of SCAA would create a broad and complex new exemption for "recycling" activities.[63] It would limit generator and transporter liability for transactions involving the recycling of scrap glass, paper, plastic, rubber, textile, metal, and spent batteries, including spent lead-acid batteries. Scrap metal would include metal byproducts, including slag, skimming, or dross, and probably also including mine tailings.

While we agree that recycling activities should be encouraged, we are nevertheless troubled by this exemption. We believe the exemption is particularly inappropriate as it applies to spent lead-acid batteries. Such batteries contain large quantities of lead, an especially toxic substance, as well as smaller quantities of cadmium and other heavy metals. Much of the lead in these batteries is in the form of lead oxide and lead sulfate, compounds that are relatively mobile and bioavailable in the environment. Moreover, the sulfuric acid in these batteries (which has a pH approaching 0) greatly enhances the solubility and mobility of these metals. Furthermore, the battery reclaiming industry has a woefully poor record for compliance with environmental laws.[64] The industry has also created a large

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[63] S. 8 § 510 (proposed §§ 101(47) and (48) and 107(w) of CERCLA).

[64] *See, e.g., United States v. ILCO*, 32 Env't Rep. Cas. (BNA) 1977 (N.D. Ala. 1990) (imposing a civil penalty of $3.5 million on ILCO, a secondary lead smelter in Leeds, Alabama, and its president, Diego Maffei, for violations of RCRA and the Clean Water Act); *United States v. Sanders Lead Co.*, No. 89-T-1123-N (1989 M.D. Ala. filed Oct. 1989); *In re Refined Metals Corp.*, EPA RCRA Docket No. 90-01-R (administrative complaint filed Sept. 4, 1990); *In re Ross Metals, Inc.*, EPA RCRA Docket No. 90-03-R (administrative complaint filed Sept. 4, 1990).

number of Superfund sites.[65]

The bill would place certain limitations on the exemption for spent batteries. For several reasons, however, the limitations may not work as intended. First, the bill provides that the exemption for spent lead-acid batteries would only apply if the person was in compliance with a standard established by EPA under RCRA governing the management of such batteries.[66] EPA has promulgated regulations under RCRA governing the management of spent lead-acid batteries.[67] In states with RCRA authorization, however, the state regulations, not the federal regulations, would be applicable. Hence, in most states, there would be no applicable standard set by EPA. Second, the secondary lead smelter industry has repeatedly argued that the RCRA regulations -- under either federal or state authority -- do not apply to spent batteries. These batteries, the industry argues, are raw material; they are not discarded, and thus not solid wastes and not subject to regulation under RCRA.[68] Finally, the lead components of spent lead-acid batteries would also fall within the definition of "scrap metal." The limitations on the exemption for scrap metal is significantly less stringent than the limitations on the exemption for spent batteries. As the exemptions are currently drafted, a person recycling the lead from spent lead-acid batteries could take advantage of the less stringent limitation for scrap metal.

We are also very concerned by the scrap metal exemption as it applies to "byproducts" such as slag. Slag from smelters, which may contain high levels of lead and other heavy metals, has often been "recycled" as fill material creating serious environmental problems. Moreover, the exemption could be interpreted to cover mine tailings, which have similarly been "recycled" as fill material.

We urge the Subcommittee to narrow the recycling exemption,

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[65] *E.g.*, ILCO, Leeds, Alabama; Sapp Battery, Cottondale, Florida; Prestolite Battery, Vincennes, Indiana; Cal West Metals, Socorro County, New Mexico; Marathon Battery, Cold Springs, New York; C&R Battery, Chesterfield County, Virginia.

[66] S. 8 § 509(b) (proposed § 107(w)(5)(A)(iii) of CERCLA).

[67] 40 C.F.R. Part 266, Subpart G.

[68] *See, e.g., United States v. ILCO, Inc.*, 996 F.2d 1126 (11th Cir. 1993) (rejecting defendants' arguments that the lead components reclaimed from spent lead-acid batteries are "raw materials" not subject to regulation under RCRA).

particularly as it applies to spent lead-acid batteries, and to eliminate the exemption for metal byproducts. To address spent batteries, we would much prefer a more limited exemption for retailers of batteries that accept spent batteries from consumers for recycling and that are in compliance with applicable federal and state regulations. The exemption should be modelled on the service station dealer exemption in section 114(c) of CERCLA.[69] At the very minimum, the exemption should be revised to address the issues we have raised.

C. *Allocation*

Section 503 of SCAA provides a lengthy procedure for the allocation of liability among responsible parties. The procedure would be required at all sites involving two or more parties.[70] The bill requires EPA to promulgate regulations establishing the allocation procedures in greater detail.

NAAG does not have an official position on the issue of allocation, as there is a wide range of views on the issue among the attorneys general. Nevertheless, last year we expressed serious reservations about the allocation provisions in S. 1285,[71] and in 1994 we expressed similar reservations about the allocation provisions in S. 1834.[72] We have quite similar reservations about the allocation provisions in S.8.

First, we continue to be concerned that the allocation procedure will be very time-consuming, and will inevitably result in delays in cleanup. On this issue, we are very pleased to see that S. 8 would reserve the agency authority to bring an enforcement action seeking cleanup while the allocation procedure is pending. This reservation is a major improvement over S. 1285, which would have expressly barred any such enforcement action. We believe the bill should go further, however, and expressly require EPA to proceed with notice, negotiations, and enforcement[73] independent of any allocation proceedings.

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[69] 42 U.S.C. § 9614(c).

[70] S. 8 § 503 (proposed § 136(a)(4) of CERCLA).

[71] *Hearings on S. 1285, supra* note 2, at 701-02 (statement of Washington Attorney General Christine O. Gregoire).

[72] *Superfund Reform Act of 1994: Hearings on S. 1834 before the Subcomm. on Superfund, Recycling, and Solid Waste Management of the Senate Comm. on Environment and Public Works*, 103d Cong., 2d Sess. 403-05 (Apr. 12, 1994) (statement of New Mexico Attorney General Tom Udall).

[73] *See* CERCLA § 122(e), 42 U.S.C. § 9622(e).

Second, although we are pleased to note that the bill's allocation procedures are significantly more flexible than those in S. 1285, we continue to believe the procedures are far too rigid. Under the bill, allocation would be mandatory for most sites, even if there are only two responsible parties. We believe the bill should allow EPA, and delegated states, maximum flexibility to determine whether or not to conduct an allocation, and how it should be conducted.

Third, we are concerned that implementation of the allocation procedure would place a significant burden on EPA and delegated state agencies. Implementation is likely to entail considerable agency resources, at the expense of the more important goal of getting sites cleaned up.

Fourth, the bill would require the allocation to be based on consideration of seven factors, commonly referred to as the "Gore factors," listed in the bill.[74] These factors include the volume, toxicity, and mobility of the waste, and the culpability and cooperation of the responsible party. As the bill is written, the allocator would apparently be required to consider each of these factors, although doing so might add considerable delay to the allocation process. For example, at many sites the time and effort necessary for a thorough consideration of waste toxicity and mobility, rather than simply basing the allocation strictly on volume, may far outweigh the benefits obtained by a marginally more precise allocation.[75] The allocator should have the flexibility to make a determination to give little or no consideration to certain factors such as toxicity and mobility, and thus potentially save substantial time and resources.

Finally, we question whether the allocation provision is really necessary. As previously discussed, EPA is aggressively addressing the liability of *de minimis* and *de micromis* parties, and we anticipate that the reauthorized statute will further limit the liability of such parties. These efforts will resolve or eliminate the liability of a great many small-stake parties that tend to bear a disproportionate share of transaction costs, particularly at large multi-party sites. Thus, the benefits of the bill's allocation provision will be of considerably less consequence.

VI. FEDERAL FACILITIES (TITLE VI)

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[74] S. 8 § 503 (proposed § 136(g) of CERCLA).

[75] *See United States v. Hardage*, 19 Chem. Waste Lit. Rep. (Andrews) 132, 136-37 (W.D. Okla. Sept. 22, 1989) (upholding EPA's decision not to consider toxicity in a settlement allocation, finding that the costs of considering toxicity "would be prohibitive").

The states have a particular interest in the cleanup of federal facilities. As Congress recognized when it enacted SARA in 1986, federal facilities are "among the worst hazardous waste sites in the nation."[76] Yet the federal government is relatively insulated from enforcement actions to compel cleanup. Where federal government agencies are the liable parties, EPA enforcement authority is at its weakest. Under the "unitary Executive" theory, long advocated by the U.S. Department of Justice, EPA cannot bring a judicial enforcement action against a sister federal agency.[77] Given EPA's limited enforcement authority, state enforcement authority is of critical importance.

A. *Delegation Procedures*

Section 601 of SCAA would provide for the transfer of Superfund authority for federal facilities to delegated states.[78] We strongly support the concept of transfer of authority, as we have stated previously.[79] We nevertheless have a number of concerns with the bill's specific provisions.

First, the bill would require that a state must have "demonstrated experience in exercising similar authorities" before the state can receive EPA authority over a federal facility. This requirement is quite vague -- what is meant by "similar authorities"? -- and goes beyond the requirements for delegation of authority over non-federal sites. We suggest that the provisions for the "transfer" to states of EPA authority over federal facilities should mirror the provisions for the

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[76] H.R. Rep. No. 253, 99th Cong., 1st Sess., pt. 1, at 58 (1985).

[77] As explained by then Assistant Attorney General for Land and Natural Resources Henry Habicht, the Department of Justice "has consistently taken the position that under our constitutional scheme, disputes of a legal nature between two or more executive branch agencies whose heads serve at the pleasure of the President are properly resolved by the President or by someone with authority delegated by the President." *Environmental Compliance by Federal Agencies: Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce*, 100th Cong., 1st Sess. 206 (Apr. 28, 1987) (statement of F. Henry Habicht II, Assistant Attorney General for Land and Natural Resources).

[78] S. 8 § 601 (proposed § 120(g) of CERCLA).

[79] *E.g.*, letter from New Jersey Attorney General Deborah T. Poritz to Senator Robert C. Smith, signed by 43 attorneys general, at 3 (Apr. 27, 1995).

"delegation" to states of CERCLA authority over other sites.

Second, the bill would allow a state to receive transfer of authority over a federal facility only if the state first agrees to abide by the terms of any existing interagency agreement covering that facility. Many interagency agreements for federal facilities were negotiated and executed without state participation, however. We believe it would be inappropriate to force such terms on a state.

Third, the bill does not expressly provide for transfer of authority over designated portions of federal facilities. At several sites, such as Rocky Flats in Colorado, state agencies are overseeing the cleanup of distinct portions of the larger facility, while EPA oversees the cleanup for the remainder of the facility. Such an arrangement allows for the maximum utilization of state and federal resources.

B. *Waiver of Sovereign Immunity*

The bill does not include a clear waiver of the federal government's sovereign immunity from enforcement actions under CERCLA and state law. We have consistently advocated that a clear waiver of federal sovereign immunity be added to CERCLA.[80]

Under the ancient doctrine of sovereign immunity,[81] the federal government is immune from a lawsuit unless Congress has expressly waived the immunity. Although Congress has attempted to waive the sovereign immunity of the federal government from enforcement actions under CERCLA and analogous state law,[82] those attempts do not appear to have been entirely successful. The Supreme Court has interpreted waivers of federal sovereign immunity in environmental laws extremely narrowly, holding that such waivers must be "unequivocal," "construed strictly in favor of the sovereign," and "not enlarged beyond what the language requires."[83] Moreover, at least two federal district courts have held that the CERCLA waiver of sovereign immunity from actions under state law does not apply to liability based on prior

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[80] *E.g.*, letter from New Jersey Attorney General Deborah T. Poritz to Senator Robert C. Smith, signed by 43 attorneys general (Apr. 27, 1995); *Hearings on S. 1834, supra* note 72, at 405-06 (statement of New Mexico Attorney General Tom Udall).

[81] The doctrine of sovereign immunity derives from the ancient English common law maxim that "the King can do no wrong." *See United States v. Nordic Village, Inc.*, 503 U.S. 30, 42-43 (1992) (Stevens, J. dissenting).

[82] *See* CERCLA § 120(a), 42 U.S.C. § 9620(a).

[83] *U.S. Dep't of Energy v. Ohio*, 503 U.S. 607, 615 (1992).

ownership of the facility.[84] As Senator Stafford remarked during the SARA debates, "no loophole, it seems, is too small to be found by the Federal Government."[85]

To ensure a complete waiver of federal sovereign immunity, Congress should revise the provision. Congress should add to CERCLA a waiver provision similar to that in RCRA as amended by the Federal Facility Compliance Act of 1992.[86] Such a waiver was included in the 1995 House Superfund reauthorization bill.[87] In addition, Congress should revise the waiver of federal sovereign immunity from actions under state law so that immunity from liability based on prior site ownership is clearly waived.

C. ***Criminal Liability*** Section 602 of SCAA would create a limitation on criminal liability for officers, employees, and agents of the United States. Such persons would not be subject to criminal liability for failure to take a response action under any state or federal law unless such person failed to request adequate appropriations to pay for the response action, or unless adequate funds were appropriated to pay for the response action.[88]

We believe this provision is wholly unnecessary, and is likely to cause needless confusion. We suggest it be deleted from the bill.

VII. NATURAL RESOURCE DAMAGES (TITLE VII)

The natural resource damages title of S. 8 represents a substantial improvement over S. 1285. We very much appreciate that the Subcommittee has listened to our comments and addressed several of our concerns. However, we still have major concerns with these provisions of the bill, which would handicap most state programs.

A. ***Limitations on Natural Resource Damage Liability***

1. **Liability For Pre-1980 Injury.** Section 701(3) of

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[84] *Rospatch Jessco Corp. v. Chrysler Corp.*, 829 F. Supp. 224 (W.D. Mich. 1993); *Redland Soccer Club v. U.S. Dep't of the Army*, 801 F. Supp. 1432 (M.D. Pa. 1992), *aff'd in part, rev'd in part on other grounds*, 55 F.3d 827 (3d Cir. 1995), *cert. denied*, 116 S.Ct. 772 (1996).

[85] 132 Cong. Rec. 28,414 (Oct. 3, 1986) (statement of Sen. Stafford).

[86] Pub. L. 102-386, 106 Stat. 1505 (Oct. 6, 1992).

[87] H.R. 2500, 104th Cong., 1st Sess. § 605 (Oct. 18, 1995) (proposed revision to § 120(a)(1) of CERCLA).

[88] S. 8 § 602 (proposed § 120(k) of CERCLA).

SCAA would substantially limit recovery for natural resource damages for injuries occurring prior to 1980. First, it would preclude recovery for "lost use" values that occurred before the enactment of CERCLA on December 11, 1980.[89] Current law contains no such limitation on lost use values.

Second, the bill would preclude recovery for any damages if the release of a hazardous substance and the resulting injury occurred wholly before December 11, 1980.[90] Current law, on the other hand, provides that there shall be no liability for natural resource damages "where such damages and the release of the hazardous substance from which such damages resulted have occurred wholly before" December 11, 1980.[91] Thus, where a release occurs prior to the date of enactment and the resulting damages continue to occur after that date, liability exists for the post-enactment damages, but not for the pre-enactment damages.[92]

The bill would greatly limit liability for releases of hazardous substances occurring prior to 1980. Under current law, a trustee may recover if the *damages* continue after 1980. Under the bill, a trustee would recover only if the *injury* continues after 1980. The distinction between damages and injury is a crucial one. If contaminants were released into a groundwater aquifer in 1979, and remain in the aquifer in 1997, the release and arguably the *injury* occurred prior to 1980, although the *damages* continue until the aquifer is restored. Under current law, a trustee may recover for the post-1980 damages; under the bill, it could not. Interpretation of the new language, moreover, would likely engender further litigation.

Such a restriction on liability will extinguish many claims that trustees currently have arising from the disposal and release of hazardous substances prior to 1980. Affected claims could include those for the Clark Fork site near Butte, Montana, the Coeur d'Alene site in Idaho, the Montrose site in southern California, Lavaca Bay in Texas, and the Hudson River PCB spills in New York. Several of these sites are the subject of ongoing litigation.

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[89] S. 8 § 701(3) (proposed § 107(f)(1)(B)(iv)(I) of CERCLA).

[90] S. 8 § 701(3) (proposed § 107(f)(1)(B)(iv)(II) of CERCLA).

[91] CERCLA § 107(f)(1), 42 U.S.C. § 9607(f)(1).

[92] The distinction is clearly illustrated in the case of *In re Acushnet River and New Bedford Harbor Proceedings re Alleged PCB Pollution*, 716 F. Supp. 676 (D. Mass. 1989).

Under the common law, a party that was responsible for creating a nuisance many years ago remains liable for that nuisance so long as it continues. This common law concept was incorporated in CERCLA when it was enacted; it is consistent with principles of fairness and public policy promoting prompt abatement of nuisances, including those resulting from the release of hazardous substances. This common law concept should not be limited by these amendments.

2. Passive Use Values. Section 701 of SCAA expressly prohibits the recovery of damages for nonuse or passive use values.[93] Similarly, section 702(a) of SCAA prohibits recovery for the costs of a contingent valuation study.[94]

We are opposed to any limitation on recovery for passive use values, or any limitation on the use of contingent valuation methodology, as we have stated previously.[95] "Passive use" refers to the value that is derived from the knowledge that resources exist and can be passed on to future generations. For example, most people would place a value on the Grand Canyon or Yellowstone National Parks, even though they do not expect ever to visit those places.[96] Contingent valuation is a methodology used to estimate the value of resources that are not traded in the market, and it is the only methodology available to estimate passive use value. The methodology employs surveys of individuals having a stake in the given resource.[97]

Economists widely recognize the validity of passive use values. In 1992, the National Oceanic and Atmospheric Administration commissioned the Contingent Valuation Panel, a blue ribbon of experts, including two Nobel laureates, to

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[93] S. 8 § 701(3) (proposed § 107(f)(1)(B)(ii) of CERCLA).

[94] S. 8 § 702(a) (proposed § 107(f)(2)(C)(iii)(II) of CERCLA).

[95] *E.g.*, *Hearings on S. 1285*, *supra* note 2, at 712-17 (statement of Montana Attorney General Joseph P. Mazurek); letter from Washington Attorney General Christine O. Gregoire, New Jersey Attorney General Deborah T. Poritz, and Minnesota Attorney General Hubert H. Humphrey III to Senator John Chafee 41 (Feb. 27, 1996); letter from New Jersey Attorney General Deborah T. Poritz to Senator Robert C. Smith, signed by 35 attorneys general, at 2 (May 11, 1995).

[96] Frank B. Cross, *Natural Resource Damage Valuation*, 42 VAND. L. REV. 269, 315 (1989).

[97] 43 C.F.R. § 11.83(c)(2)(vii) (1996).

evaluate contingent valuation as a damage assessment tool. According to the panel, "for at least the last twenty-five years, economists have recognized the possibility that individuals who make no active use of a particular beach, river, bay, or other such natural resource might, nevertheless, derive satisfaction from its mere existence, even if they never intend to make active use of it."[98] Courts have also recognized the validity of passive use values.[99]

While the methodology for determining passive use value -- contingent valuation -- is quite controversial, the methodology is evolving and improving. It can be a useful tool in the effort to place a value on resources that are not traded in the market place, and on the environmental benefits of those resources. The report of the Contingent Valuation Panel concluded that a properly conducted contingent valuation survey can provide a useful measure of natural resource damages.[100] We do not believe Congress should stifle the development of this methodology by legislation.

Moreover, for a contingent valuation study to be of any value in supporting a natural resource damage claim, it must meet the evidentiary standards for admissibility of scientific evidence in a federal court. The Supreme Court has recently spoken on this issue, holding that scientific evidence can be admitted only if the trial court finds that it is both relevant and *reliable*.[101] A trial court must determine the reliability of scientific evidence by considering several factors: 1) whether the scientific methodology has been tested; 2) whether the methodology has been subjected to peer review and publication; 3) the rate of error of the methodology; and 4) the general

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[98] Kenneth Arrow, Robert Solow, et al., Report of the NOAA Panel on Contingent Valuation 2 (Jan. 11, 1993), *reprinted in* NOAA, Advance Notice of Proposed Rulemaking, App. I, 58 Fed. Reg. 4601 (Jan. 15, 1993).

[99] *Ohio v. U.S. Dep't of the Interior*, 880 F.2d 432 (D.C. Cir. 1989) (upholding federal regulations allowing recovery for lost passive use values); *Utah v. Kennecott Corp.*, 801 F. Supp. 553, 571 (D. Utah 1992) (refusing to approve a natural resource damage settlement because it did not include any consideration of lost passive use values), *appeal dismissed*, 14 F.3d 1489 (10th Cir. 1994).

[100] Arrow & Solow, *supra* note 98, at 42.

[101] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592 (1993).

acceptance of the methodology in the relevant scientific community.[102] Thus, the courts would be required to pass on the reliability of any contingent valuation study, thereby providing a substantial check on the use of such a study to support damage claims. A poorly conducted contingent valuation study would not be admissible, or would be afforded little weight.

3. Cap on Liability. The bill would retain the cap on liability for natural resource damages without change from current law. S. 1285 would have revised the liability cap to substantially limit natural resource damage recoveries, a proposal that we opposed.[103] We very much appreciate the elimination of these revisions in S. 8.

4. Double Recovery. Section 701(3) of SCAA would revise, and presumably expand, the prohibition on double recovery for natural resource damages.[104] The revised language is somewhat ambiguous, however. It is also unclear why this revision is necessary, as CERCLA already includes an adequate prohibition on double recovery.[105] We fear that the revised language may be interpreted to preclude recovery for any damages at sites for which response costs have been recovered.

B. *Assessment and Restoration*

1. Payment Period. Section 702(a) of SCAA would allow natural resource damage payments to be paid over a period of time. Such time period would be based on the period of time over which the damages occurred, the financial ability of the liable parties, and the period of time over which expenditures for restoration are anticipated.[106]

We agree that a payment period based, in part, on the financial ability of the liable party, or on the agreed restoration schedule, may be appropriate. Trustee agencies currently take these considerations into account routinely, and we therefore question the need for a statutory provision. We do not agree, however, that the period of time over which the damages occurred should be a factor in determining the length of the payment period. It would be wholly illogical to delay the implementation of full restoration of injured resources simply

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[102] *Id.* at 592-95.

[103] S. 1285, 104th Cong., 1st Sess. § 701(d) (Sept. 29, 1995) (proposed § 107(c)(4) of CERCLA).

[104] S. 8 § 701(3) (proposed § 107(f)(1)(B)(iii) of CERCLA).

[105] CERCLA § 107(f)(1), 42 U.S.C. § 9607(f)(1).

[106] S. 8 § 702(a) (proposed § 107(f)(2)(C)(iv) of CERCLA).

because the activities that caused the injuries had been ongoing for a long period of time.

2. Regulations. Section 702(a) of the bill requires trustees to follow, to the extent practicable, natural resource damage assessment regulations promulgated by the Department of the Interior.[107] Adherence to these regulations is optional under current law, and the regulations were written to be optional.

We do not believe adherence to the regulations should be required, even only "to the extent practicable." Strict adherence to these complex regulations will often result in lengthier, more complex assessments and significantly higher assessment costs, ultimately to be borne by the responsible parties. In many cases, the trustee agencies and the responsible parties may agree that the additional work needed to comply with the regulations may not be necessary or appropriate; but such work may be easily practicable.

Moreover, the bill fails to provide for any transition until new regulations are promulgated. The bill would require numerous revisions to the existing regulations, simply to comply with the bill's new damage assessment requirements. Until such revisions to the regulations are made, adherence to the regulations might be contrary to the requirements. At the same time, the bill would mandate a degree of adherence to the regulations. The trustees would be caught in a catch-22.

3. Rebuttable Presumption. S. 8 would eliminate the CERCLA provision that entitles a damage assessment conducted in accordance with the regulations to a rebuttable presumption on behalf of the trustee.[108] We urge the Subcommittee to leave this provision of current law intact.

4. Record Review. Section 702(a) of SCAA would provide that trustees may establish an administrative record to support a restoration plan.[109] We have proposed a somewhat similar amendment,[110] and we are pleased to see a record review provision in the bill. Such a requirement would reduce the

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[107] S. 8 § 702(a) (proposed § 107(f)(2)(C)(i) of CERCLA).

[108] CERCLA § 107(f)(2)(C), 42 U.S.C. § 9607(f)(2)(C).

[109] S. 8 § 702(a) (proposed § 107(f)(2)(C)(v) of CERCLA).

[110] *E.g.*, *Hearings on S. 1285*, *supra* note 2, at 704 (statement of Washington Attorney General Christine O. Gregoire); letter from Washington Attorney General Christine O. Gregoire, New Jersey Attorney Deborah T. Poritz, and Minnesota Attorney General Hubert H. Humphrey III to Senator John Chafee 47-49 (Feb. 27, 1996).

amount of litigation associated with natural resource damage claims and would allow a much more open decision-making process. We continue to support an express provision that a trustee decision based on the administrative record shall be upheld by a reviewing court unless found to be arbitrary and capricious or otherwise not in accordance with law.

5. Lead Trustee. The bill, in two separate and somewhat inharmonious subsections, would provide for designation of a lead trustee for natural resources. Section 702(a) would allow trustees to designate a lead administrative trustee or trustees for preparation of a restoration plan.[111] Section 702(b) would require the Department of the Interior to promulgate regulations providing for, among other things, the designation of "a single lead Federal decisionmaking trustee" for each facility that will be subject to a damage assessment.[112]

We have no objection to a general requirement for a "lead trustee," which is now contained in the federal damage assessment regulations.[113] We have some concerns with the language of these provisions, however, particularly the second one which we believe is unnecessary.

First, we are troubled by the designation of a lead trustee having final *decisionmaking* authority. For a state trustee agency to place all decisionmaking authority in a single "lead" federal agency would be to surrender its sovereignty, an action that would be contrary to the law of many states.

Second, we have serious concern over designation as lead trustee of an agency that is also a responsible party. In our experience, federal trustee agencies have been much, much less cooperative where the trustee agency is a responsible party. The dual identity of natural resource trustee and responsible party, which afflicts many agencies, both federal and state, at many sites, is a recurring problem. We suggest that the bill be revised to prohibit the designation as the lead trustee of a federal or state agency that is a responsible party.

Third, in working with other trustee agencies, we have generally avoided naming a "lead" trustee, but have instead proceeded as "co-lead." This approach has worked well in our experience. The first provision seems to address this issue by allowing the designation of a lead "trustee or trustees." The second provision, perhaps inconsistently, requires designation of a "single" lead trustee.

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[111] S. 8 § 702(a) (proposed § 107(f)(2)(C)(v)(I) of CERCLA).

[112] S. 8 § 702(b) (proposed § 301(c)(2)(D) of CERCLA).

[113] 43 C.F.R § 11.32(a)(1)(ii).

Finally, we do not believe the second provision is necessary. The provision is totally redundant given the first provision and the regulatory requirement. It should be deleted.

C. *Consistency*

S. 8 contains two inconsistent provisions on consistency between response actions and restoration. Section 701(3) of SCAA requires a restoration action to be "consistent with all known or anticipated response actions."[114] Section 703(a) provides that response actions and restoration actions "must not be inconsistent with one another."[115]

We are very pleased to see the second provision (in section 703), which is very similar to the provision that we proposed. We believe the first provision is, consequently, unnecessary and should be deleted.

D. *Statute of Limitations*

S. 8 does not propose to correct the ambiguous statute of limitations for natural resource damages. Such a correction would reduce uncertainty and litigation over the limitation provision. We have long advocated correcting this provision.[116]

CERCLA establishes a two-pronged statute of limitations period for claims for damages to natural resources. Such an action must be brought within three years of the later of: 1) "the date of the discovery of the loss and its connection with the release in question"; or 2) the date on which federal regulations are promulgated.[117] These provisions are commonly referred to as the "discovery prong" and the "regulatory prong."

Each of these provisions is highly ambiguous. The "discovery prong" is vague and generally will not indicate a precise date. What constitutes "discovery of the loss" and "its connection with the release" is subject to a wide range of

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[114] S. 8 § 701(3) (proposed § 107(f)(1)(A) of CERCLA).

[115] S. 8 § 703(a) (proposed § 107(f)(3) of CERCLA).

[116] *E.g., Hearings on S. 1285, supra* note 2, at 703 (statement of Washington Attorney General Christine O. Gregoire); letter from Washington Attorney General Christine O. Gregoire, New Jersey Attorney General Deborah T. Poritz, and
(continued . . .)
(. . . continued)
Minnesota Attorney General Hubert H. Humphrey III to Senator John Chafee 33-36 (Feb. 27, 1996).

[117] CERCLA § 113(g)(1), 42 U.S.C. § 6913(g)(1).

interpretations.[118] The "regulatory prong" is also ambiguous, given the piecemeal promulgation of the natural resource damage assessment regulations issued by Interior.[119] These ambiguities have resulted in considerable litigation. Indeed, the federal courts that have construed the language have given it three inconsistent interpretations.[120]

Further, the current statute of limitations frequently puts a trustee in the awkward position of bringing an action for natural resource damages before a damage assessment has been completed and hence before the trustee can articulate the relief it is seeking. Until the damage assessment has been completed it

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[118] *See, e.g., United States v. Montrose Chem. Corp.*, 883 F. Supp. 1396 (E.D. Cal. 1995) (declining to follow the recommendations of the special master and holding that the trustees had "discovered" the loss and its connection to the release of hazardous substances more than three years prior to filing the lawsuit), *rev'd on other grounds*, 43 Env't Rep. Cas. (BNA) 1946 (9th Cir. 1997).

[119] Section 301(c)(2) of CERCLA, 42 U.S.C. § 9651(c), as enacted in 1980, requires Interior to promulgate regulations for the assessment of damages for injuries to natural resources. Interior promulgated regulations in August 1986, 51 Fed. Reg. 27,674 (Aug. 1, 1986), and March 1987, 52 Fed. Reg. 9042 (Mar. 20, 1987). These regulations were challenged and were found by the D.C. Circuit to be legally defective in several respects. *Ohio v. U.S. Dep't of the Interior, 880 F.2d 432 (D.C. Cir. 1989); Colorado v. U.S. Dep't of the Interior, 880 F.2d 481 (D.C. Cir. 1989). Interior promulgated revised regulations to conform to the Ohio and Colorado decisions in March 1994, 59 Fed. Reg. 14,262 (Mar. 25, 1994), and May 1996, 61 Fed. Reg. 20,560 (May 7, 1996).*

[120] *Kennecott Utah Copper Corp. v. U.S. Dep't of the Interior*, 88 F.3d 1191, 1209-13 (D.C. Cir. 1996) (the regulatory prong began to run when DOI promulgated the type A regulations in 1987); *United States v. Seattle*, 33 Env't Rep. Cas. (BNA) 1549 (W.D. Wash. 1991) (same); *United States v. Montrose Chem. Corp.*, 883 F. Supp. 1396 (E.D. Cal. 1995) (the regulatory prong began to run when the original type B regulations were promulgated in August 1986), *rev'd*, 43 Env't Rep. Cas. (BNA) 1946 (9th Cir. 1997); *Idaho v. M.A. Hanna Co.*, No. 83-4179 slip op. at 8-9 (D. Idaho July 17, 1995) (the regulatory prong will not begin to run until type A regulations for rivers, streams, and mountains are promulgated).

is very difficult to quantify the damages.[121]

Congress appears to have recognized these problems in passing the Oil Pollution Act of 1990 ("OPA").[122] Although earlier versions of the bill included statute of limitation language very similar to that in CERCLA[123] the Senate amendment and conference substitute revised the provision,[124] as enacted.[125] It provides that an action for natural resource damages must be brought within three years from "the date of completion of the natural resource damage assessment." In most instances, this date can be readily and precisely determined, and therefore will not present an issue to be litigated. Congress should amend CERCLA to make the statute of limitations for natural resource damage claims consistent with that in OPA.[126]

VIII. MISCELLANEOUS (TITLE VIII)

National Priorities List

Section 802 of SCAA would place a cap on new NPL listings. A total of 100 sites could be added to the NPL over the next five years, with no more than ten sites per year thereafter.[127]

We are troubled by the proposed cap on NPL listing. Sites

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[121] *See United States v. Hardage*, 663 F. Supp. 1280, 1283 (W.D Okla. 1987). The *Hardage* court "strongly admonished the government" for having brought an action for injunctive relief under CERCLA that was "premature and violated Rule 11, Fed. R. Civ. P." because the government "was unable to articulate the nature of the relief it sought."

[122] Pub. L. No. 101-380, 104 Stat. 484 (Aug. 18, 1990).

[123] S. REP. No. 94, 101st Cong., 1st Sess. 16 (1989); H.R. REP. No. 242, 101st Cong., 1st Sess., pt. 1, at 14 (1989).

[124] H.R. CONF. REP. No. 653, 101st Cong., 2d Sess. 23 & 121 (1990).

[125] OPA § 1017(f)(1)(B), 33 U.S.C. § 2717(f)(1)(B).

[126] Such a statute of limitation would not create any incentive for trustees to delay preparation of a damage assessment in order to postpone the running of the limitation period. Trustees have a strong interest in expeditiously pursuing their natural resource damage claims and obtaining restoration of injured resources or compensation for the injuries. Completion of a damage assessment is an essential step in pursuing such a claim.

[127] S. 8 § 802 (proposed § 105(i)(1)(A) of CERCLA).

should be listed on the NPL on the basis of the risk they present to human health and environment, not on the basis of an arbitrary numerical limit. Similarly, sites should be added to the NPL for so long as sites continue to pose a serious enough threat to health and the environment as to warrant remedial action.

The cap on NPL listing might remove a major incentive for responsible parties to conduct voluntary cleanups. In New Mexico, as in other states, we have several sites for which NPL listing has been deferred pending negotiation of a voluntary cleanup agreement. The responsible parties for these sites, recognizing their potential CERCLA liability, have entered into negotiations to reach such agreements. If NPL listing is capped, these parties will realize that CERCLA liability may never be imposed, and much of their incentive to conduct voluntary cleanups will be lost.

IX. FUNDING (TITLE IX)

Funding For Natural Resources

The bill does not address the issue of funding for natural resource damage assessment and restoration activities. We have previously proposed amendments to provide that Superfund monies would be available to federal, state, and tribal trustees for damage assessments and restoration activities, as under the original law.[128]

Section 111(c)(1) and (2) of CERCLA, which was originally enacted in 1980, expressly provides that Superfund monies may be used to conduct natural resource damage assessments and to restore, rehabilitate, replace, or acquire the equivalent of injured natural resources.[129] This provision is contradicted, however, by section 517 of SARA, which amends section 9507(c)(1) of the Internal Revenue Code. As amended, that section provides that Superfund monies shall be available only for purposes "other than" the purposes set forth in section 111(c)(1) and (2), that is, for purposes other than damage assessment and restoration.[130]

Given this limitation it is extremely difficult for trustees to fund natural resource damage assessments. Consequently, many state and tribal trustees are not conducting assessments and an important goal of CERCLA is not being met.

CONCLUSION

I want to thank you again for the opportunity to testify today on this important legislation. We look forward to working

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[128] *E.g., Hearings on S. 1285, supra* note 2, at 703-04 (statement of Washington Attorney General Christine O. Gregoire).

[129] 42 U.S.C. § 9611(c)(1) and (2).

[130] 26 U.S.C. § 9507(c)(1).

with you and your staff in revising SCAA to address these and other issues.

RESPONSES OF CHARLES DE SAILLAN TO ADDITIONAL QUESTIONS FROM SENATOR SMITH

Question 1. Does the Chief Executive of your State, Governor Gary Johnson (R–NM) agree with the positions articulated in your statement?

Response. The positions articulated in our statement are fully consistent with the positions taken by New Mexico Governor Gary E. Johnson. In formulating our positions, we have consulted with the New Mexico Environment Department, and the New Mexico Office of the Natural Resources Trustee, both Executive agencies that report to the Governor and that are headed by Governor Johnson's appointees.

While Governor Johnson has not reviewed the Superfund legislation with the same level of detail that we have in the Office of the Attorney General, he has taken very similar positions on most issues. His positions are stated in his February 29, 1996 letter to Senators Bob Dole and Thomas Daschle. A copy of the letter is enclosed herewith. Governor Johnson's appointee as Secretary of the New Mexico Environment Department, Mark Weidler, has also taken very similar positions. Secretary Weidler's positions are stated in his November 3, 1995 letter to Senator Pete V. Domenici. A copy of that letter is also enclosed.

In addition, the positions articulated in our statement are consistent with the National Governors' Association Policy on Superfund. A copy of that Policy is also enclosed.

Question 2. You raise concerns in your testimony about the technical impracticability sections of S. 8 as it relates to groundwater. Please explain to me what is wrong with using point of use treatment where it is technically impractical to clean up groundwater?

Response. Point-of-use devices, such as activated carbon filters, are often ineffective in treating drinking water. Studies have demonstrated numerous problems with such devices. For example, chlorine or other organic chemicals in source water can result in undetected "breakthrough" of contaminants from the filter into drinking water. Filters may also provide a medium for the growth of disease-causing bacteria. Moreover, in order to work properly, the devices must receive regular maintenance such as replacement of the filter. Experience has shown that homeowners often do not properly maintain the filters. See generally, Benjamin W. Likens, Jr., Robert M. Clark & James A. Goodrich, Point-of-Use/Point-of-Entry for Drinking Water Treatment 173–195 (Lewis Publishers 1992)

Part of our concern stems from the undue emphasis on point-of-use devices that the bill would create in the statute. Such devices should be used, if at all, only as a temporary measure or as a last resort when nothing else is possible—as is the case under current law. An express statutory reference to such devices as a technique for addressing contaminated groundwater makes their use much more acceptable, notwithstanding their limited effectiveness. The bill strongly implies that if groundwater remediation is technically impracticable—based on modelling or projections—then installation of point-of-use devices is all that is necessary. Implementing agencies will need to take this statutory provision into consideration, as will reviewing courts. The provision no doubt will be seized upon by attorneys for responsible parties seeking—as some do—the cheapest way out. It will be more difficult for EPA and State environmental agencies to require cleanup of contaminated groundwater or, where cleanup is impracticable, to require a more protective but more expensive alternative such as hooking residents up to a municipal water supply.

Our concerns over the emphasis on point-of-use devices are heightened by other provisions in the bill that we fear would render containment of contaminated groundwater, rather than treatment, the norm. As stated in our testimony, the bill would eliminate any preference for treatment of contaminated groundwater; it would require containment remedies to be considered on an equal basis with treatment remedies; it would limit the goal for protection of groundwater to preventing or eliminating "actual human ingestion" of contaminated groundwater; it would eliminate MCLG's and even MCL's as groundwater cleanup standards; it would allow a determination that groundwater cleanup is technically impracticable based on modelling and projections, without any effort to remediate the groundwater or even to reduce contaminant levels; it would place unnecessary emphasis on natural attenuation, dilution, dispersion, and biodegradation.

Question 3. When do we draw the line in natural resource cleanups and who makes that decision? Let me use an example: let's say you have a stream where sediments may have been deposited 20 years ago, but since that time there have not been any new releases, yet the natural resources have not fully recovered. One alternative to deal with the stream contamination is to dredge the stream which would kill everything there in the hope things would recover. Or do we let nature

take its course and let the stream continue to naturally recover? Who makes that decision?

Response. Under the Department of the Interior (DOI) natural resource damage assessment regulations, the trustee agency or agencies consider a range of alternatives for restoration of injured resources. 43 C.F.R. § 11.82(c). In the hypothetical situation you posit, these alternatives might include dredging the stream to eliminate all further releases; enhancement of the injured resources to speed up their natural recovery; acquisition of equivalent resources to compensate the public for the lost resources; no action; and various combinations of the foregoing.

Under the DOI regulations, the trustees would consider, among other things, the technical feasibility of each alternative; the relationship of the expected costs and the expected benefits of each alternative; the cost-effectiveness of each alternative; the potential for additional injury resulting from the proposed alternative; the natural recovery period of the injured resources; and the ability of the natural resources to recover without any action. 43 C.F.R. § 11.83(d). The trustees would seek public comment from interested persons, including the responsible parties, on the various alternatives. 43 C.F.R. § 11.81(d) (2). Based on these considerations, and public comment, the trustees would select the most appropriate restoration alternative. 42 C.F.R. § 11.82(a).

Question 4. Apparently, out west there are high natural concentrations of elements such as arsenic, mercury and lead (I understand that the most productive uranium mining district in the country is in New Mexico) that can leach out when touched by water. Is this taken into consideration in determining water standards in your State? Have there been instances where remedies have mandated cleanup of groundwater to levels lower than background?

Response. New Mexico has localized occurrences of relatively high levels of naturally occurring arsenic in some of its groundwater. Naturally occurring lead and mercury are less common. Lead and mercury are relatively insoluble in water at normal pH, and thus rarely create water quality problems.

New Mexico does take background levels of contaminants into consideration in determining appropriate cleanup levels. The regulations issued under the New Mexico Water Quality Act set standards for contaminants in groundwater and surface water. The regulations provide that "[i]f the background concentration of any water contaminant exceeds the standard . . . pollution shall be abated by the responsible person to the background concentration." New Mexico Water Quality Control Commission Regulations § 4101 (B). There have been no instances in New Mexico of remedial actions that mandated cleanup to standards below background levels.

Response of Charles de Saillan to an Additional Question from Senator Lautenberg

Question. On behalf of NAAG, are you aware how many States have Superfund statutes, and of those that do, how many of these have liability schemes that are retroactive? How many are strict? How many are joint and several?

Response. Because "Superfund statute" is not a precise term, it is not possible for us to provide a definitive number of States that have enacted such laws. By our count, at least 38 States have laws providing for the cleanup of hazardous substances similar to CERCLA. Several other States have features similar to CERCLA in their water quality or hazardous waste management statutes, which we have not included among the 38.

Of those 38 States with Superfund-type cleanup laws, some 26 have laws that provide for strict, joint and several, and "retro-active" liability similar to CERCLA. The laws of 36 States—all but Illinois and Michigan—provide strict liability. The laws of 36 States—all but California and Iowa—apply liability to preenactment disposal. The laws of 31 States provide for joint and several liability, either by statute or common law; the laws of Alabama, Arizona, Arkansas, California, Illinois, Tennessee, and Utah expressly preclude joint and several liability. The laws of several other States limit joint and several liability, most frequently by allowing proportionate liability if the responsible party can demonstrate a reasonable basis for apportionment, which is not unlike the current CERCLA scheme.

In addition, many States with no State Superfund laws rely on water quality laws or hazardous waste management laws to require cleanup. Many of these laws include strict, joint and several, and "retroactive" liability. The New Mexico Water Quality Act, N.M. Stat. Ann. §§ 74–6–1 to 74–6–17, is an example.

Furthermore, several States that place limitations on liability under their own statute rely on the Federal CERCLA statute to obtain cleanup. For example, the California Hazardous Substance Account Act, Cal. Health & Safety Code §§ 25300 et seq., does not provide for joint and several liability or liability for preenactment

disposal. Consequently, California relies heavily on the liability provisions of CERCLA, and has brought numerous cost recovery actions under CERCLA.

We base this information on an EPA study entitled, "An Analysis of States Superfund Programs: 50-State Study 1993 Update," and on informal surveys conducted by State attorney general staff.

We request that this letter, the enclosed letters from Governor Gary E. Johnson and from Secretary Mark Weidler, and the enclosed National Governors' Association Policy, be included as part of the hearing record.

We appreciate the opportunity to provide this information to the Subcommittee. If you have any further questions, do not hesitate to contact our Office. I can be reached by telephone at (505) 827–6939 or by telefax at (505) 827–4440.

OFFICE OF THE GOVERNOR
STATE CAPITOL
SANTA FE, NEW MEXICO 87503

GARY E. JOHNSON
GOVERNOR

(505) 827-3000

February 29, 1996

The Honorable Bob Dole
S-230 Capitol Building
Washington, DC 20510

The Honorable Thomas Daschle
S-221 Capitol Building
Washington, DC 20510

The Honorable Newt Gingrich
H-232 Capitol Building
Washington, DC 20510

The Honorable Richard Gephardt
H-204 Capitol Building
Washington, DC 20510

Dear Senators and Congressmen:

The State of New Mexico applauds the efforts of the 104th Congress to reform Superfund Legislation and believes that many of the proposed changes will benefit our State by affecting a more efficient and effective program. We would like to discuss, however, several reform measures that may be detrimental to the State. Several states share these concerns and have communicated them to you through bi-partisan efforts, through various governor's associations, and individually. With the eventual delegation of the Superfund program to qualified states, we hope you will consider these concerns in your reauthorization efforts.

State Role
The State of New Mexico supports the delegation of the Superfund program to the states. However, the proposed legislation requires states to follow federal remedy selection which pre-empts the use of state laws. We believe that states should retain all state rights, especially state applicable standards, and have the flexibility to apply the Superfund program in a manner that meets specific needs of the state. This is especially critical in arid western states where policies and procedures developed for eastern states are not appropriate.

Remedy Selection
The proposed legislation will require remedy selection to be based on the lowest total cost of cleanup rather than using cost as one of several, balanced selection criteria. While we applaud efforts to contain costs, basing remedy selection on cost alone will result in the selection of containment and natural attenuation of groundwater contaminant plumes. In an arid state such as New Mexico, we can not afford to allow portions of our drinking water supply to remain contaminated.

We are greatly concerned about provisions which allow any party to petition to reopen existing Records of Decision (ROD's) for amendments if remedial action has not yet been completed at a site. This change will seriously slow the Superfund process rather than expedite remediation efforts and will result in much higher transaction costs for the State. If the current statute is to be amended, it should be limited to requiring state concurrence and should not invoke a judicial review process.

Liability and Cost Allocation
New Mexico is supportive of the proposed reforms to the liability scheme which provide greater equity for innocent landowners and *de minimis* contributors. We are concerned, however, that further liability reforms will shift the financial burden of clean up to the states and our taxpaying citizens. We support the current liability scheme which is based on the fair principle that the polluter should pay for their pollution.

We support efforts to create a cost allocation scheme which will hopefully minimize the litigation associated with multiple Responsible Parties. However, we are concerned that the proposed allocation scheme will result in a halt to site cleanup while the allocation procedure is implemented. We propose that the legislation be amended to allow cleanup efforts to proceed concurrently with the cost allocation process.

In closing, we would again like to emphasize the State of New Mexico's support for the delegation of the Superfund program to the state. We are concerned, however, that the delegation of authority requires a strict adherence to the overly prescriptive Superfund guidelines and does not give the states enough flexibility in applying the program in a manner that best meets the needs of the states. Thank you for your consideration.

Sincerely,

Gary E. Johnson
Governor

GEJ/MEW:mh

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GARY E. JOHNSON
GOVERNOR

MARK E. WEIDLER
SECRETARY

EDGAR T. THORNTON III
DEPUTY SECRETARY

November 3, 1995

Senator Pete V. Domenici
Hart Senate Office Building, Room 328
Washington, D.C. 20510

Dear Senator Domenici:

As Secretary of the State of New Mexico Environment Department (NMED), I would like to take this opportunity to discuss Superfund Reauthorization efforts as proposed by Senator Smith in S. 1285. As stated in our previous correspondence to you, the NMED applauds many of the proposed Superfund reform initiatives and believes the reforms will benefit the State of New Mexico. I would like to discuss, however, several reform measures that may be detrimental to the State and hope you will consider these comments in your evaluation of S. 1285.

S. 1285 Title II-State Role:

1. NMED supports the delegation of the Superfund program to the states. However, the proposed legislation calls for states to follow federal remedy selection and requires the state to pay any incremental costs for the selection of a higher priced response action. NMED believes that the states should retain all state rights and have the ability to apply the Superfund program in a manner that meets specific needs of the state without paying incremental costs. This is especially critical in arid western states where policies and procedures developed for eastern states are not appropriate.

S. 1285 Title IV-Selection of Remedial Actions:

1. The proposed legislation would require remedy selection to be based on the lowest total cost of remediation rather than using cost as one of several, balanced selection criteria. Containment and natural attenuation are often the lowest priced alternatives. In New Mexico, this would severely impact groundwater resources by allowing groundwater contaminant plumes to be contained rather than treated. In an arid state such as New Mexico, we can not afford to allow portions of our groundwater supplies to remain contaminated.

2. The proposed legislation allows any party to petition to reopen Records of Decision (ROD's) for amendments if remedial action has not yet been completed at a site. This change would seriously slow down the Superfund process rather than expedite remediation efforts, be an unnecessary use of additional monies, and would likely result in the selection of a remedy such as natural attenuation or containment for groundwater

contamination plumes. As stated above in #1, we in New Mexico can not afford to allow portions of groundwater aquifers to remain contaminated.

S. 1285 Title V-Liability Allocations:

1. NMED supports the efforts to create a cost allocation scheme which would hopefully minimize the litigation associated with multiple Responsible Parties. However, we are concerned that the proposed allocation scheme will result in a halt to site cleanup while the allocation procedure is implemented. NMED proposes that the bill be amended to allow cleanup efforts to be concurrent with the cost allocation process.

S. 1285 Title VIII-Miscellaneous:

1. NMED does not support capping the National Priorities List (NPL) in 3 years. Capping the NPL will be a severe detriment to New Mexico by essentially terminating the Superfund program. In those instances where a responsible party is absent or declares bankruptcy, the state will have no other recourse for addressing the site. More importantly, the termination of the Superfund program will eliminate the incentive for voluntary clean up. The NMED has recently entered into agreements with eight different Responsible Parties who preferred to clean up their sites in cooperation with the state rather than through the Superfund process.

2. NMED is concerned about the proposal to require the Governor's concurrence on listing sites to the NPL. Currently, sites are proposed for NPL listing based on an objective and standardized evaluation of the site which takes into consideration effects to human health and the environment. Requiring any political figure to concur with listing eliminates the checks and balances built into the current listing procedure.

3. NMED disagrees with the proposed definition of a State Voluntary Remediation Program. The definition precludes the state from entering into a state order or consent agreement with the Responsible Party. NMED believes that it is necessary to have an enforceable agreement to provide consistent oversight of voluntary cleanup sites.

S. 1285 Title IX-Funding:

1. NMED is supportive of the proposed reforms to the liability scheme which provide greater equity for innocent landowners and *de minimis* contributors. However, the proposed reimbursement of cleanup costs to Responsible Parties from the Superfund would shift the costs of cleanup from the Responsible Parties to the taxpaying public. NMED supports the current retroactive liability scheme which is based on the fair principle that the polluter should pay for its pollution. Repeal of retroactive liability would allow parties that opted for cheap and unsound, albeit legal, waste disposal practices to avoid any responsibility for the public health and environmental consequences of their hazardous waste.

Before closing, we would again like to emphasize NMED's support of the delegation of the Superfund program to the states. We are concerned, however, that the delegation of authority requires a strict adherence to the overly prescriptive Superfund guidelines and does not give the states enough flexibility in applying the Superfund program in a manner that best meets the needs of the states. As specific example, NMED is pursuing an investigation of an abandoned dry cleaning site which has contaminated the City of Albuquerque drinking water supply. The City is reluctant to support listing the site on the NPL due to feared economic impacts. NMED would like to clean up the site and appease the City by trying to use Superfund monies to investigate the site without actually listing the site on the NPL. For states to be successful in applying the Superfund program in a more efficient and less costly manner, the states must be given the flexibility of tailoring the Superfund program to meet the specific needs of the state.

Thank you for your consideration of NMED's concerns discussed above. Should you or your staff aides have additional questions regarding NMED's position on Superfund Reauthorization efforts, please contact myself or Maura Hanning of the NMED Superfund Section at (505) 827-2922.

Sincerely,

Mark Weidler
Secretary
New Mexico Environment Department

MEW:MH:mh (GWPRB)

PREPARED STATEMENT OF RICH HEIG, SENIOR VICE PRESIDENT, KENNECOTT CORPORATION

My name is Rich Heig, and I am Senior Vice President for Engineering and Environment of Kennecott Corporation.

I appreciate having the opportunity to appear before this Committee on behalf of Kennecott, and express our views on S. 8, the "Superfund Cleanup Acceleration Act of 1997". There is a lot that we like about this bill. Kennecott supports a balanced reform of Superfund, designed to correct the program's many problems—problems that have led to little cleanup, and a tremendous amount of litigation. Superfund reform should have as its goal, expedient cleanup based upon good science, and should include natural resource damages (NRD) provisions that clearly focus on restoration of services. S. 8 is a positive step toward this goal.

Kennecott Corporation is headquartered in Salt Lake City, Utah, and provides management services to various Kennecott affiliates. Kennecott companies include the third largest producer of copper metal, and the third largest producer of clean burning, low sulfur coal in the United States. The operations of Kennecott Utah Copper Corporation near Salt Lake City have produced more copper than any other mine in history, and are a significant supplier of gold, silver, and molybdenum, with employment for more than 2,300 Utah residents. Over the last 10 years, Kennecott Utah Copper has invested more than $ 2 billion in modernizing its mining and processing facilities. Our new smelter, when operating to full design capacity, will be the world standard for reducing SO_2. In addition to Utah, Kennecott companies have base and precious metal operations in the States of Alaska, Nevada, South Carolina, and Wisconsin, and coal mines in Colorado, Montana, and Wyoming.

Kennecott is very familiar with the inefficiencies of the existing Superfund law, and since 1990 has undertaken proactive cleanup measures at Kennecott Utah Copper's Bingham Canyon Mine. Mining in the Bingham Canyon area can be traced to the 1860's when a number of lead and silver mines and mills became active. In the 1920's, Kennecott consolidated various holdings and began the mining of copper. Early miners, along with the rest of society, did not have the benefit of modern technology and understanding of environmental values in their practices of waste management.

We believe the results of Kennecott's proactive approach speak for themselves. Over the past 5 years, Kennecott has expended over $230 million for remediation. Twenty-five (25) million tons of historic mining wastes have been properly disposed. Over 5,500 acres have been reclaimed for wildlife habitat and recreational uses. Significant progress has been made in containing and controlling affected groundwaters. This has all been accomplished to EPA and State of Utah specifications.

These efforts have not been easy under the current Superfund law which lacks flexible mechanisms to accomplish proactive and voluntary cleanups. After years of attempting to negotiate a formal comprehensive consent decree to address the cleanup work, negotiations failed. In January 1994, Kennecott Utah Copper sites were proposed for Superfund listing, despite having spent over $85 million on cleanup at 14 source sites (with cleanup completed at seven of those sites). To avoid the negative ramifications of a Superfund listing, Kennecott mounted an extensive challenge to the proposed listing. All the while, Kennecott proceeded with cleanup activities and discussions with EPA to develop a non-traditional Superfund approach to address the numerous cleanup activities.

A site visit by Environmental Protection Agency (EPA) Administrator Carol Browner and her staff, combined with recognition of Kennecott's successful cleanup efforts and ongoing commitment, resulted in a Memorandum of Understanding (MOU) established in September 1995. In the MOU, Kennecott, EPA, and the State of Utah agreed that the Superfund listing of the Kennecott sites would be deferred if Kennecott completed certain specified cleanup programs and studies—most of which were already underway.

Kennecott's goals for its environmental cleanup program include expeditiously reducing real risks by characterizing the problems fully and efficiently, considering both proven and innovative solutions, and utilizing those technologies that are readily implementable and cost-effective. This has been done on a parallel track with regulatory and legal discussions, and, at the same time, continuing full and open communications with the affected communities. This approach has minimized transaction costs, and continues to avoid the negative effects of a Superfund listing on a viable operating facility and the adjoining communities.

Kennecott continues to work with EPA and the State in completing these projects, including, a remedial investigation and a feasibility study for groundwater contamination, an ecological risk assessment, and completion of source control and elimination efforts. Kennecott appreciates the foresight, and we believe, good judgment

exercised by Administrator Browner in adopting this approach to Kennecott's cleanup activities.

The results achieved by Kennecott Utah Copper, acting as an environmentally pro-active company, are in sharp contrast to Kennecott's experience at other Superfund sites, such as the Ekotek NPL site located in North Salt Lake. Over $19 million has been spent since 1989, approximately half of which went to EPA oversight costs and legal fees, and the final cleanup remedy is yet to be implemented, even though the potentially responsible parties (PRPs) are eager to proceed.

Kennecott Utah Copper also has experience with the natural resource damages provisions of Superfund. In the midst of all the Superfund cleanup activity, the NRD Trustee for the State of Utah maintained a $129 million action for natural resource damages for contaminated groundwater. An initial settlement was rejected by the Federal court, and the parties entered a second round of negotiations. It was difficult to develop a settlement of the NRD Trustee's lawsuit prior to any remedial determination on the groundwater. Kennecott needed a resolution that would not require it to pay for a cleanup twice—once for NRD damages, and once for a Superfund cleanup remedy.

Ultimately such a settlement was reached. The settlement required Kennecott to complete source control measures already begun as part of Kennecott's proactive cleanup and to pay $9 million in damages, primarily for increased costs of municipal water delivery and future lost use resulting from restoration activities. Additionally, Kennecott established a letter of credit currently valued at $35 million to be held in trust to restore municipal water services that would have been provided by the groundwater. If Kennecott develops a qualified program to provide municipal quality water, either as part of the Superfund remedy or as part of the NRD settlement, it can utilize the letter of credit to help fund that effort. How the final remedial action and NRD settlement will be coordinated has not yet been determined.

Kennecott's Superfund experiences have led to the following conclusions:

• As currently structured, Superfund is slow, costly and cumbersome. It does not provide a simple mechanism, at either the Federal or State level, for voluntary cleanups, such as that undertaken at Kennecott Utah Copper.

• Trustees are authorized by Superfund to recover natural resource damages resulting from releases by PRPs without being limited to actual lost values, and without a reasonable cap on ultimate liability.

• The criteria for cleanup standards has often been based on overly conservative or unrealistic risk assessments, without regard for reasonably anticipated land or water uses.

• The remining of historic mining sites has been hindered by Superfund's retroactive, joint and several liability provisions.

Kennecott is, therefore, pleased to see the efforts being made by the sponsors of S. 8 to amend and bring about the much-needed reform of Superfund. Toward that goal, we would respectfully ask the Committee to consider the following comments in their deliberations on this bill.

TITLE I—BROWNFIELDS REVITALIZATION

This Title includes a provision to assist States to establish and expand voluntary response programs. Kennecott believes that provision should be made for voluntary cleanups as part of the Federal program. PRPs should be encouraged to undertake voluntary cleanups, whether or not a site is listed or proposed for listing as a Superfund site. Voluntary cleanups can significantly reduce the costs and delays of Superfund, and be completed in a manner acceptable to EPA or the States.

TITLE IV—SELECTION OF REMEDIAL ACTIONS

Kennecott supports the remedial action provisions of Title IV that require the selection of remedies that are cost-effective, that are based onsite-specific conditions and risk assessments, and that consider reasonably anticipated future uses of land and water. Kennecott also supports those provisions that allow for the consideration of natural attenuation and biodegradation in groundwater remediation, that recognize institutional and engineering controls, and that eliminate the preference for permanence and treatment.

TITLE V—LIABILITY

Kennecott supports the provisions in Title V to fairly allocate response costs at non-Federal sites, including the mixed funding for orphan shares.

We recommend a provision be added that would allow remining of historic mining sites for the economic recovery of metals or minerals without the imposition of

Superfund liability for past releases. Because of the size and nature of these sites, remining may be the only practicable approach to a cost-effective cleanup.

TITLE VII—NATURAL RESOURCE DAMAGES

S. 8 recognizes the need to reform the cleanup and remedy provisions of Superfund. This includes the need to have a rational approach to determine how clean is clean. This approach should be based on reasonable risk assumptions in light of current and reasonably anticipated land and water use scenarios. In order for the remedy and liability reforms of Superfund to succeed, the objectives of the NRD program must work harmoniously with those provisions. The improvements to be gained in the cleanup provisions will be lost if NRD Trustees, under the guise of restoration, can still require payment for additional cleanup beyond that necessary to achieve protection of human health and the environment. While Kennecott and the State of Utah NRD Trustee were able to reach a compromise that so far allows Kennecott to avoid a double cleanup, this type of result could be formalized for all NRD claims, rather than left to an NRD Trustee's discretion.

NRD should not be a secondary or substitute cleanup program. Superfund reform legislation should clarify the role of the NRD program by clearly limiting NRD damages to restoring the public uses provided by the natural resource that were lost or impaired by the release of hazardous substances. It also includes defining injury in terms of actual injury to measurable and ecologically significant functions provided by the resource that were committed or allocated to public use just prior to the time an injury occurred. Restoration programs should be cost effective and reasonable, based upon actual restoration needs, and damages should be spent on restoration. To be cost effective, the cost of restoration should not exceed the benefits of the restoration activity. Surplus or punitive recoveries of past lost use or nonuse damages should be eliminated.

The NRD Title of S. 8 is a good beginning from which to address these concerns. In particular, we concur in the elimination of non-use damages, and the elimination of assessment costs for studies using the contingent valuation method (CVM). However, we believe CVM should be eliminated altogether as a damage calculation methodology. We agree that regulations should be required to take into consideration the ability of a natural resource to recover naturally, as well as the availability of replacement or alternative resources. We also believe it would be appropriate to clarify that natural recovery should also be applied to reduce the amount of the overall recoverable damages.

Kennecott offers the following suggestions to clarify the provisions of Title VII:

- The limitation on double-recovery now appears to be less protective than the existing prohibition. The proposed language seems to limit the existing prohibition on double recovery only with respect to the same person and to the same injury. This could allow two different Trustees to obtain damages for different injuries to the same natural resource caused by the same release of hazardous substances.
- The NRD program should continue to include a reasonable limitation on liability. The existing $50 million cap should be included in any Superfund reform, and should pertain to the entire area affected by the release of hazardous substances.
- The recovery of NRD damages should be clearly limited to releases occurring after 1980.
- Not only should EPA be required to take into account potential resource injury that could result from remedy selection, there also should be a bar to recovery of NRD damages resulting from the selected remedy.
- The NRD provisions limiting judicial *de novo* review of restoration plans should not eliminate *de novo* adjudication of damage claims.
- There should be a precise statute of limitations that runs from the time the Trustee knew, or should have known, of the injury.
- The authority of trustees to issue Section 106 orders should be clarified to ensure that trustees and EPA are not using different standards of what is necessary to protect the environment, and to ensure that trustees do not use Section 106 orders to bypass statutory provisions governing NRD claims.

In conclusion, Kennecott believes that S. 8 offers several positive improvements to the Superfund program. We appreciate this opportunity to testify and offer our suggestions for additional improvements to Superfund.

RESPONSES OF RICH HEIG TO ADDITIONAL QUESTIONS FROM SENATOR SMITH

Question 1. Mr. Heig, you state in your testimony that it was because of your voluntary cleanup efforts that the Bingham Canyon project was successful. Are the vol-

untary cleanup provisions in S. 8 that would provide for more State control and the ability to provide finality, an improvement to the current system?

Response. Title I of S. 8 provides in Section 102 for "qualifying State voluntary response programs," and defines the elements of such programs. Further, in Section 103, S. 8 provides finality to response actions completed under a State program, as well as requiring State concurrence with Federal Section 106 orders within 90 days after issuance. Kennecott supports these provisions, and believes they represent a significant improvement over the existing system in Superfund. Volunteer response programs would act to eliminate or minimize litigation, reduce costs, and result in quicker cleanups to the benefit of all. As noted in our testimony, Kennecott also recommends that the volunteer response provisions in S. 8 be extended to the Federal program. The benefits to be gained under a State program would be equally valuable to the Federal program, and would be complementary to other cooperative initiatives recently undertaken by EPA.

Question 2. Your statement demonstrates that there is a strong need to coordinate remediation efforts and NRD claims. Do you believe that the changes made by S. 8 in this regard are an improvement?

Response. Yes, a number of changes made by S. 8 improve coordination of the cleanup and NRD provisions of CERCLA. Specifically, S. 8 improvements to the NRD program include:

- Eliminating non-use damages;
- Elminating recovery of assessment costs for CVM studies;
- Requiring response actions and restoration measures to "not be inconsistent" with one another and to be implemented in a coordinated and integrated manner; and
- Requiring natural recovery of a resource to be considered in injury and restoration assessments.

Nevertheless, for the remedial and NRD programs to be implemented as effectively as possible, further changes should be considered:

(1) to avoid conflicting standards between remedial authorities and NRD trustees that essentially result in dual cleanups; and

(2) to avoid duplicative damages and transaction costs.

(1) Avoid Conflicting Standards Essentially Resulting in Dual Cleanups

It is Kennecott's understanding that at a CEQ meeting on January 27, 1997, to discuss the Section 106 Executive Order 13016, Administration officials asserted that trustees have cleanup responsibilities in addition to EPA's cleanup responsibilities. The example given was that EPA might require the cleanup of contaminated sediments to a level necessary to protect human health and the environment, but that trustees might decide additional cleanup is necessary. This results in what some proponents of NRD reform refer to as the "Cleanup 1 and Cleanup 2" scenario. Essentially, "Cleanup 1" is EPA's required cleanup to a level protective of human health and the environment; "Cleanup 2? is a trustee's required cleanup to a level beyond that necessary to protect human health and the environment and possibly beyond that necessary to restore the services provided by the resource in question. (See, "Superfund's Natural Resource Damages Program Should Not Be a New Cleanup Program, "Attachment 1.) Without coordination, problems addressed by S. 8 in the cleanup program ultimately may be shifted to the NRD program.

There are a number of instances where uncoordinated application of conflicting standards will result in wasted resources. The attached document, entitled "NRD Site Examples" (Attachment 2), illustrates various cases where the differing remediation and NRD goals will result in potential double cleanup expenditures, the very issue Kennecott attempted to avoid in structuring its NRD settlement.

The proposed S. 8 requirement for coordination of response and restoration measures is a good beginning to avoid these unfair results. However, this mandated coordination should not become a means for the NRD restoration to drive the remedy based upon cleanup goals that are inconsistent or more onerous than remediation goals. This is particularly important where NRD trustees seek restoration at "cleanup" levels beyond those required by EPA (or any similar to the proposed revisions contained in Title IV of S. 8). For example, EPA, as well as provisions of proposed Title IV, are working toward a sustainable ecosystem approach to remedy selection. Conversely, some NRD trustees are seeking restoration to address any contaminants causing a measurable adverse impact on the chemical, physical or biological environment (See, 43 C.F.R. §§11.14(v) and 11.15; IS C.F.R. §§990.30 and 990.51(c)), regardless whether contaminants left in place following remediation impair the ability to restore the services provided by the resource to the public. This issue could be addressed by including a restoration standard in S. 8 based on restoring the meas-

urable and ecologically significant functions of the natural resources that provided services to the public.

(2) Avoid Duplicative Damages and Transaction Costs

Kennecott did not face an NRD issue involving multiple trustees at the Bingham Canyon site; however, this is not true for many sites. As Kennecott noted in its testimony, efforts at addressing this issue in S. 8 appear to unintentionally eliminate existing protections against double recovery. S. 8 includes a good addition designed to prevent a trustee from recovering damages not only under CERCLA, but also under other laws. However, the modification in S. 8 appears to apply only to the same "person" and could be misconstrued to allow a party that has first recovered damages under another law to proceed with recovery under CERCLA. Consequently, this provision should be clarified to preclude recovery of duplicate damages by more than one trustee for injuries to the same resource caused by the same release(s) of hazardous substances. It should also preclude recovery of the same damages under multiple laws, regardless if the claim is brought first under laws other than CERCLA.

Question 3. Would you have progressed as far as you have at the Bingham Canyon site, if that facility had been placed on the NPL? Are the cleanup provisions in S. 8 and improvement to this problem?

Response. Kennecott believes the cleanup efforts at the Bingham Canyon site have progressed further and more quickly than would have been possible had the site been listed on the NPL. As you are aware, the traditional Superfund process hinders the ability to quickly achieve cleanup. Under the approach utilized by Kennecott with the oversight of EPA and the State of Utah, of the 20 sites (source areas) initially identified, Kennecott has completed cleanup at 10, cleanup is in progress at 8 other sites, and 2 sites were determined not to require additional work. To date, the percentage of costs spent on actual cleanup at Kennecott sites is still over 90 percent and at times exceeds 95 percent. These percentages are likely to remain close to this level, particularly given EPA's recent policy that makes the Kennecott sites eligible for reduced oversight costs. Spending over 90 percent of costs on actual cleanup is not likely to be achievable at an NPL site.

Key to the success of the proactive approach utilized by Kennecott has been the ability to proceed quickly while utilizing community participation, and to focus efforts on removing potential sources of contamination through area by area removal actions. If Kennecott were required to conduct all of its cleanup activities under the process found in the cleanup provisions of S. 8 (Title IV), it is not clear that the results would be as efficient and effective as they have been to date.

However, assuming that the provisions of Title IV do not eliminate the ability to address contamination through accelerated removal actions, some of the provisions appear to be beneficial. For example, Kennecott is conducting a remedial investigation and feasibility study (RRFS) relative to groundwater contamination (and is initiating a separate remedial investigation regarding a different area of groundwater contamination.) A number of changes proposed by S. 8 that could benefit the continued efficiency of achieving a cost-effective remedy include:

- Remedial actions based on the current, planned, or reasonably anticipated use of the surface water, groundwater, or land;
- Providing that a remedial action using institutional and engineering controls be considered on an equal basis with other remedial action alternatives;
- Requiring consideration of natural attenuation or biodegradation;
- Emphasis on allowing PRPs to develop work plans;
- Preference for using facility-specific data; and
- Comparison of risks posed by the facility to other risks commonly experienced by the local community.

Additionally, the "results-oriented approach" contained in Title VIII, requiring procedures to minimize the time required to conduct response actions, expedite facility evaluations and risk assessments, limit engineering studies and require streamlined oversight, appears to be a constructive approach for timely response actions in comparison to the typical Superfund process. However, the ability to quickly and efficiently conduct a cleanup should not be encumbered with additional procedures unless existing procedures are eliminated. Again, these procedures, even if expediting, should not impede the ability to conduct timely removal actions to address the majority of the contamination at a site if appropriate.

Question 4. As you know, President Clinton recently issued an executive order which would allow the Department of interior, or any other Department to issue orders under Section 106. You state in your testimony that this section should be clarified so that there is consistence among the Departments about what is nec-

essary to protect the environment. How would you modify S. 8 to address these issues under Section 106?

Response. The executive grant of Section 106 authority to Federal NRD trustees was unnecessary to fix any problems in CERCLA's cleanup program. Yet, with this new grant of Section 106 authority comes the concern that the problems of CERCLA's cleanup program will not only be magnified five times, but that the authority granted to Federal NRD trustees by Section 106 may encourage trustees to blur distinctions between cleanup and NRD. Consequently, the simplest means to address the concerns raised by Executive Order 13016 is to modify Section 106 by limiting the delegation of Section 106 authority to those agencies that have had the authority for the last 16 years—the Environmental Protection Agency and the National Coast Guard.

This approach would avoid potential problems that can result from the broad duplicitous delegation of Section 106 authority to five additional Federal agencies which are also NRD trustees. This approach also would alleviate the improper use of Section 106 authority as a pretense for Section 107 NRD purposes and the magnification of problems already identified in the implementation of Superfund. Even all of EPA's Administrative reforms will have little impact on other agencies not bound by those policies. At a minimum, if Federal NRD trustees are allowed to retain Section 106 authority, such authority should be clearly limited to emergency situations and be unavailable if the trustee is also a PRP at a site. These minimal limitations are discussed further below.

DISCUSSION

Giving trustees Section 106 authority raises many concerns about fairness, particularly where in many instances, the Federal trustee may also be a PRP at the site in question. The concerns that some trustees might use this new power improperly are not suspicious rhetoric. The Administration has made a number of alarming statements about the purpose of the Executive Order. For example, when the Administration issued the Executive Order, public statements indicated that the authority is directed at cleanup [Cleanup 2] of "natural resources that support hunting, fishing, tourism and recreation in local economies." This is the objective of the Administration's stated NRD program of "restoration" for injured natural resources that support hunting, fishing, tourism and recreation in local economies.[1] CEQ's Twenty-Fifth Anniversary Report furthers this notion when it states:

> "Superfund moneys are not available, however, to fund natural resource restoration, and thus the natural resource damage programs have had more limited support than EPA's remedial program. To enhance the program authority of natural resource agencies that now lack access to the Superfund, Executive Order 13016 provides these agencies with authority to issue administrative orders to compel responsible parties to perform response work."

Moreover, an EPA official indicated that the new authority will enable trustees to compel PRPs to conduct natural resource damages assessments.[2] That is not what Section 106 authority is intended to address.

If the authority granted by the Executive Order is improperly utilized for purposes of Section 107 NRD, the few procedural and substantive safeguards provided by Section 107 could be circumvented, including:

- Evasion of a PRP's rights to an Article III court hearing where the trustee must prove its case;
- Circumvention of the retroactive and monetary limitation on liability that currently exists under Section 107;
- Avoidance of statute of limitations and the prohibition on double recovery; and
- Bypassing the requirement that a trustee prove that the PRP's release was the cause of the actual injury.

Furthermore, where a trustee improperly utilizes Section 106 authority, the Superfund is at risk for recovery of response costs by those subject to improperly issued orders.

Part of the concern for misuse of the authority lies in the minimal standard for issuing Section 106 orders. The current standard for exercising Section 106 authority is the existence of an "imminent and substantial danger to public health and

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[1] *See,* Administration August 28, 1996, Press Release *"Protecting All Communities From Toxic Pollution;"* and June 20, 1995 Testimony of Asst. Sec. Oceans Atmosphere, National Oceanic and Atmospheric Administration, before the Subcommittee on Commerce, Trade, and Hazardous Materials, House Commerce Committee.

[2] Interview with Assistant Administrator for Solid Waste and Emergency Response, Superfund Report, October 2, 1996.

welfare or the environment" from the "actual or threatened release of a hazardous substance."[3] While, to the average reader, this standard appears to apply only in emergency cases, it has been indulgently construed so the standard is more a catch phrase than a criteria for issuing 106 orders. For example, "imminent" endangerment exists if "factors giving rise to it are present, even though harm may not be realized for years."[4] Similarly, the definition of "release" has been applied broadly by some courts to include ongoing, passive "releases" from a source that was disposed of historically.

With such a flexible standard, Federal trustees should, at a minimum, be limited to utilizing Section 106 authority only in true emergency situations. Limiting the trustees' use of Section 106 authority to emergency situations requires either (1) a clarification of the "imminent and substantial endangerment" standard applicable to all agencies with authority under Section 106 or (2) modification of the standard relative to NRD trustees' Section 106 authority. For example, to modify the Section 106 standard with respect to the authority of NRD trustees, the authority should be eliminated for historically contaminated sites. Those sites should already have been identified for CERCLA response if such was necessary. Emergency authority is more applicable to current or future incidents caused by current or future conduct.

Furthermore, a trustee should be prohibited from exercising Section 106 authority where the trustee is a potentially responsible party. In that situation, if an emergency response needs to be undertaken, the trustee can undertake the removal itself and seek to recover response costs from other parties if appropriate, or the trustee can rely upon EPA or the Coast Guard to exercise Section 106 authority.

Kennecott respectfully requests that as part of its response to this question, Attachments 3 and 4 be incorporated and considered. Attachment 3 contains the comments of several companies, including Kennecott, concerning the Implementation of Executive Order 13016. Attachment 4 contains the comments prepared by the Chemical Manufacturing Association (CMA) that are referred to in Kennecott's comments contained in Attachment 3.

Question 5. You state that at the Ekotek NPL site, you have spent $19 million on legal fees and oversight costs since 1989 (8 years), yet no cleanup remediation has been implemented. Do you believe that the changes proposed in S. 8 would have avoided this problem?

Response. The Ekotek Site is a former used oil recycling center in Salt Lake City, Utah. In 1988, EPA took over the site and in 1989 the Ekotek Site Remediation Committee was formed to respond to EPA cleanup orders and conduct emergency removal. The site contained many leaking drums and tanks, oil sludge ponds and other materials left behind when the owner, Ekotek, Inc., abandoned the site and declared bankruptcy. Over the life of the Committee it has been made up of some 400 of 3,000 potentially responsible parties at the site and is currently at 60 as a result of settlements. To clarify, although final remediation cleanup at the site has not occurred, approximately $10 million of the $19 million was spent by the Committee on the emergency removal, including EPA's response and oversight costs.

Several of the changes proposed in S. 8 may have resulted in benefits to the overall process and costs at the Ekotek site.

- Title I—Brownflelds

In 1996, the Ekotek Site Remediation Committee (Committee), requested EPA to consider the Ekotek site as a candidate for the Brownfields Pilot Programs nationwide. The Committee believes the site would be a good candidate for Brownfields as a means of encouraging its redevelopment once remediation is completed. Al-

[3] Under Section 106 of CERCLA, 42 U.S.C. 9606, EPA's main avenues to compel PRPs to conduct removals, studies or remediation include issuing a Unilateral Order (UAO) or making a referral for a judicial enforcement action. A judicial referral under Section 106 could result in an order compelling compliance and exacting penalties. If the PRP refuses to conduct a response action pursuant to a UAO, EPA could conduct a fund-financed response action. The EPA could then recover its costs and may be able to recover punitive damages up to three times the amount of the cost of the cleanup as well as seek penalties up to $25,000 per day. 42 U.S.C. 9606 and 9607. Now those authorities appear to have been granted to five Federal trustees. Even if a Federal NRD trustee issued a UAO beyond the scope of authority granted by Section 106, a PRP would be placed in an extremely difficult position to refuse the order at the rib of penalties and treble damages.

[4] See, *United States* v. *Conservation Chemical Co.* 619 F. Supp. 162 (W.D. Mo. 1984). "Substantial" endangerment exists "if there is reasonable cause for concern that someone or something may be exposed to risk of harm by release or threatened release of hazardous substance if remedial action is not taken, keeping in mind that protection of public health, welfare, and environment is of primary importance." *Id.*

though the Committee has not received a response regarding the Brownfields request, Kennecott would not want to see any future opportunity for Brownfields treatment eliminated because S. 8 excludes NPL sites. Even if the final remediation is conducted by responsible PRPs, the benefits to be gained under Brownfields that limit the liability of a prospective purchaser and encourage development of the property into a new viable commercial facility will be of great benefit to the neighboring community.

• Title IV—Remediation

It appears that many of the concepts of the proposed remediation provisions of S. 8 potentially could have avoided some of the delays and expenses incurred at the Ekotek site. For example, EPA's proposed remedy at the site included a pump and treat requirement for groundwater contamination related primarily to hydrocarbons. The Committee expended considerable time, effort and money to establish a technical case showing that the proposed pump and treat remedy for groundwater at the site was not cost-effective, would pose more of a threat to uncontaminated groundwater and the groundwater could be effectively remediated through intrinsic bioremediation. These same concepts relative to groundwater are formally addressed within the remedial groundwater provisions of S. 8. If the remediation provisions had been in place at the time of the RI/FS and remedy selection process it is possible that the proposed pump and treat remedy would not have been selected by EPA as the initial proposed remedy and much of the time, effort and money expended on rebuffing that proposal would have been saved. The difference between EPA's initial proposed pump and treat remedy and the intrinsic bioremediation remedy is approximately $4–6 million based on the Committee's estimates.

Although unknown at the time to the Committee, the proposed remedy for the Ekotek site was one of the remedies reviewed by the Administration's Remedy Review Board. Following the Board's review and consideration of comments received by interested parties, EPA Region VIII selected the alternative that included intrinsic bioremediation for the groundwater. Additionally, the second major component of the proposed remedy called for thermal desorption (incineration) of contaminated soils. The Committee sought a containment remedy for the contaminated soils, with removal of hot spots rather than the incineration remedy, as a cost-effective method of addressing the contamination and while remaining protective of human health and the environment. Ultimately, the selected remedy is the containment option. The overall cost difference between the two soils remedies is estimated by the Committee to be $10 million.

The Committee was pleased that at the end of the day EPA chose the more cost-effective yet protective remedies urged by the Committee. There are, however, a number of contingencies tied to the implementation of the selected remedy that could result in increased remediation costs in the future, notwithstanding the efforts of the Remedy Review Board.

• Title V—Allocation

The ability to fairly allocate liability at a site like Ekotek is important if the overall unfairness of Superfund with its strict joint and several liability is not otherwise addressed. The parties carrying the primary responsibility at the Ekotek site did not own or operate the site. Whether large or small, many of the PRPs sent only used motor oil to the site for recycling into useful products. It is possible the site would qualify as a "mandatory allocation" site under S. 8, and as such, allocation of the response costs could have been fairly allocated among the parties. However, any allocation process must necessarily take into consideration the toxicity of parties' wastes at a site. At Ekotek, some parties sent substances contaminated with PCBs. The cleanup costs associated with PCB contamination have the potential to increase the cleanup costs at the site by several million dollars.

At some sites, including Ekotek, the 1 percent threshold for a liability exemption could result in large numbers of PRPs and waste volumes fiL1ling in the exempt category. At a mandatory allocation site, it appears that the exempt category would be covered by orphan share funding. However, it appears that at requested or permissive allocation sites, this exempt share would be unfairly distributed to the remaining PRPs. For example, the total volume of hazardous substances sent to the Ekotek site is estimated at between 30 and 50 million gallons. One percent is 300,000 to 500,000 gallons, and it is estimated that all but a few dozen of the thousands of Ekotek PRPs would fall into the exempt category with at least 50–60 percent of total site gallonage exempted.

• Title VIII—Accelerated Remediation

"Results-Oriented Approach—The time for the completion of the RD/RA process for Ekotek (assuming only 60-day review period by EPA on submittals) has been

projected to take another 3.3 years, making the total response time at the site approximately 13 years. Given the length of time lost between the removal action and the issuance of a final ROD and the final remediation, accelerating the time to complete the remedial planning process would help to reach the final cleanup more quickly and presumably avoid delays and additional costs.

Queston 6. 1 would like to ask you about the issue of remining, which is not addressed in S. 8. Could you explain what remining consists of why it is prevented by Superjund's joint strict, several and retroactive liability system, and why it could be environmentally beneficial for former mining sites?

Response. By the term "remining" we mean the recovery of mineral values from historic mining sites by extraction, beneficiation, or re-processing of the remaining in situ ore and/or residual materials. Early mining and mineral processing methods were not as efficient as those employed today, and, consequently, mineral values were not always fully recovered. In some instances operations closed prematurely because of downturns in the market or lack of adequate capital. With modern equipment and technology, it may now be technically and economically feasible to reenter some historic sites and recover those values left behind.

Minesites by their nature are located at naturally occuring concentrations of minerals, often the metals identified as hazardous by Supcefund, and, as such, some historic sites have been candidates for the CERCLIS list. The CERCLA list contains a number of historic mining-related sites. Under the existing law, if a miner acquires a historic mining site, with contamination from historic operations (e.g., groundwater contamination), the miner can become a PRP subject to the joint, several and strict liability provisions of Superfund. The added burden of litigation, oversight, and other Superfund costs would likely overwhelm the economic incentives to remine the site. If the miner could acquire or enter the site to reprocess waste materials and recover additional minerals without becoming strictly liable for contamination caused by historic operations, some of the contamination sources could be eliminated.

Remining not only results in the recovery of valuable minerals or metals but also allows the residual materials to be managed with modern technology and practices that are protective of the environment. Remining would be conducted with the oversight and safeguards of current regulatory controls that act to protect air and water quality during operations, and require reclamation of the disturbed areas before final closure.

SUPERFUND'S NATURAL RESOURCE DAMAGES PROGRAM
SHOULD NOT BE A NEW CLEANUP PROGRAM

- When Superfund passed in 1980, Congress envisioned it as having one cleanup program to protect human health and the environment administered by EPA. After cleanup would come restoration to replant trees, restock fisheries, re-create wetlands, etc. under the natural resources damages ("NRD") program administered by resource trustees.

- In January 1997, federal resource trustees explained that their responsibilities are not limited to restoration and that Superfund now has two different cleanup programs: cleanup #1 administered by EPA to protect human health and the environment and cleanup #2 administered by resource trustees to remove contaminants having any measurable adverse impact on a chemical, physical or biological function. Thus, Superfund has become:

Cleanup #1	• Administered by EPA. • Designed to protect human health and the environment.
+	
Cleanup #2	• Administered separately by federal trustees (DOI, NOAA, DOA, DOE, DOD). • Designed to address natural resource injury. • Trustees define resource injury as the presence of contaminants causing a measurable adverse impact on the chemical, physical or biological environment.
+	
Natural Resource Restoration	• Administered by federal trustees to replant trees, re-create wetlands, etc.

- Under the trustees' cleanup standard, virtually nothing escapes attention under the NRD program. If the trustees' definition of cleanup prevails, Superfund experts have concluded that we might as well stop worrying about reforms to the EPA cleanup program because whatever EPA requires to protect human health and the environment can be overridden or rendered moot by the more expansive cleanup program administered by the trustees.

- Small and large businesses which have engaged in cleanup under EPA standards, agreed to a remedy selection, or entered into a covenant not to sue with EPA can find themselves liable for additional cleanup under the trustees all encompassing definition.

- When the Administration gave federal trustees Section 106 authority to require industry to take ordered actions, the problems with having a cleanup #2 became worse.

February 27, 1997

NRD SITE EXAMPLES

- The Natural Resource Damages ("NRD") program should be an important part of Superfund. Unfortunately, the program has lost its focus. In some cases, trustees are using the NRD program as a second cleanup program. In other instances, trustees ask for restoration money to fund unrelated projects. In still other cases, trustees demand, and collect, NRD money without any plan regarding how to use the funds. Congress should reform the NRD program to conform and clarify that its purpose is to restore resources used by the public which are injured by the release of hazardous substances and to place boundaries around the discretion trustees now claim in implementing the program.

- **Clark Fork River, Montana.** EPA's approved cleanup required that mine tailings be removed and then treated on higher ground. The state cleanup agency concurred. Now, the state trustee has filed a $713 million NRD claim demanding that the mine tailings be moved again and that additional stream channel cleanup be undertaken. The NRD claim also includes $371 million for so-called non-use and lost damages and for items such as $55 million to build a water reservoir for area residents despite the fact that these residents get their drinking water from a river system which was not affected by the mine operations.

- **Berks, Pennsylvania.** At a typical waste oil site cleanup, a state concurred in an EPA cleanup decision which found groundwater cleanup was unnecessary. Thereafter, the state filed an NRD claim for $565 million including groundwater cleanup. The NRD claim was for the difference between the agreed cleanup amount and the most expensive cleanup alternative which had been identified previously.

- **Fish Creek, Indiana.** A 1993 pipeline rupture caused an oil spill in Fish Creek and resulted in an NRD claim. Trustees estimated the NRD damage assessment could cost as much as $10.7 million even though the actual cost of restoration could be as little as $3 million. After the spill, the Nature Conservancy reported that the oil spill was a low risk source of stress and concluded that agricultural practices were the primary cause of habitat loss. But to resolve the trustee's NRD claim for the oil spill, the responsible party agreed to an "oil spill restoration" plan which provided for the acquisition of agriculture limiting conservation easements, the purchase of livestock fencing, and the purchase of mechanical barriers to trap silt caused by agricultural practices.

- **Fox River, Wisconsin.** After the State, industry and conservation groups voluntarily reached agreement on a cleanup and restoration plan and took steps to implement it, the Department of the Interior suddenly filed notice of an NRD claim which may include additional cleanup and non-use and lost-use damages. The Interior Department had refused to participate in the discussions leading to the voluntary agreement and its action has the real potential for disrupting the voluntary cleanup agreement.

- **Los Angeles Harbor.** The government has filed NRD claims against a municipal sewerage authority and others totaling $1.2-$1.8 billion, including $575 million in non-use values and

up to $1.04 billion for various restoration alternatives, including dredging or placing a 6 foot sand cap over 10.5 square miles of ocean bottom with a depth up to 300 feet. The dredging or capping of 10.5 square miles of ocean bottom is an unprecedented engineering project criticized by scientists and environmental groups as unnecessary and dangerous to marine life. The dredge or cap plan is designed to benefit two species of fish whose populations have not been shown to have been impacted; the peregrine falcon population, which stood at 14 pairs before the introduction of pollutants and is at 12 pairs now; the bald eagle, which is more plentiful today than before pollution discharges began; and the California sea lion whose population has increased from 1,000 in the 1920's to 110,000 today.

- **Coeur D'Alene, Idaho.** An NRD claim has been filed for $1.4 billion which includes removing and storing over 2 billion cubic feet of mine tailings in a river valley. Two billion cubic feet would fill 800,000 railcars. Of the total claim, $735 million is based on lost use and non-use values, including a claim for $200 million in lost tribal cultural and spiritual values although the Tribe's reservation is miles away from the valley.

- **Cantara Loop, California; Elliot Bay, Washington; Commencement Bay, Washington; New Bedford Harbor, Massachusetts; Los Angeles Harbor, California.** On May 18, 1996, the General Accounting Office ("GAO") released a study of how trustees have used monies collected from NRD settlements at five sites. GAO found that of the $33.9 million collected for NRD at these sites, only $3.6 million has been disbursed and that has been spent to pay for (1) past damage assessments and (2) preparing resource restoration plans to determine what to do with the rest of the money. GAO states "no other restoration actions have been taken with the monies collected." In fact, GAO notes that at one site the trustees admit most elements of the ecosystem are recovering without any special restoration efforts and, therefore, the trustees may not use the NRD money at that site but will instead use it "to develop natural resource restoration projects in other areas of the state." GAO found trustees made NRD claims without any restoration plan in mind and the money collected for alleged damages at one site was being used for projects elsewhere.

Dated: March 13, 1997

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January 8, 1997

Mr. Bradley M. Campbell
Associate Director
Council on Environmental Quality
Old Executive Office Building
Washington, D.C. 20501

Re: Comments on Implementation of Executive Order 13016

Dear Mr. Campbell:

In response to the Council of Environmental Quality's recent solicitation of comments, 61 Fed. Reg. 59,866 (November 25, 1996), we are pleased to submit these comments on the implementation of Executive Order 13016 on behalf of Aluminum Company of America, American Forest & Paper Association, American Petroleum Institute, Atlantic Richfield Company, Asarco Incorporated, E.I. du Pont de Nemours and Company, Kennecott Holdings Corporation & Affiliates, Fort Howard, FMC Corporation, General Electric Company, General Motors Corporation, Hercules Inc., NCR, Rhône-Poulenc, Inc., Zeneca Inc. (collectively "Commenters").

We thank you for the brief extension of time which you extended to the Commenters over the holiday period and look forward to your consideration and resolution of the important issues identified.

If you have any questions concerning these comments or desire additional information please contact either me (202-736-8111) or Jim Connaughton (202-736-8364).

Very truly yours,

David T. Buente
Richard B. Stewart
James L. Connaughton

JLC/pjt

CAMPBELL.WPD January 8, 1997 (11:55am)

BEFORE THE COUNCIL ON ENVIRONMENTAL QUALITY

COMMENTS ON THE IMPLEMENTATION OF EXECUTIVE ORDER 13016

Aluminum Company of America
American Forest & Paper Association
American Petroleum Institute
Atlantic Richfield Company
Asarco Incorporated
E.I. du Pont de Nemours and Company
Kennecott Holdings Corporation & Affiliates
Fort Howard
FMC Corporation
General Electric Company
General Motors Corporation
Hercules Inc.
NCR
Rhône-Poulenc, Inc.
Zeneca Inc.

JANUARY 8, 1997

Prepared by:

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COMMENTS TO THE COUNCIL ON ENVIRONMENTAL QUALITY ON EXECUTIVE BRANCH IMPLEMENTATION OF EXECUTIVE ORDER 13016

INTRODUCTION AND SUMMARY

Aluminum Company of America, American Forest & Paper Association, American Petroleum Institute, Atlantic Richfield Company, Asarco Incorporated, E.I. du Pont de Nemours and Company, Kennecott Holdings Corporation, Fort Howard, FMC Corporation, General Electric Company, General Motors Corporation, Hercules Inc., NCR, Rhône-Poulenc, Inc., Zeneca Inc. ("Commenters") are pleased to submit the following comments on the Council on Environmental Quality ("CEQ") notice inviting comment on implementation of Executive Order 13016. 61 Fed. Reg. 59,886 (November 25, 1996) ("Executive Order"). While the exact scope and import of the Executive Order are unclear, it purports to grant authority to issue administrative orders under Section 106 of CERCLA to the Secretaries of Commerce, Interior, Agriculture, Defense and Energy ("federal trustees") with respect to releases or threatened releases of hazardous substances affecting natural resources under their trusteeship or vessels or facilities subject to their custody, jurisdiction, or control. Such authority may only be exercised with the concurrence of the Environmental Protection Agency ("EPA") or the Coast Guard, which exercised such authority exclusively in the past. The federal trustees authority may not be exercised at any vessel or facility where the Coast Guard or the EPA is the lead federal agency for conduct or oversight of a response action. Superfund monies may not be used to fund response actions where a Unilateral Administrative Order ("UAO") has been issued by the federal trustees and not followed.

All of the Commenters have substantial experience not only with CERCLA's cleanup program, but also with implementation of the natural resource damages ("NRD") programs under CERCLA and OPA. Certain Commenters have provided extensive comments to the Department of the Interior (DOI) and to the National Oceanic and Atmospheric Administration (NOAA) concerning the development and implementation of various rulemakings governing natural resource damage assessments.[1]

A core objective of the Superfund reform effort has been to bring greater clarity to the cleanup program in order to reduce transaction costs and delay and to promote greater fairness. In the last two years, Congress has also come to recognize that any benefits of reforming the cleanup program could be diminished significantly if corresponding clarification

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[1] Commenters have reviewed, and generally support, the comments prepared by the Chemical Manufacturers Association (CMA) in response to CEQ's notice. Those comments focus primarily on core challenges that must be addressed in order to fairly and properly incorporate new federal actors and activity into the Superfund cleanup process under Section 106. These comments focus primarily on the significant NRD implications of the Executive Order.

of the NRD program does not occur: without such clarification, problems corrected in the cleanup program could simply be transferred to the NRD program. Granting Section 106 UAO authority to natural resource trustees is a major step in the wrong direction because it will encourage trustees to blur further the important legal, policy and practical distinctions between the two programs, and thereby provoke needless conflict and litigation.

In Commenters' view, a grant of Section 106 UAO authority to natural resource trustees is not needed in order to fix any identifiable problem in CERCLA's cleanup program and will only serve to further complicate and confuse the cleanup effort. Further, giving trustees Section 106 UAO authority raises very difficult and likely insurmountable legal, constitutional, and practical issues relating to CERCLA's NRD program. Accordingly, Commenters believe that trustees should not be given Section 106 UAO authority. If such authority is nonetheless conferred, it should be limited to true emergency abatement situations resulting from current disposal activity and apply only to sites owned and managed by the federal trustee in question. Further, Section 106 UAOs should not be used at sites where trustees have already initiated the NRD assessment process.

Finally, given the national and state significance of the Executive Order, and the need for a cooperative approach to the NRD program, Commenters urge CEQ to convene meetings of stakeholders to explore the myriad, complex issues posed by giving federal trustees this new authority.

I. Giving Trustees Section 106 UAO Authority is Unnecessary and Will Needlessly Complicate CERCLA's Cleanup Program

Although the grant of Section 106 UAO authority to federal natural resource trustees ostensibly deals with cleanup program issues, neither the Executive Order nor CEQ's notice identifies any specific problems in the cleanup program to which the Executive Order is addressed. In the last four years of debate concerning Superfund reform, the Administration has never publicly asserted a need to extend Section 106 UAO authority to natural resource trustees, nor has this issue been identified on the public agenda of administrative reforms that EPA has targeted for action. If legitimate problems exist with the current exercise of Section 106 UAO authority by EPA and the Coast Guard, CEQ should publicly identify what those problems are, explain in detail how the new authority responds to those problems, invite comment on each specific problem, and explore whether alternative mechanisms exist to address them.

Rather than solving the serious procedural and substantive problems in CERCLA's cleanup program, the Executive Order compounds the potential for increased complexity, inefficiency, and transaction costs by adding a broad new class of federal actors with overlapping cleanup authority. The Order gives new Section 106 UAO authority to five major Cabinet Departments. Each of these Departments has various bureaus and countless field offices scattered throughout the country; most have little or no experience in implementing Superfund

cleanups. Extensive training and resources will have to be committed in order to equip officials throughout these five Departments to exercise Section 106 UAO authority. Yet the federal trustees' authority to act does not replace that of EPA or the Coast Guard. Rather, in order to execute a Section 106 UAO, these agencies must obtain the concurrence of EPA or the Coast Guard -- which already possess the authority. While EPA or Coast Guard concurrence is plainly critical, the proliferation of Section 106 UAO authority among numerous federal agencies will create wasteful bureaucratic duplication and complexity, resulting in a needless and unjustified drain on the federal budget.[2] As pointed out in the comments of the Association of State and Territorial Solid Waste Management Officials ("ASTSWMO"), fragmentation of federal cleanup authority could also discourage voluntary cleanups pursuant to State remedial programs.

Further, giving Section 106 UAO authority to federal trustees agencies will undermine the important objective -- recognized both by the Administration and by Congress -- of establishing and adhering to orderly priorities in the cleanup program by targeting limited cleanup resources on the most serious problems. By fragmenting cleanup authority and encouraging trustees to blur further the crucial distinction between response actions and restoration of injured natural resources, the Executive Order will make it more difficult to achieve orderly cleanup priorities. The Executive Order creates a real danger that remedial/restoration priorities will be turned on their head: work will continue to proceed more deliberately at the supposed worst sites -- i.e., those on the NPL -- while trustees can use Section 106 UAO authority to attempt to compel more immediate action at sites which pose little or no significant comparative risk to human health or the environment.

Finally, as pointed out in the CMA comments at pages 4, 24-27, there are also serious problems of unfairness in giving Section 106 UAO authority to Federal trustee agencies who are themselves PRPs at sites which they own and manage. This situation creates a serious conflict of interest on the part of trustees, who will have strong incentives to use UAOs to shift the initial cleanup burden to private PRPs at sites for which trustees are responsible in an effort to eliminate or minimize their own liability.

Accordingly, giving trustees Section 106 UAO authority is not justified by any need to fix the cleanup program, and will instead create unnecessary complexity, waste, conflict, and unfairness. At the same time, as explained in Section II, granting such authority to trustees will distort and undermine the NRD program by potentially inviting trustees to use Section 106 "abatement" authority to order PRPs to undertake what is, in fact, restoration, thereby unlawfully circumventing the important constitutional and other safeguards and requirements established by CERCLA for the NRD program.

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[2] A further budgetary implication of the Executive Order arises from the circumstance that PRPs who comply with a federal trustee UAO later shown to be invalid can seek reimbursement of the costs of compliance from the Superfund under Section 106(b)(2). See CMA Comments at 18.

II. Commenters Are Skeptical That any Plan for Implementing the Executive Order Can Ensure that Natural Resource Trustees' Use of Section 106 UAOs Will Not Undermine and Conflict With CERCLA's NRD Provisions.

A. Any Memorandum of Understanding Would Have to Establish a Clear, Enforceable Distinction Between Cleanup Actions Taken by a Natural Resource Trustee Under Section 106 UAO Authority and Restoration Actions Subject to the NRD Provisions of CERCLA

As discussed in Section I, it is at best unclear what problem, if any, in the cleanup program the Executive Order is designed to cure. On the other hand, the Commenters are extremely concerned that the authority granted by the Executive Order could be used by trustees to skirt the constitutional and procedural guarantees, substantive requirements, and important liability limitations that Congress adopted in CERCLA's NRD provisions to ensure fairness in the assessment and recovery of damages for injury to public natural resources.

Legislative history and statutory structure make clear that CERCLA's Section 106 cleanup program is distinct from CERCLA's NRD program. Section 106 is titled "Abatement Actions" and authorizes response authorities to issue emergency UAOs to prevent imminent and substantial danger posed by current releases or current threats of releases of hazardous substances. Natural resource restoration is addressed separately in Section 107 and other provisions of CERCLA which authorize trustees of natural resources to assert claims in federal court for money damages for redressing any residual injury to natural resources that continues to impair public uses after cleanup has been accomplished. Through provisions dealing with trustee notification and tolling of the statute of limitations at NPL sites, Congress clearly intended that NRD claims would follow federal remedial actions in cases where natural resource injuries remain notwithstanding cleanup. Congress also recognized that, following cleanup, replacement of natural resources, acquisition of equivalent resources, or natural recovery could be appropriate options, along with on-site rehabilitation measures, for reinstating public uses impaired by resource injury.

Further, Congress placed extensive safeguards and requirements on the restoration program that do not apply to Section 106 UAOs under the cleanup program. These include:

- a PRP's right to an Article III court hearing, with a requirement that a trustee must first prove its case, before a PRP can be required to pay for NRD;
- an explicit prohibition on retroactive liability;
- a $50 million cap on prospective liability;

- a three year statute of limitations;
- a prohibition on double recovery for injury to the same resource;
- a requirement that trustees prove that actual injury was caused by a defendant's release in order to recover NRD.

Until issuance of the Executive Order, the danger that the Section 106 abatement program and the NRD program would be confused was somewhat limited because they were administered by entirely different governmental authorities -- EPA and the Coast Guard on the one hand, and natural resource trustees on the other -- with distinct responsibilities and objectives.[3] By granting Section 106 UAO authority to natural resource trustees, the Executive Order creates an acute danger that trustees may attempt to use such authority to, in effect, compel restoration by administrative order, thereby circumventing the distinct procedures and requirements and extensive safeguards applicable to the NRD program. This danger is confirmed by public statements from the Administration concerning the extension of UAO authority to trustees. The Administration's press release accompanying the Executive Order states that the new authority is aimed at "cleanup" of "natural resources that support hunting, fishing, tourism and recreation in local economies." Yet that objective is precisely the same as the Administration's stated NRD program objective of "restoration" of injured natural resources that support hunting, fishing, tourism and recreation in local economies. Further, a press report later quoted a senior official of EPA as saying that the new authority will enable trustees to compel PRPs to conduct "natural resource damage assessments." These statements do not instill confidence that the new Section 106 authority will be implemented solely to improve the "cleanup" program.

In order to prevent the potential for illegal circumvention of the congressional design, any MOU would have to limit very carefully the scope of any trustee exercise of Section 106 UAO authority in order to avoid confusion or overlap between the cleanup and NRD programs. For the reasons set forth below, Commenters are very skeptical that it is feasible to craft an MOU that would achieve this objective.

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[3] Some trustees, however, have already attempted to blur the line between cleanup and NRD by seeking to require additional contaminant removal or other cleanup beyond that required by response authorities even though such additional measures were not needed in order to restore injured resources and reinstate committed public uses of such resources.

B. Because Trustees Could So Readily Use Section 106 UAO Authority to Attempt to Circumvent CERCLA's NRD Provisions and Requirements, Commenters Are Skeptical That It Is Possible to Establish a MOU That Would Appropriately and Effectively Limit Trustees' Exercise of Such Authority to Genuine Abatement Emergencies

Giving federal trustees Section 106 UAO authority would inevitably invite its use by some trustees to compel PRPs to undertake restoration measures in the guise of "abatement," circumventing the requirements, procedures, and safeguards of CERCLA's NRD regime. The likelihood of such circumvention is particularly acute in the case of historical contamination at sites where hazardous substances have been disposed of in the past.[4] Given their experience with both the cleanup program and the NRD program, Commenters are quite skeptical that a workable, enforceable framework for distinguishing genuine emergency Section 106 abatement actions by trustees from restoration measures can be created.

The government's interpretation of the "imminent and substantial" endangerment provision of Section 106 has often been so broad as to virtually deprive those terms of significance as a limitation on the use of administrative orders to compel remedial action. Further, in administering the NRD program, trustees have given an extraordinarily expansive interpretation of the term "release" to include any ongoing seepage or other movement of historical contamination at a site. Applying this interpretation of "release" in the context of applying Section 106 UAO authority, trustees might readily argue that any site at which hazardous substances are found, including sites with historical contamination, involves "an actual or threatened release of a hazardous substance from a facility." Further, trustees have embraced very attenuated conceptions of what constitutes harm or injury to natural resources. For example, any detectable modification of the physical, chemical, or biological condition of a resource may be regarded as "injury." Applying this dilute notion of injury in the section 106 context, trustees might maintain that any contamination, including historical contamination, poses an "endangerment" to the public welfare or the environment at any site at which it is found because it threatens some modification of physical, chemical, or biological conditions.

By combining these various interpretations, trustees could try to build a claim of far-reaching authority and attempt to require PRPs to undertake extensive additional contaminant

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[4] Most CERCLA cases involve sites with historical contamination. Commenters firmly believe that there is no reason for giving trustees Section 106 UAO authority at such sites. Notwithstanding the government's expansive interpretation of "imminent and substantial endangerment" from historical contamination, where disposal has occurred in the past, often in the distant past, there will rarely be a current emergency threat to health or the environment that might justify exercise of Section 106 UAO authority. Where imminent, major harm is threatened, the site will already have been listed on the NPL or otherwise be subject to EPA cleanup authority.

removal far beyond what is necessary to protect the public health or the environment from significant harm. Trustees could also try to order PRPs to undertake other aggressive on-site rehabilitation measures, including resource replacement, in the guise of preventing ongoing risk of "injury" due to continuing "releases." Further, trustees could attempt to assert that no pre-enforcement judicial review of such orders is available, and that PRPs disregard of such orders would expose them to significant penalties.[5] Such an approach is by no means fanciful, as shown by the expansive interpretive positions asserted by the government in the past.

Accordingly, by using Section 106 UAO authority to compel what essentially is natural resource restoration, trustees could attempt unlawfully to circumvent the important requirements, safeguards, and limitations that Congress included in the NRD program, including the following:

1. NRD Article III Judicial Safeguards; Constitutional Issues. By recasting restoration as Section 106 "abatement," trustees could try to deprive PRPs of any pre-enforcement judicial hearing, circumventing the provisions in the NRD program that entitle PRPs to their day in court before trustees are able to collect NRD. Any such use of Section 106 authority would raise fundamental constitutional problems by depriving PRPs of their due process right to a judicial trial before being required to pay compensatory damages for natural resource injury, and by fencing out the Article III courts. It would be a blatant violation of separation of powers principles for the Executive to attempt to exact NRD by administrative order and thereby nullify PRPs' statutory and constitutional rights to an Article III court hearing.

2. Trustee Override of State Actions. By recasting restoration as "abatement" under Section 106, federal trustees could trump State investigations, remedial decisions, and restoration decisions under the NRD provisions of CERCLA and other statutes, including the Clean Water Act and state natural resource damages statutes. Federal trustees might similarly attempt to use Section 106 UAO authority to override State or tribal settlements with PRPs for restoration or NRD and compel additional, different or inconsistent restoration measures in the guise of "abatement."[6]

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[5] As pointed out in CMA's Comments, at 18-19, PRPs who fail to comply with a Section 106 UAO issued by a federal trustee are not liable for treble damages pursuant to CERCLA Section 107(c)(3) because the Executive Order provides that Superfund monies are not available to fund response actions in connection with such orders. However, PRPs that fail to comply with such orders are potentially liable for significant penalties under Section 106(b)(1), subject to limitations pointed out in the CMA comments at 19.

[6] Further, CMA identifies the potential for federal trustees to override prior decisions of federal decisionmakers in U.S. EPA (as well as state and tribal authorities) that a response action is not

(continued...)

3. NRD Prohibition on Double Recovery. By using Section 106 UAO authority to compel additional restoration measures in a manner that goes beyond or is otherwise inconsistent with state or tribal restoration decisions or settlements, federal trustees could attempt to circumvent Section 107(f)'s prohibition on double recovery and impose unfair multiple liabilities on PRPs.

4. NRD Retroactivity Prohibition. There is no retroactivity limitation on cleanup remedies under Section 106. By recasting restoration as "abatement" under Section 106, trustees could try to circumvent the prohibition in Section 107(f) on retroactive liability for natural resource injury caused by pre-1980 releases.

5. $50 Million Cap on NRD Liability. There is no cap on remedial costs under Section 106. By recasting restoration as "abatement" under Section 106, trustees could also try to circumvent the $50 million cap on NRD liability set forth in CERCLA Section 107(c).

6. NRD Statute of Limitations. There is no statute of limitations on remedial orders. By recasting restoration as "abatement" under Section 106, trustees could seek to compel action that otherwise would be barred by the "date of promulgation" or the "date of discovery" prongs of the CERCLA Section 113(g)(1) statute of limitations on NRD actions.

7. Requirement of Trustee Proof of NRD. Trustees might improperly include in Section 106 UAOs requirements that PRPs undertake in the first instance and at their expense studies of natural resource conditions and potential remedial measures as a prelude to being required to undertake restoration actions in the guise of "abatement." This stratagem would circumvent CERCLA's NRD provisions, which require federal trustees to prove in the first instance, and at their own expense, the elements of NRD -- including injury, causation, and the sums necessary for restoration -- through damage assessments conducted pursuant to the CERCLA NRD regulations or otherwise.[7]

8. NRD Proof of Injury and Causation and Baseline. Under Section 106, a remedial authority need not show actual resource injury caused by a defendant's release, but only "endangerment," a requirement which the government has construed very loosely. By recasting restoration as "abatement" under Section 106, trustees could try to circumvent

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[6] (...continued)
required at a site. CMA comments at 6-7.

[7] If trustees conduct a natural resource damage assessment in accordance with the NRD regulations, they may subsequently recover from PRPs the reasonable costs of such restoration. As pointed out in CMA's comments at 15, 20-21, CERCLA does not authorize NRD assessments as a part of response actions pursuant to Section 106 UAO.

the NRD requirements that trustees prove injury, causation and the extent to which the resource differs from the baseline condition -- the condition that it would have been in but for defendant's release. They could similarly try to circumvent the NRD program requirement that restoration measures should be based upon and limited to reinstating committed public uses under baseline conditions.

9. NRD Restoration Alternatives. By recasting restoration as "abatement" under Section 106, federal trustees could focus restoration activities on costly, on-site measures, including extensive additional contaminant removal, and ignore other, more cost-effective alternatives sanctioned by CERCLA's NRD provisions, including natural recovery and replacement or acquisition of equivalent resources.

10. Other Procedural and Substantive Safeguards in the NRD Program. CERCLA's NRD provisions and implementing regulations include many vital safeguards and requirements to govern restoration actions in order to ensure that they are genuinely needed to redress injury, are scientifically sound, and are cost effective. These include provisions basing natural resource restoration on reinstatement of services provided only by resources that have been committed to public use, provisions limiting trustee NRD authority to resources over which they exercise trusteeship,[8] exceptions from NRD liability for irrevocable commitments of resources, biological acceptance criteria, injury quantification thresholds, and principles of cost-effectiveness and gross disproportionality. These safeguards are absent from Section 106. By recasting restoration as "abatement," trustees could try to circumvent these important safeguards and override remedial actions and decisions by State authorities by, for example, ordering contaminant removal to virtually zero levels without any showing that such costly measures were needed to reinstate ecologically significant resource functions that support committed public uses of a trusteeship resource.

11. Asserted Welfare Losses: In recasting restoration as Section 106 "abatement," trustees might not only seek to require PRPs to initiate measures to restore injured resources but also to compel additional measures to to address asserted public welfare losses or threats of such losses claimed to be associated with continuing "releases" at historically contaminated sites, including past lost use, future lost use, and nonuse losses.

This analysis shows how federal trustees could attempt to exploit Section 106 UAO authority to order restoration and other remedies in the guise of "abatement" and thereby circumvent the many important safeguards and limitations contained in CERCLA's NRD regime, including most notably PRPs' constitutional rights to an Article III court hearing before being required to pay NRD. It is of course unlikely that all trustees would seek to assert Section

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[8] The Executive Order gives further UAO authority over vessels or facilities subject to their custody, jurisdiction control in addition to natural resources under their trusteeship.

106 UAO authority in such a sweeping and dangerous fashion. But experience indicates that at least some trustees will take very aggressive positions and seek to interpret their authority expansively in an effort to leverage large settlements from PRPs. Such a tactic, however, is likely to provoke litigation, delay, and enormous transactions costs, exacerbating the already serious problems that plague both the CERCLA cleanup and the NRD programs.

C. Given the Difficulties in Preventing Trustee Misuse of Section 106 UAO Authority to Unlawfully Circumvent the Requirements of the NRD Program, Trustees Should Not be Given Section 106 Authority, or Any Such Authority Should Be Restricted to Addressing Actual Emergencies Caused by Current Disposal Conduct.

For the reasons set forth above, Commenters are highly skeptical that there is any feasible way to prevent trustee use of Section 106 UAO authority to circumvent the safeguards of the NRD program through MOU provisions that would effectively and enforceably distinguish between true "abatement" on the one hand and "restoration" on the other. General provisions in a MOU to the effect that Section 106 UAOs should not be used to require "restoration" will not be effective so long as government authorities continue, as they have for many years, to maintain expansive interpretations of "release" and "endangerment" and very loose interpretations of "imminent and substantial." Given the elusive character of many of CERCLA's key terms, Commenters have not been able to identify any satisfactory way for a MOU to draw a tight, workable, enforceable distinction between abatement measures that may be pursued under Section 106 and restoration measures that must be pursued under the NRD Program.

The most straightforward way of dealing with this dilemma, and the one which Commenters urge the Administration to follow, is to withdraw the Executive Order's grant of Section 106 UAO authority to federal trustees. As previously discussed, there has been no showing of any need to grant federal trustees such authority. Such authority would only serve to confuse the existing cleanup program as well as invite circumvention of the NRD program's safeguards and procedures.

The only potenially viable alternative to withdrawal would require that the MOU strictly limit trustee Section 106 UAO authority to responding to releases caused by current disposal activities that are causing or threaten to cause major harm warranting emergency, time-critical remedial action. See also CMA Comments at 12-15. To operationalize such an emergency limitation, the MOU must explicitly preclude the use of Section 106 UAOs to deal with historical contamination. Further, its use should be limited to sites owned and managed by the federal trustee in question; it is at such sites that trustees will be in a position to learn about and respond to any genuine emergencies caused by current disposal activities. As a further safeguard against circumvention of NRD procedures and requirements, Section 106 UAO authority should not be available at a site where one or more federal, state, or tribal trustees have already initiated the NRD assessment process through preassessment screening, a notice of intent

to perform an assessment or other measures. Such a bar is a logical analogue to the Executive Order's bar on federal trustee use of UAO's where EPA has already assumed the remedial lead.

While these limitations would help ensure that trustee use of Section 106 authority is restricted to emergency situations, they may nevertheless be circumvented, given the government's equation of "release" with "disposal" in some circumstances and its very expansive views of what constitutes an "imminent and substantial endangerment" under Section 106. Accordingly, given the lack of demonstrated need for giving federal trustees Section 106 UAO authority, the counterproductive impact of fragmented cleanup authority on the cleanup program, and the need to ensure the integrity of the CERCLA statutory scheme and the distinction between the cleanup and NRD programs, Commenters believe it preferable not to give federal trustees Section 106 authority. The Executive Order should be withdrawn.

III. In Order to Reinstate a Cooperative Approach to the NRD Program, CEQ Should Make a Draft of Any Memorandum of Understanding Available for Public Comment And Convene Meetings of Stakeholders

The issuance of Executive Order 13016 greatly surprised the PRP community and state officials, particularly those who have been involved in the NRD rulemaking process and in discussions concerning appropriate reform of the NRD program. Commenters note that in a letter to CEQ dated October 28, 1996, ASTSWMO -- also an active participant in NRD legislative and regulatory reform discussions -- expressed concern about the Administration's failure to consult state officials on the formulation of the Executive Order, particularly as it "may constitute a significant national policy change." Congress, federal rulemaking authorities, state trustee representatives and the PRP community have been working together over the past several years exploring solutions to problems in NRD program implementation. The issuance of the Executive Order without prior notice to known stakeholders undermines those constructive efforts. Moreover, senior Administration officials have stated in rulemaking proceedings and before Congress that a primary objective of CERCLA's NRD program is to establish a cooperative process of NRD assessment that reduces resort to litigation and facilitates more timely restoration of injured natural resources. Granting natural resource trustees authority to issue Section 106 UAOs is particularly out of step with such statements. A Section 106 UAO is the antithesis of cooperative agreement.

Commenters agree that there is a vital need to reestablish a cooperative approach to NRD assessments and to NRD program reform. If CEQ decides to go forward with an MOU, CEQ should prepare and publish draft MOU language in order to promote open dialogue and a detailed understanding of the proposed MOU's scope and implementation. Meaningful dialogue is not possible in the absence of a draft proposal, which should also discuss and respond to the issues raised in these and other comments. Further, given the significance of the issues raised and the potential for controversy and protracted litigation posed by the Executive Order and its implementation, Commenters urge CEQ to conduct meetings with stakeholders in order to

discuss the need for giving trustees Section 106 authority and whether any such authority can be implemented without distorting or unduly complicating the CERCLA cleanup and NRD programs. Stakeholders invited to participate should include federal trustee authorities, federal remediation authorities (EPA and the Coast Guard), OMB, state and tribal trustees and remediation authorities, PRPs, and environmental and other interest groups. If for some reason public meetings are not feasible, Commenters request an opportunity to meet directly with CEQ's task force to discuss their concerns in greater detail. ASTSWMO made a similar request to be consulted. CEQ should honor all such requests.

CHEMICAL MANUFACTURERS ASSOCIATION

M.L. MULLINS
VICE PRESIDENT
REGULATORY AFFAIRS

December 26, 1996

Mr. Bradley M. Campbell
Associate Director
Council on Environmental Quality
Old Executive Office Building
Washington, D.C. 20501

RE: Comments on the Implementation of Executive Order 13016
(Redelegating Unilateral Order Authority Under CERCLA Section 106)

Dear Mr. Campbell:

In response to the Council on Environmental Quality's recent solicitation of comments, 61 Federal Register 59886 (November 25, 1996), the Chemical Manufacturers Association (CMA)—on behalf of itself and the American Forest and Paper Association, Edison Electric Institute, Electronic Industries Association, General Electric Company, Lockheed Martin Corporation, Michigan Consolidated Gas Company, National Association of Manufacturers, United Technologies Corporation, and WMX Technologies, Incorporated (referred to jointly as the "Commenters")—is please to submit these comments on the implementation of Executive Order 13016.

CMA is a nonprofit trade association whose member companies represent more than 90 percent of the productive capacity for basic industrial chemicals in the United States. Today, the manufacturers of chemicals and allied products provide over one million paying jobs for American workers. Chemical manufacturers are the number one R&D industry in the United States, investing over $18 billion per year, and are the leading U.S. exporter, with exports expected to top $60 billion in 1996.

CMA and its member companies have been heavily involved in the Superfund program since its inception in 1980. We have been out front at hundreds of sites, trying to make Superfund work. Our members have devoted a tremendous amount of time, energy, and money to this effort.

CMA believes that the Executive Order changes existing U.S. Environmental Protection Agency (EPA) practices and will likely increase the number of facilities that receive CERCLA section 106 orders, and may expand the cleanup requirements imposed in such orders. We urge CEQ to seriously consider the attached comments when developing the interagency agreement that will implement Executive Order 13016. We believe that the recommendations made in the comments, if implemented, will potentially avoid or minimize some of the most troubling problems raised by the Executive Order.

1300 WILSON BOULEVARD, ARLINGTON, VA 22209 • TELEPHONE 703-741-5200 • FAX 703-741-6099

If you have any questions concerning these comments or desire additional information please contact Paul Hirsh of our Regulatory Affairs Department, at 703/741-5237 or, Dell Perelman of our Office of General Counsel, at 703/741-5155.

Sincerely,

M.L. Mullins,
Vice President-Regulatory Affairs

BEFORE THE COUNCIL ON ENVIRONMENTAL QUALITY

COMMENTS OF THE CHEMICAL MANUFACTURERS ASSOCIATION, AMERICAN FOREST AND PAPER ASSOCIATION, EDISON ELECTRIC INSTITUTE, ELECTRONIC INDUSTRIES ASSOCIATION, GENERAL ELECTRIC COMPANY, LOCKHEED MARTIN CORPORATION, MICHIGAN CONSOLIDATED GAS COMPANY, NATIONAL ASSOCIATION OF MANUFACTURERS, SUPERFUND SETTLEMENTS PROJECT, UNITED TECHNOLOGIES CORPORATION, AND WMX TECHNOLOGIES, INC.

ON THE IMPLEMENTATION OF EXECUTIVE ORDER 13016

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December 26, 1996

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EXECUTIVE SUMMARY

Executive Order 13016 ("the Order") threatens to increase the inefficiency, unfairness, and litigiousness of the Superfund program by authorizing five Cabinet departments (Agriculture, Commerce, Defense, Energy, and Interior) to issue unilateral administrative orders under section 106 of CERCLA at sites where they are natural resource trustees and at sites that are otherwise "subject to their custody, jurisdiction, or control." The Order could affect some 500,000,000 acres of federal land containing more than 60,000 potentially contaminated sites, with total cleanup costs estimated at $230 to $388 billion.

A forthcoming Memorandum of Understanding ("MOU") among these five departments, EPA, and the Department of Justice will spell out the details of how the Order is to be implemented. These comments identify and discuss the specific provisions that the MOU should contain. Unless the MOU resolves the problems raised in these comments, however, the Order could end up jeopardizing the Clinton Administration's efforts to improve the Superfund program.

General Issues

No section 106 orders should be issued by the departments until the MOU has been drafted, proposed for public comment, finalized, and executed.

The departments should not issue section 106 orders at sites where EPA, a State, or an Indian Tribe has already determined that no response action is needed.

The MOU should require the departments to comply with CERCLA, the National Contingency Plan ("NCP") that prescribes how response actions are to be selected, and EPA's Superfund policies and guidance documents, including the Superfund Administrative Reforms announced by Administrator Carol Browner on October 2, 1995.

EPA should conduct a full review of each proposed section 106 order before deciding whether or not to concur.

Potentially responsible parties ("PRPs") named in each proposed order should receive a copy of the order and should have a chance to meet with the department to provide any information that might be pertinent.

After a final section 106 order is issued, the PRPs should have the opportunity to trigger a dispute resolution process so that any problems can be ironed out before the deadline for starting work.

Section 106 Issues

The MOU should limit the use of section 106 orders to emergency situations, in keeping with the intent of Congress. This means that only time-critical removal actions, not long-term remedial design or remedial action work, should be the subject of section 106 orders.

Any section 106 orders issued by the departments should name the largest manageable number of PRPs at each site, as required by EPA's long-standing policy and by the recent Superfund Administrative Reforms.

Work performed under a section 106 order issued by one of the departments should be deemed to be performed under an order issued by EPA, making the work consistent with the NCP for purposes of private-party contribution claims.

The MOU should confirm that PRPs performing work under section 106 orders issued by one of the departments are eligible for reimbursement under section 106(b)(2) of CERCLA.

Natural Resource Damages Issues

Because damage assessments and resource restoration are not CERCLA response actions, they should not be compelled pursuant to section 106 orders.

Any section 106 orders issued by natural resource trustees must not circumvent CERCLA's statutory limitations on their claims for natural resource damages.

Federal Facilities Issues

The departments should not issue section 106 orders at sites where they are major PRPs due to their status as owners and/or operators.

Section 106 orders should not be issued to companies that are current or former contractors or tenants at the federal facility sites in question.

I. INTRODUCTION

The Chemical Manufacturers Association, the American Forest and Paper Association, the Edison Electric Institute, the Electronics Industries Association, General Electric Company, Lockheed Martin Corporation, Michigan Consolidated Gas Company, the National Association of Manufacturers, the Superfund Settlements Project, United Technologies Corporation, and WMX Technologies, Inc. appreciate the opportunity to submit these comments on the implementation of Executive Order 13016, 61 Fed. Reg. 45871 (Aug. 30, 1996) ("the Order"), in response to the recent solicitation of comments by the Council on Environmental Quality, 61 Fed. Reg. 59886 (Nov. 25, 1996). We offer these comments in the spirit of cooperation and constructive criticism.

In the four months since President Clinton signed the Order on August 28, 1996, the PRP community has tried, without great success, to discern the problem(s) that it was meant to help solve. It appears that the Order was intended to help insure a rapid response to genuine emergencies at federally owned or managed sites. The number of sites that present such emergencies is relatively small. But the Order may nevertheless fail to achieve its goal because it gives too much power at too many sites to too many agencies with limited experience in implementing the Superfund program. These comments identify and discuss numerous legal and practical problems raised by the Order.

We are pleased that the interagency task force charged with overseeing implementation of the Order plans to draft a Memorandum of Understanding ("MOU") among the affected Cabinet departments and agencies, 61 Fed. Reg. 59886 (Nov. 25, 1996). If the MOU is carefully crafted, and if it is then presented to the public for comment on its specific terms and provisions before being adopted in final form,[1/] it has the potential to minimize some of the most troubling problems raised by the Order. Unless these many problems can be addressed, the Order could end up jeopardizing the Administration's intensive efforts to improve the Superfund program.[2/]

We have organized these comments as follows. Part II presents some broad themes that reflect our principal concerns with the Order as signed by President Clinton. In Part III,

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1/ Rather than soliciting written comments on the proposed MOU, it might be more efficient to convene a round table discussion group to address the issues in a one-day session.

2/ The Order was signed without prior notice to Superfund stakeholders, such as potentially responsible parties ("PRPs") or State governments. If prior notice had been provided, we would have been able to help identify and solve potential problems in the Order before it was signed. In general, the road to a better Superfund program begins when the government agencies charged with implementation make it a regular practice to engage in prior consultations with those whose interests may be affected by their decisions.

we spell out some of the most basic features that should be incorporated into the MOU in order to make it effective. The remaining portions of the comments address equally important provisions that should also be contained in the MOU. Part IV addresses CERCLA section 106 issues. Part V deals with natural resource damages issues, and Part VI discusses federal facilities issues.

II. PRINCIPAL CONCERNS WITH THE ORDER

Unless the MOU imposes numerous limitations on the implementing departments, the Order is likely to increase the inefficiency, unfairness, and litigiousness of the current Superfund program at many sites throughout the United States. In this initial portion of the comments, we present some of these general concerns. Later in these comments, we suggest a number of specific ways in which the MOU should be drafted to avoid or minimize some of these concerns.

A. Scope.

It is important to recognize the vast scope of the Order itself before turning to the proposed MOU. By its own terms, the Order covers two extremely broad categories of potentially contaminated sites that are owned or managed by the Departments of Agriculture, Commerce, Defense, Energy, and Interior. The first category consists of all "natural resources under their trusteeship," while the second category includes all facilities "subject to their custody, jurisdiction, or control." Order §§ 1, 2.

Because these categories are so broad, the Order applies to some 500,000,000 acres of federal land[3/] containing more than 60,000 potentially contaminated sites, including former nuclear weapons production facilities, abandoned mines, landfills, and underground storage tanks.[4/] According to the departments themselves, the total cleanup

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3/ The Department of the Interior alone manages over 440 million acres of federally owned land, while the Department of Defense manages another 25 million acres. Superfund Reauthorization, Hearings Before the Subcommittee on Water Resources and the Environment, 104th Cong., 1st Sess. 829, 834 (1995).

4/ According to the most recent government estimate, a total of 60,425 potentially contaminated sites are present on land owned by the Departments of Agriculture, Defense, Energy, and Interior. Federal Facilities Policy Group, Improving Federal Facilities Cleanup 17 (October 1995). Although the Order excludes those sites where "the Administrator of EPA is the lead federal official," most of these 60,425 sites are unlikely to fit that description. Moreover, the exclusion itself is murky enough, even as applied to sites on the National Priorities List, that its interpretation in particular situations is difficult to predict with confidence. See Part III-A infra.

cost for these sites is estimated to be at least $230 billion, and may be nearly twice that amount.[5/]

Given the huge number of sites potentially affected by the Order, with their staggering total cleanup cost, the PRP community has grave concerns about the potential for increased use of CERCLA section 106 unilateral administrative orders at these sites. As we show below, expanded issuance of section 106 orders at these sites appears likely to aggravate the major problems with the current Superfund program--its inefficiency, unfairness, and litigiousness.

B. Inefficiency.

Although the Superfund program is already inefficient, the Order actually increases that inefficiency in at least three ways. First and foremost, it spreads section 106 authority among numerous federal agencies, rather than providing EPA with whatever additional resources are deemed necessary for the proper implementation of section 106.

The inevitable result of this redistribution of authority is added expense, confusion, and conflict, all of which represent inefficiency. Under the Order, multiple federal agencies, instead of just one, will now assess contaminated sites to determine whether action is warranted under section 106. The five Cabinet departments, which never before possessed such authority, have thousands of program staff and lawyers working in dozens of different bureaus, bases, posts, and field offices. These personnel must now be trained to make analytical and investigative judgments, develop response actions, conduct settlement negotiations, and, where necessary, issue unilateral administrative orders. In order to do so, these employees must now either master a body of law and policy found mostly in unpublished EPA guidance documents or, worse yet, "reinvent the wheel" by devising new legal standards and policies of their own. They must also resolve the inevitable disputes with other federal and state agencies, and with Indian tribes, over shared jurisdiction at or near sites where contamination is present. All of this is inefficient in the extreme.

Second, aside from natural resource damages issues, the Order gives dramatically new power over private PRPs to five Cabinet departments that have not yet demonstrated the ability to select or manage cost-effective cleanups at their own facilities.[6/] Allowing these

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5/ The most recent government estimates range from $234 billion to $388 billion. Id.

6/ See, e.g., U.S. General Accounting Office, Federal Hazardous Waste Sites--Opportunities for More Cost-Effective Cleanups 6-9 (1995) (GAO/T-RCED-95-188) (finding inadequate management of cleanup contracts, inadequate financial management information systems, and (continued...)

departments to order private parties to perform cleanups for them runs directly counter to the goal of making Superfund more efficient.

Third, the Order directs new federal resources to the wrong sites. Rather than focusing on sites posing real threats to human health, which should be the highest priority as a matter of law, see CERCLA section 104(a)(1), and as a matter of public policy, the Order addresses primarily other sites that present solely natural resource damage concerns.

C. Unfairness.

The Superfund program has been roundly criticized for its unfairness, but the Order is likely to exacerbate the problem, particularly with regard to federal facilities. A literal reading of the Order suggests that even at sites where the department itself is a major PRP due to its status as an owner and/or operator, the agency may select the cleanup and then issue a unilateral order to some private party that is also a PRP, compelling the private PRP to perform the entire cleanup at its sole expense. The private PRP may have little choice but to accept this unfair result because the PRP faces substantial penalties for noncompliance, and may be unable to obtain judicial review of the federal agency's order in a timely manner.

D. Litigiousness.

The Superfund program is notorious for generating litigation and the attendant transaction costs. Unfortunately, the Order appears destined to bring about still more litigation. We present two examples to demonstrate this unhappy outcome.

First, the Order provides natural resource trustees with brand-new authority to compel action at contaminated sites. Trustees that have found it difficult in the past to pursue their statutory damage claims under section 107, either because they lack the funds to perform damage assessments or because they have significant factual weaknesses in their cases, may now be sorely tempted to use section 106 orders instead. But in order for them to do so, the trustees will have to bypass the entire statutory process for addressing natural resource damages and actually circumvent one or more of the explicit statutory limitations on their claims for damages. Section 106 orders that attempt such circumvention will surely reduce incentives for cooperation between PRPs and trustees, and are likely to lead to aggressive pre-enforcement litigation challenging the validity of the orders.

6/(...continued)
substantial obstacles to use of innovative cleanup technologies).

Second, as noted above, the Order empowers federal facility landowner agencies to issue CERCLA section 106 orders to private PRPs, including companies whose activities occurred in connection with current or former government contracts or leases. Again, such orders will reduce cooperation and will probably be challenged. Pre-enforcement judicial review of such orders is certain to be sought in view of the substantial unfairness of such orders. This will consume not only judicial resources, but those of the Department of Justice as well.

In sum, the Order itself is likely to intensify some of the most familiar problems with the Superfund program. This means that implementation of the Order is apt to be a major setback for the Superfund program unless the MOU is drafted very carefully. The purpose of these comments is to offer constructive suggestions for the MOU process in an effort to minimize problems.

III. GENERAL ISSUES THAT SHOULD BE ADDRESSED IN THE MOU

The MOU should withhold section 106 authority at sites where EPA, a State, or an Indian Tribe has already determined that no response action is required. In addition, the MOU should insure that all section 106 orders issued by the five Cabinet departments conform to CERCLA, to the National Contingency Plan ("NCP"), and to all existing EPA policies, including the October 2, 1995 Superfund Administrative Reforms announced by Administrator Carol Browner.[7/] Finally, the MOU should place other important substantive and procedural limitations on the issuance of section 106 orders by the five Cabinet departments. Some of those limitations are described in this section of the comments, while others are presented in the sections that follow.

Before we turn to the contents of the MOU, however, it is imperative that no section 106 orders be issued by the departments until the MOU has been drafted, widely circulated for public comment, redrafted, and then executed. The Order itself has already spawned widespread confusion, both in government and in the private sector. The departments and EPA cannot know how to exercise their respective authorities under the Order until the MOU has been finalized. The potential for mischief in uncoordinated use of this new authority is far too great to allow the departments to exercise it before the MOU is in place. We understand from recent press accounts that at least some within the Administration agree, and we urge that this basic ground rule be clarified among the affected agencies without delay.

7/ One important exception to this general rule is addressed in Part IV-A below.

A. The MOU Should Withhold Section 106 Authority at Sites that EPA, a State, or a Tribe Has Determined Do Not Require Response Actions.

The MOU should withhold section 106 authority from the trustee departments at sites where EPA, a State, or an Indian Tribe has already determined that no federal response action is required under CERCLA. The Order already provides that the trustee departments shall not exercise authority under section 106 "at any . . . facility at which the Administrator is the lead Federal official for the conduct or oversight of a response action." But many other situations that pose similar problems of coordination and consistency among federal agencies, or between federal agencies and State agencies, or between federal agencies and Indian tribes. The MOU should address these as well.

For a very simple example, consider the Upcounty Landfill, a hypothetical municipal solid waste landfill in the Midwest that has operated for at least 40 years. The Upcounty Landfill is located near a small freshwater wetland, which may have been adversely affected over time by run-off or leachate from the landfill itself. At the request of the State, EPA evaluated the entire site--both the Upcounty Landfill and the nearby wetland area--and decided not to list it on the National Priorities List ("NPL").

Now, enter the Department of the Interior as the federal trustee. Rather than pursue a statutory claim for damage to the wetland area under section 107, the Department would prefer to compel some PRPs to perform response actions under section 106. What authority does the Department have under the Order?

On the one hand, the site is not one "at which the Administrator is the lead federal official," so the plain language of the Order does not bar the Department from exercising section 106 order authority. On the other hand, if the Department issues an order requiring studies and/or cleanup at a site that EPA has decided does not merit federal response action under CERCLA, then it is second-guessing EPA's determinations. Moreover, it is doing so in a context where section 106 authority is not needed at all, because the trustee(s) retain undiminished authority to seek damages under section 107.

A similar situation could also arise if EPA had listed the Upcounty Landfill on the NPL. Suppose, for example, that EPA informally determined that the wetland did not require a response action and defined the NPL site so as not to include the wetland area. Later, using its presumptive remedy for municipal solid waste landfills, EPA issued a ROD that called for capping the Upcounty Landfill, collecting any methane gas, and monitoring the groundwater leaving the site. This remedy has been implemented successfully.

Again, enter the Department of the Interior as the federal trustee, seeking to require some response action in the wetland area under section 106 of CERCLA. What authority does the Department have? On the one hand, the wetland itself is not part of the NPL site "at which the Administrator is the federal official," and so the Order's exclusion does not

bar the Department from exercising its new section 106 authority. On the other hand, if the Department now issues an order requiring studies and/or cleanup in the wetland area, it is effectively second-guessing EPA's informal determinations (made at the NPL listing stage and again during the remedy selection process) that the wetland area does not require any further federal response action under CERCLA. Once again, this second-guessing is the result of the trustee's attempt to bypass its statutory damage claims and compel the performance of work instead.

One possible response to this problem is simply to hope that EPA would decline to concur on any proposed section 106 order that effectively second-guessed its own prior determinations about a site. But this would turn the concurrence process into a new form of bureaucratic turf struggle. EPA should not be put in the position of declining to concur as a means of defending its own previous determinations. Moreover, EPA may find it difficult not to concur after the department has already devoted substantial time and effort to developing a proposed order. Instead, the MOU should address the problem directly by withholding section 106 authority at sites where such prior determinations have been made.

It is inefficient for multiple government agencies to review the same problem and unfair for PRPs to face conflicting judgments by these multiple agencies on the same problem. It will generate litigation if PRPs are exposed to new liabilities when the Cabinet departments second-guess the conclusions of EPA, a State, or a Tribe regarding protection of human health and the environment. The best way to address these issues is for the MOU to state unequivocally that the Cabinet departments shall not exercise section 106 authority at sites that EPA, a State, or an Indian Tribe has previously determined do not warrant response action.

B. Substantive Limitations.

1. **The NCP.** The five Cabinet departments should be required to adhere not only to CERCLA, but also to the NCP, which defines and implements many of the critical mandates of CERCLA. Congress spoke clearly on this point. See CERCLA § 105(a) ("Following promulgation of the revised national contingency plan, the response to . . . hazardous substances releases shall, to the greatest extent possible, be in accordance with the provisions of the plan."). Moreover, the PRPs that perform work pursuant to section 106 orders will be unable to obtain contribution from other PRPs unless they can demonstrate that the work they performed was "consistent with the national contingency plan." 42 U.S.C. § 9607(a)(4)(B).[8/]

8/ We address another aspect of this issue in Part IV-C of these comments below.

The Order itself, however, is silent on this point, raising the potential for confusion, inconsistency, and error on this extremely important issue. We give two brief examples pertaining to selection of response actions in order to illustrate the point.

a. Remedy Selection Process. The NCP states that each remedial action must be based on an RI/FS and must be selected using the detailed criteria for remedy selection. See 40 C.F.R. § 300.430 (1996). If the MOU allows the Cabinet departments to issue section 106 orders for remedial actions[9/] and does not require compliance with the NCP, the departments may feel free to disregard the NCP and compel remedial actions based on insufficient data or inadequate consideration of the nine factors specified in the NCP.

b. ARARs for Removal Actions. The NCP makes it clear that removal actions need not comply with federal and state ARARs to the same extent as remedial actions; the test is a flexible one that takes account of the exigencies of the situation. See 40 C.F.R. § 300.415(j) (1996). If the MOU does not require compliance with the NCP, the Cabinet departments issuing section 106 orders may require compliance with such ARARs in circumstances where it is neither legally required nor technically appropriate to do so. Therefore, the MOU should mandate that the Cabinet departments adhere to the NCP.

2. Superfund Administrative Reforms. The five Cabinet departments should also be required to comply with all of EPA's Superfund Administrative Reforms, including the major series of substantive reforms announced by Administrator Carol Browner on October 2, 1995. These reforms were aimed at achieving "smarter" and "more cost-effective" approaches to cleanup, as well as "fairer" enforcement practices, pending comprehensive review and reauthorization of the Superfund law by Congress. It is vital that the response actions secured by the departments using the new Order fully reflect these EPA reforms. (We discuss one of these reforms--equitable issuance of section 106 orders--in greater detail in Part IV-B of these comments.) The MOU should direct EPA to provide the five Cabinet departments with copies of all documents issued to date pertaining to the various Superfund Administrative Reforms. In addition, the MOU should require EPA to furnish copies of all such documents issued in the future. This will enable the departments to stay fully informed about EPA's evolving practices and policies.

C. Procedural Limitations.

Because issuance of unilateral section 106 orders by the Cabinet departments has the potential to significantly affect private interests, the MOU should also establish a comprehensive set of procedural limitations on the use of this authority. This will help to

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9/ We discuss this issue in Part IV-A of these comments below.

minimize confusion, inconsistency, inefficiency, and litigation. In particular, we strongly urge adoption of the following basic procedures:

1. **Full EPA Review of Proposed Orders.** The Order recognizes EPA's considerable expertise and experience in remedy selection and implementation by stating that the authority granted to the Cabinet departments is "to be exercised only with the concurrence of the Administrator." Before the Administrator can make an informed decision on a proposed section 106 order, EPA must review each of the following items:

* the background information concerning the site,

* the technical information indicating the existence of an emergency situation requiring issuance of a unilateral order (see Part IV-A of these comments),

* the record supporting selection of each removal action (or other action) called for in the proposed order,

* the evidence supporting the liability of each PRP proposed to be named in the order, including any claims such PRP may have for indemnity or contribution from the department proposing to issue the order (see Part VI-B of these comments),

* the liability, if any, of the department proposing to issue the order (see Part VI-A of these comments), and

* conformity of the proposed order to statutory and regulatory requirements (e.g., the provisions of the NCP) and to all pertinent EPA policies and guidance documents (e.g., the October 2, 1995 administrative reforms).

It has been reported that EPA, understandably concerned about conserving its own resources, may seek to limit its review of proposed orders to whether they would conflict with any other section 106 orders already issued by EPA at the same site, or that might be issued by EPA in the future. Although we appreciate the resource constraints that EPA faces, a narrow EPA review function would render the Order's "concurrence" requirement meaningless. The Cabinet departments could issue section 106 orders in any way they saw fit (so long as they avoid direct conflicts with EPA-issued orders). As already discussed, PRPs would either have to comply with such defective orders or litigate their validity, adding to the inefficiency of the process. It is vital that the MOU require full EPA review of each proposed order, including at a minimum each of the items noted above.

2. **PRP Participation.** Another basic procedural requirement is that PRPs have some advance notice of the proposed order and some ability to present their views at two

separate points in the process. First, PRPs should be afforded some kind of audience with the department before it seeks EPA concurrence on a proposed order. Second, they should also be given an informal hearing by EPA before EPA determines whether or not to concur. We spell out these procedures in greater detail below.

The rationale for specifying these procedures in the MOU is rooted in the history of the Superfund program. EPA and the PRPs at a Superfund site frequently are mired in costly, protracted litigation because they never engaged in open discussions regarding the problems at the site. Many notorious Superfund cases stemmed from disagreements over basic facts, technical issues, or legal conclusions that might have been resolved far more efficiently if the parties early on had exchanged information and opinions.

The two specific forms of PRP participation that we recommend are as follows. First, before a department seeks EPA concurrence on a proposed order, it should give the PRPs to be named in the order (a) reasonable advance notification, (b) a copy of the proposed order, and (c) a limited period of time, such as 10 days from receipt of the proposed order, to provide the department with any information they believe is pertinent. Such information could include any of the items listed in Part III-C-1 above, such as facts relevant to whether the site presents an emergency situation, concerns about the response action called for in the proposed order, or details regarding the liability of various PRPs at the site.

Second, before EPA decides whether to concur on a proposed order, it should give the PRPs to be named in the order (some of whom may not have been on the department's original list) (a) a copy of the proposed order, and (b) a limited period of time, such as 10 days from receipt of the proposed order, to provide EPA with any information they believe is pertinent. Again, such information could include any of the items described in the previous paragraph.

The information to be provided by the PRPs at both stages of the process would help the department and EPA to evaluate consider whether issuance of the order is warranted, whether the order is likely to be complied with, whether additional PRPs should be named in the order, and whether issuance of the order will generate new litigation. If EPA concurs after considering this information, both the department and EPA will have gained valuable insight into the likely future course of action. This front-end process will greatly streamline the dispute resolution proceedings that may follow issuance of the final order (see item 4 below). Finally, it also will minimize future "surprises" in reimbursement petitions under section 106(b)(2).[10]

10/ The reimbursement issue is addressed below in Section IV-D of these comments.

3. **EPA Concurrence.** A third key procedural limitation is the EPA concurrence mechanism itself. The MOU should state emphatically that no order will be issued until EPA concurrence is obtained in writing.[11/] It should also state that the concurrence decision will be made by the Assistant Administrator for Solid Waste and Emergency Response during the first few years that the MOU is in effect. Once greater experience with implementation of the Order has been gained, then the concurrence decision might be made by the Regional Administrator in the EPA Region in which the site is located. Delegating the EPA concurrence decision to a lower level within the Regions would inevitably diminish EPA's review of the proposed orders, making the concurrence function something akin to a "rubber stamp," which is not what the Order contemplates at all. Further, it is inevitable that EPA decisions not to concur will generate conflicts within the Administration. A clear internal process, perhaps along the lines of the process previously established under Executive Order 12088, should be developed in advance in order to protect the integrity of EPA's concurrence role in implementing the Order.

4. **Dispute Resolution.** Finally, PRPs receiving a section 106 unilateral order from one of the Cabinet departments should have the opportunity to engage in focused dispute resolution before advising the department as to whether they intend to comply. This opportunity for dispute resolution is fully consistent with the spirit of Executive Order 12891 ("Improving the Administration Of Civil Justice"), which seeks to avoid litigation whenever possible by exploring alternative methods of resolving disagreements. In the context of section 106 orders, successful dispute resolution will also minimize the number of future petitions for reimbursement under section 106(b)(2).

The post-issuance dispute resolution process should be a focused process aimed at addressing issues germane to implementation or modification of the order prior to its effective date. The post-issuance dispute resolution process should be limited to 21 calendar days, to avoid delay in the performance of the work.[12/]

IV. SECTION 106 ISSUES THAT SHOULD BE ADDRESSED IN THE MOU

Implementation of the Order raises a host of potential problems relating to section 106 of CERCLA that must be addressed--and resolved--in the MOU. This section of the comments discusses the major section 106 issues.

11/ To put it another way, EPA should not be "deemed" to have concurred at the end of a given period of time for review of the proposed order.

12/ This suggested time limit assumes that the MOU limits the issuance of section 106 orders to emergency situations, as urged in Part IV-A below. To the extent that the MOU does not impose such a limit, however, there is correspondingly less concern about delay and so the time available for dispute resolution need not be as short as 21 calendar days.

A. The MOU Should Limit the Use of Section 106 Orders to Emergencies.

The MOU should limit the issuance of section 106 orders by the Cabinet departments to those situations that may pose an imminent and substantial endangerment, i.e., situations that are truly in the nature of emergencies. This means that only time-critical removal actions should be required pursuant to these new section 106 orders. It also means that long-term remedial actions, natural resource damage assessments, and resource restoration would not be the subject of these orders. As we show below, this result is fully consistent with the statutory framework and with the apparent rationale for the Order itself. Indeed, any other approach would be unworkable.

Section 106 of CERCLA, entitled "Abatement Actions," was meant to address emergency situations. The statutory language provides that unilateral administrative orders may be issued only where:

> "the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility . . . ."

42 U.S.C. § 9606(a) (emphasis supplied). The related provisions of sections 106(b)(1) and 107(c)(3) reinforce the emergency nature of this abatement authority by creating severe penalties for refusal to comply: the ability to collect "punitive damages" in an amount equal to three times the cost of the work required under the order.[13/]

Congress clearly intended the threshold of "imminent and substantial endangerment" under section 106(a) to be significantly higher than the minimum threshold of "substantial threat of a release of a hazardous substance" under section 104(a)(1)(A). Thus, courts have recognized that EPA's authority to respond to such potential releases is much broader than its authority to response to threatened releases of pollutants or contaminants, which requires an imminent and substantial endangerment to human health or welfare.[14/]

13/ As we discuss below, treble damages cannot be assessed for violations of a CERCLA § 106 order issued by one of the Cabinet departments pursuant to the Order. This result, which is compelled by the language of CERCLA § 107(c)(3), does not alter the fact that Congress intended these unilateral orders to be issued only in emergency situations.

14/ See 42 U.S.C. § 9604(a)(1)(B); Dickerson v. Administrator, EPA, 834 F.2d 974, 977 (11th Cir. 1987) ("EPA must establish an 'imminent and substantial danger to the public health or welfare' only when it seeks to remove pollutant and contaminants."); cf. Eagle-Picher Industries, Inc. v. EPA, 759 F.2d 922, 932-33 (D.C. Cir. 1985) (allowing EPA to list sites with pollutants or

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Moreover, even if CERCLA lowered the common law threshold for obtaining an injunction to abate damage, an "imminent and substantial endangerment" does not exist simply because hazardous substances may be released into the environment. As the Supreme Court recently recognized when interpreting similar language under the Resource Conservation and Recovery Act, 42 U.S.C. § 6972(a)(1)(B), "an endangerment can only be 'imminent' if it threatens to occur immediately, and the reference to waste which 'may present' imminent harm quite clearly excludes waste that no longer presents such a danger." Mehrig v. KFC Western, Inc., 116 S. Ct. 1251, 1252 (1996).[15/]

Despite Congress's clear intent, EPA's past practice at NPL sites has sometimes disregarded the statutory "imminent and substantial" threshold. In some cases, EPA has issued section 106 orders to address non-emergency situations.

It is vital that the MOU direct the five Cabinet departments to exercise their new section 106 authority at non-NPL sites in a manner that respects the statutory "imminent and substantial" threshold. The apparent rationale for the Order was to insure that when genuine emergencies do arise, the federal agencies most directly involved in managing the sites are authorized to compel a rapid response that might not have been compelled by EPA absent the Order.[16/] True emergency situations will be relatively infrequent at sites

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14/(...continued)
contaminants on the NPL only because the Court found it reasonable to await a detailed determination of whether a site presents an imminent and substantial danger before undertaking any remedial action).

15/ Similarly, emergency removal actions may preclude the possibility of an imminent and substantial endangerment, even though the potential for releases may remain. See, e.g., Continental Insurance Companies v. NEPACCO, Inc., 811 F.2d 1180, 1183 n.6 (8th Cir. 1987) (stored wastes at remediation site no longer presented an imminent and substantial danger); cf. United States v. Aceto Agricultural Chemicals Corp., 872 F.2d 1373, 1383 (8th Cir. 1989) ("The endangerment language [of RCRA] is plainly intended by Congress to limit the reach of RCRA to sites where the potential for harm is great."); Price v. U.S. Navy, 39 F.3d 1011, 1021 (9th Cir. 1994) (affirming dismissal of claim for failure to establish imminent and substantial endangerment, even though earlier remediation might have left some contamination under plaintiff's property).

16/ The only example cited to show the need for the Order is the threatened collapse of a retaining wall at the Blackbird Mine site in Idaho, which is being cleaned up under a settlement between various PRPs and the natural resource trustee agencies. The trustees were concerned that the collapse of the wall would have released thousands of gallons of contaminated water. Apparently EPA did not address the situation to the satisfaction of the trustee agencies. Using
(continued...)

managed by the five Cabinet departments and, absent the Order, EPA likely would adequately respond to any emergencies. In any event, the MOU should reserve section 106 authority for those situations.

The emergency nature of section 106 has important implications for the type of work that the Cabinet departments can seek to compel through unilateral administrative orders. Some categories of Superfund activity are appropriate for section 106 orders, while others are not.

1. **Removal Actions.** Removal actions generally are short-term responses to an immediate problem. See 40 C.F.R. § 300.415(b)(1). As such, they are the sort of "emergency" Superfund activity that could be secured properly through section 106 orders.

EPA has divided the universe of removal actions into "time-critical" and "non-time-critical" actions.[17/] The former category roughly overlaps with the concept of "emergency" actions. The latter category, however, includes activities that take many months, or even years, to complete. Non-time-critical removals effectively take the place of long-term remedial actions at many sites. These kinds of activities cannot remotely be considered "emergencies," and so the Cabinet departments should not resort to unilateral section 106 orders to secure their performance.

2. **Remedial Investigation/Feasibility Studies.** These important RI/FS studies should not be the subject of section 106 orders. The RI/FS studies plainly do not abate emergency situations, although they are technically classified as removal actions due to CERCLA's rigid terminology. On the contrary, one of the hallmarks of a time-critical removal action is that it is carried out without performing an RI/FS. At best, then, RI/FS studies could be viewed as non-time-critical removal actions. For the reasons set forth above, these actions should not be compelled through the use of section 106 orders.[18/]

16/(...continued)
this example to demonstrate the existence of an imminent and substantial endangerment at the Blackbird Mine site, much less to justify the Order itself, presupposes that the trustees were correct in their assessment of the situation and that EPA was incorrect. We know of no facts supporting that conclusion.

17/ See EPA, Guidance on Conducting Non-Time-Critical Removal Actions Under CERCLA, OSWER Directive 9360.0-32 (August 1993).

18/ EPA itself has rarely used § 106 orders to compel the performance of RI/FS studies, issuing about a dozen such orders in the last ten years.

3. **Remedial Design/Remedial Action.** Unlike removal actions, the departments should not use section 106 orders to compel performance of Remedial Design/Remedial Action ("RD/RA") activities.[19/] In sharp contrast to removal actions, the RD/RA work at Superfund sites is the long-term activity that typically takes years, or even decades, to complete. Because RD/RA work is so time-consuming, EPA relies on early removal actions to address any "emergency" situations, often while the long-term RD/RA activity is still in its very early stages. Although the RD/RA work is what may achieve the ultimate cleanup, it cannot remotely be viewed as addressing an "emergency." Accordingly, the Cabinet departments should not use section 106 orders to secure it.

4. **Damage Assessments and Resource Restoration.** Damage assessments and resource restoration should not be the subject of section 106 orders. Assessing damage to natural resources and restoring damaged natural resources are separate and apart from the various categories of response actions discussed above. These issues are discussed below in greater detail in Parts V-A and V-A of these comments. For present purposes, it should suffice to say that neither damage assessments nor restoration are performed in order to abate any danger to public health or the environment. As a result, they should not be secured through the issuance of section 106 orders.[20/]

B. The MOU Should Require All Section 106 Orders to Name the Largest Manageable Number of PRPs at Each Site.

Implementation of the Order will begin in 1997, just as EPA begins to implement its own October 2, 1995 administrative reform reinforcing EPA policy that all section 106 orders be issued to "the largest manageable number of PRPs" at each site and requiring written justification for any identified PRPs at the site that are not named in the order. See

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19/ Even if § 106 orders were not limited to emergencies, the remedy selection authority under § 121 of CERCLA has not been delegated to any of the Cabinet departments. Thus, the departments could not lawfully issue § 106 orders for the performance of RD/RA activities in any event. We understand that the Order itself may be amended or supplemented at some point to give § 121 authority to the departments, a move that we would oppose as inconsistent with the proper scope of § 106(a) order authority. Finally, if the Order is to be reopened to address this or any other issues, then the process plainly should be broadened to encompass the numerous issues raised in these comments.

20/ Since the Order was signed, various Administration officials have indicated informally that the Cabinet departments will not use § 106 orders to compel performance of either damage assessments or restoration activities. We strongly endorse that approach, and we offer here (in Parts IV-A, V-A, and V-B of these comments) our own views on why that approach is correct. The MOU itself should incorporate this approach in order to avoid the confusion, inconsistency, inefficiency, and litigation that would otherwise result.

August 2, 1996 Memorandum from Jerry Clifford, Documentation of Reasons(s) for Not Issuing CERCLA § 106 UAOs to All Identified PRPs. EPA's administrative reform was announced shortly before the Order was signed. The MOU should expressly incorporate these procedures to avoid losing the benefits of EPA's reform.[21]

The highlights of the EPA reform (as described in the Clifford memorandum) are as follows:

* EPA has "committed to ensuring that UAOs are issued in an equitable manner";

* it remains EPA policy "to issue UAOs to the largest manageable number of parties" at each site;

* "[t]his includes a commitment to issue UAOs, as appropriate, to other government entities (federal, state, or local) that are PRPs";

* "EPA will identify, for internal management review purposes only, reasons for excluding PRPs from any order proposed to be issued"; and

* this reform applies both to UAOs for removal actions and to UAOs for RD/RA work.[22]

The MOU should articulate these basic elements of section 106 order practice so that all affected agencies and other interested parties understand the ground rules.

C. The MOU Should Confirm that Work Performed Under Section 106 Orders Issued by the Departments Is "Consistent With the NCP."

Many PRPs that perform cleanup work at Superfund sites later seek cost recovery and/or contribution (hereafter jointly referred to as "contribution") from other PRPs that did not participate in the cleanup. In order for these worker PRPs to obtain contribution, they must demonstrate as an element of their prima facie case that, inter alia, the work they performed was "consistent with the national contingency plan." 42 U.S.C. §

21/ We regard it as essential that the Cabinet departments also adhere to this reform, which is an important step toward making the CERCLA enforcement process fairer pending comprehensive review and reauthorization of the statute by Congress. Even EPA acknowledges that the Superfund administrative reforms are no substitute for legislative reform.

22/ As previously stated in Part IV-A above, we believe that EPA's use of § 106 orders to compel RD/RA work at NPL sites is inconsistent with the limited scope of § 106 and, in any event, is no model for the departments to follow as they begin to implement § 106 themselves.

9607(a)(4)(B). Because the NCP is so detailed and so complex,[23] defendants in these contribution actions frequently target the issue of "NCP consistency" as a major element of their defense strategy. To date, the courts have often sided with the defendants.

The NCP does provide some comfort to PRPs performing work under a section 106 order issued by EPA. It states that such work is "deemed" to be consistent with the NCP for purposes of private-party cost recovery litigation. 40 C.F.R. § 300.700(c)(3)(ii). This provision was recently held to carry the plaintiff's burden on "NCP consistency." See Bancamerica Commercial Corp. v. Mosher Steel of Kansas, Inc., No. 95-3385 (10th Cir. Nov. 13, 1996).

Unfortunately, the NCP contains no comparable language regarding section 106 orders issued by agencies other than EPA, such as the five Cabinet departments. Now that the departments will be issuing section 106 orders, this creates a significant problem in the NCP. The ideal solution is for EPA to amend the NCP to provide equivalent recognition for work performed under section 106 orders issued by any of the five Cabinet departments. Such an amendment should be promulgated as quickly as possible.

In the short term, however, worker PRPs performing under section 106 orders issued by the departments risk being second-guessed by defendants (possibly including the same Cabinet department issuing the orders) and by the courts on "NCP consistency" simply because they received orders from agencies other than EPA. Thus, PRPs receiving such orders must choose between violating the orders and incurring substantial penalties, on the one hand, or performing the work and then failing to obtain contribution from other, equally responsible parties, on the other hand.

The short-term solution to this problem is for the MOU to state that the departments and agencies signing it agree that any section 106 order issued by one of the departments pursuant to the Order shall be deemed to be issued by EPA for purposes of private-party cost recovery. This would mean that the work is deemed to be "consistent with the NCP" under 40 C.F.R. § 300.700(c)(3)(ii) for purposes of cost recovery litigation. Such a provision in the MOU is amply justified, particularly in light of the plenary EPA review of proposed section 106 orders prior to granting its concurrence under the Order. See Part III-C-I supra.

23/ Sometimes defendants even dispute which version of the NCP--the 1982 version, the 1985 version, or the 1990 version--should be used to evaluate "NCP consistency."

D. The MOU Should Confirm that PRPs Performing Work Under Section 106 Orders Are Eligible for Reimbursement Under Section 106(b)(2).

Sometimes a PRP receives a section 106 order and dutifully complies, to avoid risking substantial penalties, even though it firmly believes (1) it has no liability at the site and/or (2) the response action selected in the order is arbitrary and capricious. In 1986, Congress amended section 106(b) to create a specialized reimbursement mechanism for PRPs who perform work under a section 106 order and then demonstrate that they have no liability or that the response action selected in the order was arbitrary and capricious. The first step in this process is to petition EPA for reimbursement from the Fund and await a decision by EPA's Environmental Appeals Board.

To date, there have been few successful petitions for reimbursement under section 106(b)(2). The availability of this mechanism, however, helps achieve several desirable policy objectives. First, it provides some accountability on the issuance of section 106 orders. Second, it helps maintain a high rate of compliance with these orders, because PRPs can always agree to perform the work while reserving their rights to seek reimbursement in the future if the facts support such relief.

PRPs confronting orders issued by the five Cabinet departments will now find their decisionmaking process complicated by a new issue: How will EPA and the Cabinet departments jointly administer the reimbursement provisions of section 106(b)(2) with respect to orders issued by these departments? For example, might EPA decline to reimburse PRPs on the ground that the ultimate obligation should rest with the issuing Cabinet department? Will the Cabinet department in turn decline to reimburse EPA because CERCLA states that the Fund itself should pay the reimbursements to PRPs?

The MOU should state that the section 106(b)(2) reimbursement mechanism is available to PRPs receiving orders from the Cabinet departments, that EPA will reimburse those PRPs that meet the standards of section 106(b)(2), and that any resulting transfers of funds within the federal government are matters to be addressed between EPA and the Cabinet departments.

E. The MOU Should Address Two Important Legal Issues Regarding Penalties for Noncompliance with Section 106 Orders.

Finally, the MOU should address two issues pertaining to penalties for noncompliance with orders issued by the departments: treble damages and daily civil penalties.

1. **Treble Damages.** In order to avoid possible confusion and needless litigation, the MOU should acknowledge that as a matter of law, punitive treble damages under section 107(c)(3) are not available with regard to orders issued by the departments. The damage remedy in section 107(c)(3) provides for up to three times "the amount of any costs

incurred by the Fund." Because the Order makes it clear that the transfer of section 106 authority "shall not be construed to . . . permit use of the . . . Superfund to implement section 106 or to fund performance of any response action in lieu of the payment by a person who receives but does not comply with an order [issued by one of the departments] pursuant to section 106(a)," the Fund itself will not incur any costs in the event of noncompliance with such an order. Therefore, there can be no Fund costs upon which to base a treble damage award. The MOU should confirm this before the departments begin issuing orders.

2. **Daily Civil Penalties.** Although daily civil penalties under section 106(b)(1) can be imposed for noncompliance with a section 106 order issued by one of the departments, there is an important limitation on this penalty exposure. As EPA concluded early on in the history of Superfund, it would be unfair--and possibly unconstitutional--for the daily penalties to keep accruing even after a PRP declines to comply and EPA decides to perform the work using money from the Fund. See generally United States v. Reilly Tar & Chemical Co., 606 F. Supp. 412, 418-21 (D. Minn. 1985).

The same considerations apply to orders issued by the departments. If the recipient of an order declines to comply, and the department decides to perform the work itself, using available funds (other than Fund monies), then at that point the daily civil penalties must cease accruing. Otherwise, the recipient of the order would be in the untenable position of being unable to comply but also unable to stop the accrual of daily penalties until the day an enforcement action is actually filed. For this reason, the MOU should confirm that daily civil penalties for noncompliance with an order issued by one of the departments cease to accrue once the department decides to perform the work itself. [24/]

V. NATURAL RESOURCE DAMAGES ISSUES THAT SHOULD BE ADDRESSED IN THE MOU

Another set of issues requiring careful attention in the forthcoming MOU involves the use of section 106 orders by the natural resource trustee agencies, primarily the Departments of Agriculture, Commerce, and Interior. Standing alone, the Order could be read to mean that trustees can bypass their section 107 damage claims entirely and instead obtain performance of response actions under section 106. To put it another way, the Order seemingly invites the trustees to use their new authority in ways that are at odds with explicit statutory limitations and with sound public policy.

24/ This prudential limitation on the accrual of daily civil penalties does not mean that PRPs have no incentive to comply with section 106 orders issued by the departments. For example, a trustee might agree to waive recovery of damages for interim losses to the resource if the PRPs perform a removal action pursuant to a section 106 order.

This reading of the Order is untenable for several reasons. First, neither damage assessments nor resource restoration are CERCLA response actions that may be compelled through section 106 orders. Second, even if they were, the trustees' section 107 damage claims are ultimately claims for restoration, not for the performance of response actions. It fundamentally distorts the nature of those claims to view them as claims for response actions. Moreover, the trustees would have to circumvent a number of provisions in sections 107 and 113 if they sought to compel those response actions using section 106 orders as a means of coercion. The MOU should address and resolve these problems.

A. Section 106 Orders Should Not Require Damage Assessments.

Troubling questions arise if one contemplates the trustee departments using section 106 orders to compel the performance of damage assessments. We are uncertain whether such orders were contemplated by the drafters of the Order, as various Administration officials have expressed different points of view on this issue. As a definitional matter, however, damage assessments fall outside the scope of section 106 authority because they are not CERCLA response actions. The MOU should specifically preclude the issuance of section 106 orders requiring the performance of damage assessments.

To begin with, damage assessments are not CERCLA response actions. They are not "remedial actions," 42 U.S.C. §§ 9601(24), because they do not seek to "prevent or minimize the release . . . of hazardous substances so that they do not migrate to cause substantial danger . . . ." Nor do they fit within the definition of "removal." At most they might be viewed as "actions . . . to monitor, assess, and evaluate the release . . . of hazardous substances," id. § 9601(23), but even this language is a poor fit. Damage assessments do not "assess . . . the release"; they assess "damages for injury to, destruction of, or loss of natural resources resulting from a release." Id. § 9651(c)(1).

Section 107(a)(4) of CERCLA enumerates the categories of costs to be paid by persons found liable under section 107. In familiar language, section 107(a)(4)(A) covers "all costs of removal or remedial action incurred by the United States Government . . . not inconsistent with the national contingency plan." Yet section 107(a)(4)(C) covers not only damage to natural resources, but also "the reasonable costs of assessing such injury, destruction, or loss resulting from such a release." This language would be superfluous if damage assessments were either "removals" or "remedial actions." Congress separated and dealt with response actions and damage assessments separately in the same part of CERCLA because damage assessments are not CERCLA response actions.

Moreover, even if damage assessments were somehow considered to be CERCLA response actions, they would still be beyond the scope of section 106 order authority. As we showed in Part IV-A of these comments, the proper role of section 106 orders is to

abate emergency situations. Damage assessments seek to quantify and monetize damage after the fact, not to abate the release itself.

Finally, issuing section 106 orders for the performance of damage assessments would raise still other troubling legal issues. The damage assessment is, after all, the heart of the trustee's case in any litigation to recover damages from PRPs. It specifies the dollar amount of the damages that the trustee may recover for injury to the natural resource. If the trustee could compel PRPs to perform the assessment under its oversight, and to revise the document until it contained a particular dollar amount selected by the trustee, then what effect would the assessment have in litigation?

As a matter of statutory construction, of course, section 107(f)(2)(C) grants a rebuttable presumption only to damage assessments "made by a Federal or State trustee," not to assessments made by PRPs. Thus, even if the Cabinet departments were authorized to issue section 106 orders requiring the performance of damage assessments, any such assessment performed involuntarily by PRPs should not qualify for the rebuttable presumption.

Even if the statute were not so clear, however, the manifest unfairness of the other approach should quickly resolve the issue. For the trustee to order a private party to prepare an assessment quantifying the damages for which it should be held liable, then direct the PRP to modify or rewrite that assessment in whatever way the trustee sees fit, all under threat of daily civil penalties for noncompliance, and then restrict his ability to challenge that assessment when it is used in court to extract those damages from him, would be a denial of due process of law.

Moreover, using section 106 orders to compel the performance of damage assessments would decrease the current level of cooperation between PRPs and natural resource trustees. Any PRP preparing a damage assessment over its objection would likely end up striving to "build an administrative record" for the inevitable litigation to follow. This means that along the way, the trustee and the PRP are apt to be at loggerheads on many points.

For all of these reasons, the MOU should expressly state that section 106 authority cannot be used to compel the performance of damage assessments.

B. Section 106 Orders Should Not Require Resource Restoration.

Very similar considerations compel the conclusion that the trustee departments cannot use section 106 orders to require PRPs to perform resource restoration. Again, we are unsure whether such orders were contemplated by the drafters of the Order, as various Administration officials have given somewhat conflicting signals on this point. Such

orders would be wholly inappropriate, however, and the MOU should specifically preclude their issuance.

As a definitional matter, resource restoration falls outside the scope of section 106 authority because it is not a CERCLA response action. For these reasons, among others, the MOU should specifically preclude the issuance of section 106 orders requiring resource restoration.

To begin with, restoration is not a CERCLA response action. It is not a "remedial actions," 42 U.S.C. § 9601(24), because it does not seek to "prevent or minimize the release . . . of hazardous substances so that they do not migrate to cause substantial danger . . . ." Nor does it fit within the definition of "removal." Instead, restoration of resources is one of the things that trustees are authorized to pay for with the damages they collect from PRPs. CERCLA § 107(f)(1), 42 U.S.C. § 9607(f)(1).

Once again, any doubt on this score is resolved by section 107(a)(4) of CERCLA, which sets forth the categories of costs to be paid by persons found liable under section 107. Section 107(a)(4)(A) covers "all costs of removal or remedial action incurred by the United States Government . . . not inconsistent with the national contingency plan." Yet section 107(a)(4)(C) covers "damages for injury to, destruction of, or loss of natural resources." Obviously this language would be superfluous if resource restoration itself was either a "removal" or a "remedial action."

Moreover, if restoration were a CERCLA response action, then trustees could perform restoration activities using available appropriations and recover these restoration costs as the costs of "removal or remedial action" under section 107(a)(4)(A). This approach would render largely superfluous the statutory provisions that directly address liability for damage to natural resources, an outcome obviously not intended by Congress. The absurdity of such a result further reinforces the conclusion that resource restoration is not a CERCLA response action.

Finally, even if restoration were somehow considered to be a CERCLA response action, it would still be beyond the scope of section 106 order authority, which is limited to orders that abate emergency situations. This is obviously <u>not</u> what restoration does. Restoration (or replacement or the acquisition of equivalent resources) is a long-term process that takes place years after the release has occurred and does not abate threats, but rather improves or restores conditions.

C. Section 106 Orders Cannot Circumvent Statutory Limitations on the Trustees' Claims for Damages.

As previously discussed, neither damage assessments nor resource restoration qualify as CERCLA response actions that can be the subject of section 106 orders. Even if the

MOU allows the Cabinet departments to address natural resource damages through the issuance of section 106 orders. however, the trustees cannot use section 106 orders to circumvent the various statutory limitations on their section 107 damages claims.[25/] We describe below some of the more important examples of this problem. The MOU should expressly address each of them in order to avoid confusion and needless litigation.

1. **Liability.** Section 106 itself does not define the class of liable parties, which is why the courts have read it as applicable to those persons who are liable by virtue of section 107(a). See, e.g., United States v. Hardage, 750 F. Supp. 1444, 1457 (W.D. Okla. 1990); United States v. A & F Materials Co., 584 F. Supp. 1249, 1257 (S. D. Ill. 1984). Therefore, to the extent a particular PRP is not liable to a trustee under section 107 for natural resource damages, it is not liable under section 106 either. The MOU should state that the trustees cannot issue a section 106 order to such at PRP to compel performance of a damage assessment, or resource restoration, or any other action that addresses damage to natural resources.

2. **Retroactive liability.** Section 107(f)(1) of CERCLA stipulates that no liability for natural resource damages exists if the release and the damages occurred wholly before December 11, 1980. The MOU should state that at sites where these conditions are met, the trustees cannot issue section 106 orders requiring action to address damage to natural resources.

3. **Liability cap.** Section 107(c)(1)(D) of CERCLA limits liability for natural resource damages to $50 million per site. The Order is potentially broader, as it imposes no such limitation. The MOU should assure that the departments cannot issue section 106 orders requiring actions equivalent to resource restoration, the costs of which exceed $50 million, to address damage to natural resources.

4. **Statute of limitations.** Section 113(g) of CERCLA specifies the statute of limitations for natural resource damage claims. In Kennecott Copper Co. v. Babbitt, 88 F.3d 1191, 1208-13 (D.C. Cir.1996), the court recently clarified that this period has already run with respect to some sites. The MOU should state that at sites where this has occurred, the trustees cannot issue section 106 orders requiring action to address damage to natural resources.

25/ This is no abstract concern over legal formalities. Allowing trustees to bypass their statutory damage claims and issue § 106 orders instead will wreak havoc on settled expectations. For example, a PRP may have substantial insurance coverage for any "damages" recovered by a trustee, either in court or through a settlement, but none for the costs of work performed under a § 106 order, because those costs are often held not to be "damages" that trigger coverage.

5. **No double recovery.** Section 107(f)(1) of CERCLA prohibits double recoveries for damage to natural resources. The Order is potentially broader, as it acknowledges no such prohibition. The MOU should confirm that the departments cannot issue section 106 orders requiring action to address damage to natural resources that would amount to a double recovery because compensation for that damage has already been awarded in another proceeding.

VI. FEDERAL FACILITIES ISSUES THAT SHOULD BE ADDRESSED IN THE MOU

Another set of troubling issues arises from the Order's sweeping application to federal facilities, i.e., sites that are "subject to [the] custody, jurisdiction, or control" of the five Cabinet departments, but that do not present natural resource damages issues. Most of these sites are owned and/or operated by the Department of Defense ("DOD"), and so in the following discussion, we refer to DOD purely as a matter of convenience. The proposed use of section 106 orders by DOD to compel private-party cleanups at these sites typically would be unfair and would give rise to new litigation.

At most contaminated facilities that are subject to DOD's "custody, jurisdiction, or control," DOD itself is a major PRP by virtue of its owner/operator status.[26/] Most viable private PRPs at these facilities are either (1) current or former contractors, or (2) current or former tenants, of DOD and/or the other federal agencies that owned and/or operated the facilities (collectively, "the landowner agencies"). This means that the activities of these private PRPs typically were either directed by the landowner agencies, or at least occurred in connection with the activities of the landowner agencies.

Under these circumstances, it would be highly unfair and inappropriate for the landowner agencies to assume the mantle of "enforcer" against their own contractors or tenants. Allowing the major PRP at a site to compel another PRP to perform the cleanup entirely at its own expense, subject to daily civil penalties for noncompliance, is not calculated to place the Superfund program on a better footing, particularly when the major PRP issuing the order has historically failed to manage its own cleanups in a cost-effective manner. See page 3 supra.

26/ The developing law on allocation suggests that the landowner agency will typically be assigned a substantial share of liability solely on the basis of owner status. See, e.g., United States v. R. W. Meyer, Inc., 982 F.2d 568, 571-72 (6th Cir. 1991). Moreover, the landowner agency cannot invoke CERCLA's "third-party defense" by pointing to its contractor or tenant, because the defense is unavailable where the "third party's" acts or omissions "occurr[ed] in connection with a contractual relationship" with the landowner. 42 U.S.C. § 9607(b)(3).

Moreover, the issuance of such orders by the landowner agencies would only generate more litigation. Many of the contractor/tenant PRPs that would receive such orders would have viable contractual claims against the landowner agencies, based on their contracts or leases, for some or all of the costs of any cleanup work they are required to perform. These contractor/tenant PRPs, upon receipt of any such section 106 order, would have a strong incentive to go straight to court for a declaration that the costs of the work should be borne, in whole or in part, by the landowner agency issuing the order, and for an injunction that stayed the order until such funding is provided. To the extent that contractor/tenant PRPs are entitled to indemnification by the agencies issuing the orders, they are functionally the same as non-liable parties, and so should have a complete "sufficient cause" defense against the imposition of any daily penalties. Thus, issuance of the order would accomplish little or nothing and would generate more litigation.

This new litigation will raise a tangled web of novel issues, and may involve courts that have not previously considered Superfund questions. As noted above, contractor/tenant PRPs that refuse to comply with section 106 orders will argue that their contractual claims against the issuing agencies for payment of cleanup costs amount to a good-faith belief that they are not liable for those costs, thus providing a section 106(b)(1) "sufficient cause" defense against the imposition of daily civil penalties[27/] for disobeying the order. Landowner agencies may seek to argue that civil actions by contractor/tenant PRPs to establish their rights to indemnity or contribution for cleanup costs are barred by the section 113(h) prohibition on pre-enforcement judicial review of response actions.[28/] Some of these issues will be presented initially to the United States Court of Federal Claims, which generally has jurisdiction over actions brought by government contractors seeking payment of money damages. 28 U.S.C. § 1491(a). The jurisdiction of the Court of Federal Claims, however, is ordinarily limited to suits for money judgments, id. § 1491(a)(3), whereas some contractor/tenant PRPs may sue for declaratory relief prior to expending any money. Moreover, section 113(b) of CERCLA gives the district courts exclusive jurisdiction over "all controversies arising under" CERCLA, so that jurisdiction may ultimately depend on such niceties as whether the complaint for declaratory and injunctive relief regarding a section 106 order by the contractor/tenant PRP "arises under" CERCLA or "arises under" the plaintiff's contract or lease with the landowner agency.

In short, the issuance of section 106 orders by DOD to contractor/tenant PRPs is likely to be unfair and to generate new litigation. To avoid these problems, the MOU should, at an absolute minimum, place two basic limitations on the authority of these departments.

27/ As noted in Part IV-E-1 above, treble damages could not be assessed against the contractor/tenant PRP in any event.

28/ Such an argument would greatly expand the scope of § 113(h). Very few courts have read this provision to bar pre-enforcement litigation over liability, as opposed to remedy selection.

A. The Departments Should Not Issue Section 106 Orders at Sites Where They Are Major PRPs Due to Their Status as Owners and/or Operators.

The MOU should preclude the departments from issuing section 106 orders at any sites where they are major PRPs by virtue of their status as owners and/or operators. There simply is no public policy justification for granting these major PRPs the role of "enforcer" and shifting all cleanup costs to their contractors and tenants, only to hasten or generate litigation over where those costs will eventually come to rest. If, contrary to the general understanding, these departments frequently encounter emergency situations at their facilities but lack adequate appropriations, e.g., in the Defense Environmental Restoration Account, to take the necessary short-term removal actions, then that problem should be brought to the attention of Congress.

We have considered other approaches to this problem, such as directing the departments in the MOU to proceed in an "equitable" fashion, or to issue section 106 orders that assign liability to private PRPs in a manner commensurate with their "fair share." Although the departments might prefer one of these alternatives to the blanket prohibition described above, they would prove unsatisfactory and unworkable in practice for several reasons.

First, it is unclear where the line(s) would be drawn under these alternative approaches. To take an extreme case, if the department were an innocent landowner and the ten PRPs named in the proposed order sent 100% of the waste received at the site, then perhaps the department's "technical" status as a PRP should not bar the issuance of a section 106 order. (Even on facts as one-sided as these, other problems would arise, as we discuss below.) But if the department's "fair share" were even 20%, and each of the ten PRPs had a lower "fair share," then it would be difficult to justify allowing the department to compel them to perform all of the work under a section 106 order. As noted earlier, see footnote 26 supra, the department's share at most sites is apt to be substantial.

Second, the "fair shares" at a site cannot be determined in a vacuum. Years of experience with Superfund allocations demonstrate that subjective judgments about the "fair share" of any given PRP should not be made until a comprehensive PRP search has been completed and the facts have been fully aired.[29/] The Cabinet departments generally have limited experience with performing PRP searches and participating in allocations of liability. It would be unrealistic to expect the departments to delay the start of the time-critical removal actions that are properly subject to section 106 orders while they made arrangements to have PRP searches and allocations performed.

29/ This recognition was one of the building blocks of the "fair share" allocation process in H.R. 3800, the Superfund Reform Act of 1994, which was almost enacted in the 103d Congress.

Third, the "fair shares" at a site cannot be objectively assessed by the department, which (in this situation) is itself one of the PRPs and thus has a strong interest in minimizing its own liability. To put it another way, the department seeking to issue a section 106 order should not be tasked first with evaluating its own liability and then with deciding whether it is "equitable" for the proposed order to issue. To ask all that would be to make the department both the plaintiff and the judge in its own case, a sure recipe for trouble.

In sum, fairness and public policy counsel against allowing the departments to issue section 106 orders at any sites where they are major PRPs by virtue of their status as owners and/or operators. The MOU should articulate this blanket prohibition and should reject as unworkable the more subjective approaches that depend upon the departments' assessment of "fair shares" or other "equitable" considerations.

B. The Departments Should Not Issue Section 106 Orders to PRPs That Are Current or Former Contractors or Tenants at the Sites in Question.

Apart from the PRP status of the landowner agencies, which links them to CERCLA liability, the MOU should also address the very practical problem of contractual liability. The departments should not be authorized to issue section 106 orders to current or former facility contractors or tenants whose contracts or leases contain indemnification or cost-sharing provisions that are potentially applicable to the work required by the proposed order. To put it another way, the government has an obligation not to casually order private parties to incur costs without first examining whether some or all of those costs are actually the responsibility of the government itself.

Both of the critical limitations urged above will ultimately be "enforced" by EPA through the concurrence process. The department seeking to issue the section 106 order will have to satisfy EPA in each case that (1) the department is not a major PRP at the site and (2) none of the proposed recipients of the order have claims for indemnity or contribution against the department under their contracts or leases. See Part III-C supra. It may not be possible to spell out these limitations in any greater detail in the MOU, but it is imperative that the MOU at least establish these basic ground rules so that all affected agencies will be on notice.

STATEMENT OF THE ASSOCIATION OF STATE AND TERRITORIAL SOLID WASTE MANAGEMENT OFFICIALS (ASTSWMO)

The purpose of this statement for the record is to reflect the views of the Association of State and Territorial Solid Waste Management Officials (ASTSWMO) regarding the reauthorization of the Comprehensive Environmental Response, Compensation and Liability Act (commonly referred to as Superfund) during the 105th Congress. Specifically, we understand that the Senate Superfund, Waste Control and Risk Management Subcommittee held a hearing on March 5, 1997 on S. 8. We respectfully request that this statement be included as a part of the record for that hearing.

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. As the day-to-day implementors of the State and Federal cleanup programs, we believe we can offer a unique perspective to this dialog. Since we share in Congress' and the public's desire to achieve effective and timely cleanup of our nation's contaminated sites and the restoration of injured resources, associated with these sites, ASTSWMO has marshaled the comprehensive experience of our membership to provide our unique perspective to the debate surrounding Superfund Reauthorization during this first session of the 105th Congress.

We would like to begin by commending Senators Chafee and Smith on the many modifications made to S. 1285 in producing S. 8. It is evident that the Senators sought to introduce a bill which would reflect compromises from their own positions in an effort to produce a viable, workable starting point for the 105th congressional Superfund debate. We look forward to working with the Committee throughout the debate.

BROWNFIELDS REVITALIZATION

We are pleased that the Senators have chosen to recognize the clear importance of Brownfields by allowing it to occupy the first title of S. 8. Brownfields comprise the vast majority of sites which are currently being remediated by State agencies. The majority of sites classified as Brownfields will never be placed on the NPL. Currently, the biggest impediment to effectively remediating and redeveloping Brownfield sites is the inability of State agencies to provide for releases of liability from both State and Federal laws. While we support concepts such as providing Superfund liability protection to bona fide prospective purchasers, lenders, and fiduciaries, we believe the real key to solving our country's Brownfields problem is to allow the State Waste Agencies to grant releases of Federal liability once a site has been cleaned up to State standards under a State program. We can no longer afford to foster this illusion that State authorized cleanups may somehow not be adequate to satisfy Federal requirements. Over thirty States have enacted Voluntary Cleanup programs and 42 States have adopted State Superfund programs. These programs have remediated over 3,000 sites and the number is growing. It is imperative that any Brownfields legislation clarify the State-Federal roles and potential liability consequences under the Federal Superfund program. We believe S. 8 has accomplished this task. We would recommend however, one modification to the provision as written. In situations which are deemed emergencies and where the State requests assistance, we believe the Federal Government should be able to address the site and if necessary hold the responsible party liable. Emergency actions should be the only exceptions to the releases from Federal liability.

We are also pleased to see that S. 8 recognizes the importance of Voluntary Cleanup programs and enables States to receive Federal funding for both the establishment and maintenance of already highly successful programs. We would caution that the funding criteria should remain as flexible as possible in order not to unintentionally disrupt working programs. However, we are concerned that a number of States which are pursuing innovative approaches, such as privatization of cleanups, may not qualify. The funding criteria should encourage innovation not constrain it. We would also recommend that legislative history for this bill direct EPA to distribute grants for voluntary cleanup programs through their normal grant processes, i.e., through the EPA regions, and that EPA shall not be allowed to attach additional burdens onto State grant recipients in the guise of "accountability".

Lastly, we believe the explicit provision requiring local governments to comply with State laws in order to receive Federal grants is a well-thought out provision

and will serve to avoid much confusion in the long run. Ultimately, these sites are State sites and will have to be remediated under State auspices and according to State laws.

STATE ROLE

Maximum flexibility is a necessity when dealing with fifty vastly different State programs. S. 8 appears to have accomplished this goal by allowing States to be both delegated and authorized the Federal Superfund program or to retain the status quo if the State so desires. Some States will desire delegation of all sites within their borders, others may only apply for one or two sites, and States in the early stages of development may seek delegation for only parts of the remediation process. The Committee did well to recognize the unique needs of State programs and to provide a wide array of options for assuming the lead at Federal Superfund sites. State programs have grown remarkably in sophistication and we are therefore pleased that S. 8 has chosen to streamline the Federal Superfund program by allowing States to utilize their own laws when implementing the Federal Superfund program. The only way to truly capitalize on the benefits of the State Superfund programs and to transfer the many innovations which have been adopted at the State level to the Federal Government is to allow States to be authorized to implement the Superfund program. Authorization will also provide the needed consistency which is currently lacking within States due to the implementation of two Superfund programs within State borders: the Federal program and the State program. States would like the opportunity to implement one program at all sites which fall within their State borders. That is why, while we are pleased with the authorization provision, we cannot support provisions which would require the State to pay the difference should their laws be more stringent than the Federal Superfund program. We can see no reason why Federal sites should be held to a lesser standard when all other sites within the State must meet State standards. As of today thirty States either have or are in the process of promulgating State cleanup standards. States have answered the question of "how clean is clean" and this answer should apply to all sites within the State borders.

Another cost saving technique which has been added to this title which we support is the ability of States to receive funding for conducting emergency and time-critical removals. State Waste Managers have long contended that they can perform these functions for less cost than EPA, essentially leveraging more "bang for the buck". Simply put, States are physically closer to the removals which occur within their own borders than either representatives from U.S. EPA regions or headquarters. This is a common sense change.

We are also pleased that S. 8 streamlines the program by providing a fixed State cost share, namely 10 percent of remedial action costs and 10 percent of operation and maintenance costs. The current cost share system has served only to exacerbate the tension which exists between State Waste Agencies and the U.S. EPA. Under the status quo the financial incentives for EPA and the States are diametrically opposed when considering final remedies for a site (States desiring more capital intensive remedies and EPA seeking remedies with lower capital costs and higher operation and maintenance costs). State Waste Officials believe this is a fair and well-reasoned position. We strongly recommend that it should be explicitly stated in statute that States should not be required to cost share on removal actions in order to provide the needed direction to EPA in this area.

We are concerned, however, that as we alleviate the current tensions between States and EPA on the issue of State cost share that we are merely redirecting these tension into a new area namely withdrawal of delegation/authorization. As written, S. 8 allows EPA to withdraw delegation/authorization on a site by site basis rather than on a programmatic basis. This essentially creates a site by site veto authority by EPA should EPA program managers disagree with a State selected remedy. We support the concept of withdrawing delegation/authorization from a State which is consistently failing to implement the provisions of the Superfund program in a sound manner, but to allow EPA field managers the ability to second guess State field managers on a site by site basis appears to be antithetical to the stated goals of S. 8.

REMEDY SELECTION

As we indicated earlier, over thirty States are either in the process or have promulgated cleanup standards/models. The States have not waited for the Federal Government to promulgate national cleanup standards, but instead have moved out ahead. We are pleased that S. 8 recognizes the work which has occurred at the State level and maintains the provision for State applicable standards to be factored

into the Federal remedy selection process. Where State goals and standards have been established, they should be applied consistently at all sites subject to CERCLA liability in that State regardless of the lead agency. This includes not only NPL sites but brownfield/voluntary cleanup sites and Federal facilities. A uniformly applicable cleanup process will eliminate the often paradoxical inconsistency found where similar sites in close proximity are cleaned up to different levels for reasons which have little to do with the actual risk posed. It provides an expectation of consistency to responsible parties, nearby residents and other stakeholders involved in the cleanup process. In States which have not developed goals and standards, EPA should continue to use the risk range established in the NCP.

State Waste Managers do support the concept of eliminating RARs—relevant and appropriate requirements in favor of a process where States will promulgate all relevant standards, criteria and requirements in a separate rulemaking for use in the remedy selection process. We believe this will streamline the remedy selection process and provide a greater level of certainty to responsible parties and to the public.

We also support the determination of future land use early in the remedy selection process prior to the calculation of site specific cleanup levels. This is a positive change which has been implemented by most State Superfund programs and should serve to promote the redevelopment of existing industrial areas rather than encouraging industrial development in currently non-industrial areas. We also agree with the elimination of the current preference for permanence in the CERCLA statute. Neither EPA nor the majority of States are implementing permanent remedies and it is time that the statute reflected reality. States are selecting remedies which are protective of human health and the environment, cost-effective and implementable. That said, ASTSWMO does recommend that institutional controls and other designated restrictions necessary to implement a particular remedy be made legally enforceable, run with the land, and be binding among all parties to implement the restrictions. Financial responsibility mechanisms should also be identified to provide for the perpetual maintenance of these sites in case the responsible parties are unable to do so. Last, we also agree with the six factors proposed to balance the remedy selection process, i.e, the reliability of the remedial action in achieving the protectiveness standard over the long term; any short term risk to the affected community; the acceptability of the remedial action to the affected community; the implementability and technical feasibility of the remedial action from an engineering perspective and the reasonableness of cost. We believe that when all the remedial alternatives have been evaluated, the remedies which meet all applicable standards, are protective of human health and the environment and which fall within the risk range should be considered and the least costly remedy selected. The cost of implementing the alternative, including long-term monitoring and operation and maintenance must be considered. ASTSWMO believes that assessments of costs should reflect as realistically as possible the costs of perpetual monitoring and maintenance. The application of the cost effectiveness test should be applied to all sites equally with no consideration given to whether it is a fund or responsible party lead site. When the cost of achieving the target risk cleanup level results in costs which are disproportionate to the risk reduction benefits an economic waiver should be available.

While we support the above mentioned provisions as outlined in S. 8, we ultimately believe the remedy selection process should be conducted by qualified States using State law and procedures. We believe this is the only true mechanism for providing citizens and responsible parties a measure of consistency. Consequently, we question the provision in Section 133(a)(I)(B) which appears to trump the authorization provisions outlined in Title II of this bill. We respectfully request clarification of this provision.

We have three other questions/comments concerning the remedy selection procedures as outlined in S. 8. First, we question how the Committee plans to define a remedial action which is deemed protective if it protects an ecosystem from significant threats. What definition is the Committee using for "significant threats" and how will this definition relate to CERCLA natural resource damages provisions? Second, we question the construct of the remedy review boards as outlined in S. 8. Specifically, will these remedy review boards apply to sites which have been delegated/authorized to a State and in the case of authorization/delegation, who will be in charge of the review board the Governor or the Administrator? Also, who will pay for the States' time to participate on these review boards? Last, why did the Committee find it necessary to preempt State law by releasing NPL sites which are cleaned up to unrestricted use from both Federal and State liability. Does this assume the sites were cleaned up to State standards and who will make this determination will a State concurrence be required? More importantly, States are not part of the problem when it comes to returning sites to productive use. It is not

State liability laws which are keeping sites from being redeveloped. This is a Federal statute and only Federal liability should be addressed in this statute. ASTSWMO opposes this provision.

LIABILITY

As State Waste Managers, our principal concern is ensuring the timely and effective cleanup of contaminated sites. The current liability scheme may not be entirely equitable to some responsible parties, but in the past it has provided a stable source of funding. Equity must also be extended to protect those Americans living near, and suffering the effects of, contaminated waste sites. Reforms are needed and we believe those outlined in title V of this bill will serve to address many of the statute's current inequities without disrupting the flow of cleanups. For example, in 1993 State Waste Managers developed and adopted a proposal advocating the carve out of municipal solid waste landfills from the Federal Superfund program. We do not view this as a "compromise solution", but rather a smart move from a practical implementation perspective. State Waste Managers have found these sites to be ill-suited for the current Federal Superfund liability program. Municipal Solid Waste Landfills are, for the most part, large sites which involve numerous responsible parties, served a broad societal function, and have a presumptive remedy associated with their remediation, i.e., capping. We support your decision to carve these sites out of the current Superfund liability program, however, we question the scope of the term "co-disposal" landfill as outlined in S. 8. We would be happy to work with you to develop an acceptable definition of co-disposal site. We also concur with your decision to more clearly define and more actively utilize the liability relief tools of *de micromis* and *de minimus* settlements. Ultimately, we caution that any final liability scheme which may be accepted by the Committee must ensure sufficient funding to adequately cleanup sites to a level which is protective of human health and the environment and ensure the continuation of the States' ability to enforce their own laws and to provide for no cost shifts to State governments. The nation's Governors have outlined a series of criteria for revision of the CERCLA liability scheme, and we recommend that the Committee evaluate these proposals by those criteria.

FEDERAL FACILITIES

Our overall comment regarding the Federal facilities section of S. 8, is that Federal facilities should not be treated any differently than other Superfund sites. The Federal Government should be held to the same standards as other responsible parties and therefore, State applicable standards should not be waived at these sites. In addition, we believe States should be able to be both authorized and delegated to implement remedy selection at Federal facilities. Therefore, we recommend that States be allowed to self-certify for either delegation or authorization for Federal facilities sites as is specified for non-Federal sites There is no reason why the streamlining and cost savings of the Superfund program which has occurred at the State level should not be transferred to the Federal Government at Federal facility sites.

NATURAL RESOURCE DAMAGES

Of all the titles in S. 8, we believe this title is the most markedly improved from S. 1285 and we commend Senators Chafee and Smith for acknowledging the importance of restoring our country's injured natural resources. This title is extremely important to State Waste Programs as the majority of States currently utilize the Federal CERCLA Natural Resource Damages provision rather than State law at non-NPL sites. In general, while S. 8 places new restrictions on trustees, it will still enable trustees to continue to provide a level of primary restoration for injuries to natural resources caused by these sites. However, we question the Committee's desire to eliminate non-use damages and the intended definition of "reasonable cost" and request that the Committee consider adding the component of "timeliness" as a factor when evaluating restoration alternatives. While we recognize the Committee's desire to provide flexibility in the payment of damages, we are concerned that the trustees have sufficient funds available to initiate restoration work at the earliest possible time and to be able to complete the restoration of injured resources and the services they provide to the public.

ASTSWMO has three primary recommendations for further improving the natural resource damages process. First, the issue of scheduling payment of damages as well as other issues raised by both industry and trustees could be addressed through one overarching revision to the title: a provision that requires the integration of NRD into the cleanup process. While S. 8 already reflects the Committee's desire to coordinate restoration and response, this movement toward integration could be car-

ried further in order to ensure that NRD is routinely considered not only at the remedy selection stage, but during the investigative stage of the site cleanup process. Integration of NRD assessment into the remediation process reduces transaction costs and liability by enabling the collection of NRD information during the site investigation and identifying restoration options that can be made part of the remedial action. An integrated process will promote prompt resolution of NRD issues as part of the overall settlement at a site, facilitate timely and efficient restoration and address most of the industry and trustee concerns that have been raised throughout the Superfund debate. Second, we believe the statute of limitations should be clarified in order to significantly improve the program, prevent unnecessary litigation and provide certainty to both the trustees and responsible parties, and compensate the public in a timely manner. We understand the current tensions between responsible parties and regulators and the need to balance the interests of both. Responsible parties want assurances that the NRD assessment process will have an end point. However, the trustees need sufficient time to be able to perform thorough assessments in order to accumulate as much pertinent information as possible before filing a claim. One possible solution which could meet the goals of both interests is the following: upon the signing of a ROD, a trustee will have 3 years to begin a natural resource damage assessment and upon completion of the assessment, the trustee will have 3 years to file a claim. We believe this may serve to meet the needs of both parties as well as the public, and to streamline a highly ambiguous area of the law.

Third, in order for trustees to meet the goals of achieving cost-effective restoration methods, it becomes even more crucial for trustees to have access to the fund for assessing these sites. If the prohibition of using the fund for assessments is lifted, trustees will have the resources readily available to accomplish these assessments in a more timely manner, ultimately benefiting the responsible parties, the public and the environment.

MISCELLANEOUS

ASTSWMO supports the requirement to obtain Governor concurrence in order to list a site on the NPL. This ensures that the NPL is used as a strategic tool for cleaning up sites. We are concerned, however, with the Committee's desire to limit the listing of NPL sites to a specific number per year. We do not believe this provision is necessary as the Governor's concurrence requirement will limit the number of sites placed on the NPL to those meriting such treatment (note: in 1996, 50 percent of the sites EPA proposed for listing did not receive a Governors' concurrence). Also, EPA's internal listing process is very time-intensive. We believe with the Governor's concurrence provision and EPA's own listing backlog, a cap is not necessary and may serve to undermine State enforcement efforts.

CONCLUSION

Again, we commend the Senators on a bill which incorporates many of the State Waste Managers' recommendations and we look forward to working with you as the Superfund debate continues.

CHEMICAL
MANUFACTURERS
ASSOCIATION

WRITTEN STATEMENT

of the

CHEMICAL MANUFACTURERS ASSOCIATION

before the

SENATE SUBCOMMITTEE ON SUPERFUND,

WASTE CONTROL AND RISK ASSESSMENT

on

SUPERFUND REAUTHORIZATION

March 4-5, 1997

1300 WILSON BOULEVARD
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Introduction

The Chemical Manufacturers Association (CMA) commends Chairman Smith and Members of the Subcommittee for holding these hearings on the important issue of reauthorizing and reforming the Superfund law. We are submitting this written statement for the record of the March 4-5 hearings.

CMA is a nonprofit trade association whose member companies account for more than 90 percent of the productive capacity for basic industrial chemicals in the United States. Today, the manufacturers of chemicals and allied products provide more than one million good-paying jobs for American workers; are members of the number one R&D industry in the United States (investing nearly $18 billion per year); and are the nation's leading exporters with total exports in 1995 of $62 billion and a net surplus of almost $17 billion.

As a matter of policy, ***CMA is committed to the success of the Superfund program.*** The goals of the law are sound, but the law itself is deeply flawed. CMA supports making constructive changes to the law to make it fairer, faster, and more cost-effective.

CMA believes that Congress can reform and revitalize the Superfund program by instituting a number of thoughtful changes to existing law. We believe, for example, that Congress should encourage faster, more cost-effective cleanups by removing the law's existing impediments to site-specific, risk-based remedial decisions.

CMA also believes that Congress can eliminate most of the litigation that has plagued Superfund from its start by replacing the law's current joint and several liability standard. Joint and several liability permits the government to hold one party legally responsible for the waste disposal actions of others. That standard is responsible for Superfund's well-deserved reputation as a breeding ground for litigation. It should be replaced with a system that allocates cleanup responsibility based on a party's actual contributions to contaminating a site.

Superfund should be changed in other ways as well. Communities should be given a meaningful role in the decision-making process. States should obtain more control of the cleanup program. Brownfield sites should be addressed as part of the legislative package. Payments for cleanup shares belonging to unknown, insolvent or recalcitrant parties, and for parties excused from the liability system, should come from the central fund -- not from other parties at a site. And finally, the now expired taxes used to fund the program should ***not*** be reinstated ***except*** as part of a complete package of legislative reforms.

With that in mind, CMA believes that ***S.8 is an excellent starting point from which to begin a bipartisan legislative dialogue.***

Background

Congress has analyzed and debated Superfund reform for more than ***four years*** -- many bills have been proposed and debated, but none enacted. CMA and its member companies have devoted a tremendous amount of time and effort to help make Superfund reform a reality. We have developed solutions to Superfund's problems based on our long experience with the program. CMA remains firmly committed to significant reform of the law ***this Congress.***

But time is growing short. Industry, small businesses, municipalities, states and environmentalists have delivered the message that Superfund is broken -- over and over again. EPA Administrator Carol Browner again reinforced this message a few short weeks ago by stating that legislative reform of Superfund is a necessary complement to the Agency's administrative reforms.

Such statements from the Administration are important; they can help to achieve consensus on a package of meaningful bipartisan Superfund reforms this Congress. We can all agree that fully restoring Superfund will require an act of Congress. We are all familiar with the many good and meaningful reform proposals that have been put forward over the last several years.

We believe the time for talk is past. ***It is now time for Congress and the Administration to make the difficult decisions needed to achieve a complete package of legislative reforms.*** By working together, we believe that Superfund reform can become a reality – ***this Congress.***

Administrative Reforms Are Welcome, But Not Enough

Before beginning our analysis of S.8, CMA would like to offer a comment on EPA's on-going administrative reforms to the program. The agency deserves real credit for its administrative reform efforts. These reforms have helped to make the program more effective. CMA is currently conducting a study on the administrative reforms and will be happy to share the findings with the Committee.

What is becoming clear to all stakeholders, though, is that ***the administrative reforms, in spite of the agency's efforts, cannot by themselves resolve the deep-rooted, systemic problems plaguing Superfund.***

The chief impediment to EPA's reforms, we are finding, is the law itself. In many cases, EPA cannot implement a reform because it does not have the legal authority to do so. Other factors also hamper the administrative reform process. In some cases, there may be inconsistent implementation of the reforms among EPA's regional offices or at the Department of Justice. In other cases, the administrative actions do not address some of the most persistent problem areas in the statute.

Based on our knowledge of the process, we believe the Agency must continue its oversight of the Regions to ensure that the administrative reforms are fully carried out. In the end, however, as Administrator Browner has acknowledged, ***permanent, enforceable and consistent change to the Superfund program can only be accomplished through an Act of Congress.***

S. 8 -- "An Excellent Starting Point"

CMA commends Senators Chafee, Lott and Smith for introducing S. 8, the Superfund Cleanup Acceleration Act of 1997. Making Superfund a top legislative priority for the 105th Congress is welcome proof of the Senate's commitment to restoring the cleanup program. CMA believes that S. 8 is an excellent starting point for the Superfund reauthorization deliberations this year. It incorporates elements that Members of Congress from both sides of the aisle have supported during the past four years of discussions. It is truly a middle-of-the-road-bill, one that deserves to be taken seriously by both sides of the aisle.

It is no secret that ***remedy selection reform is the key to controlling Superfund's runaway remediation costs***. In the past 10 years, the average cost of restoring a site has quadrupled to $30 million or more. An improved remedy selection process can result in remedies that protect human health and the environment far more cost-effectively than we do today. In a study CMA prepared last Congress, we determined that remedy selection reform could result in fully protective remedies—resulting in savings of some 35%, saving billions of dollars while still protecting human health and the environment.

S. 8 confronts many of the flaws in the current remedy selection framework. Most important, the bill would eliminate the statutory barriers to a rational remedy selection process, such as the current statutory preferences for permanent remedies and treatment. In their place, the bill directs that cleanup decisions should be based on realistic estimates of risk, taking into account current or likely future uses of land and water resources.

Turning to the liability title, it also has been well-documented over the last four years that ***the fundamental unfairness of Superfund's joint and several liability standard results in high transaction costs and seemingly endless negotiations and litigation to resolve liability at sites***. The liability standard has also contributed to

excessive remediation costs and government overhead, because the government has no incentive to rein in expenses.

S. 8 addresses these flaws by establishing an even-handed allocation process for post-enactment costs. Replacing joint and several liability with an allocation process will dramatically reduce the unfairness of the current liability system.

The bill also eliminates liability for a number of parties, such as small businesses and municipalities, without unfairly shifting their liability to other parties at the sites. Importantly, the bill makes Superfund monies available to fund the orphan share -- those liability shares attributable to defunct, insolvent and, to a limited extent, unidentifiable parties, as well as the liability shares of parties exempted from liability. Such orphan share funding is vital to reforming the liability system.

S.8 Benefits Brownfields, States, and Communities

S. 8's brownfield provisions will help bring many abandoned or underutilized parcels of land -- often located in urban areas -- back to economic life. CMA was pleased to hear Senator Lautenberg, who we commend for introducing his own brownfields bill, say that the differences between S. 8 and his bill can be resolved. ***We*** believe that ***brownfields must be addressed as part of comprehensive Superfund reform.***

The brownfields problem arises, in large part, from Superfund's liability and remedy selection schemes. To effectively bring brownfield properties back into productive use, any brownfields title must include relief for sellers of brownfield properties under appropriate circumstances.

S. 8 also recognizes that the ***States are often in the best position to manage Superfund sites*** because of their unique knowledge and access to the sites within their boundaries. Unfortunately, the states and federal government often find themselves in duplicative as well as conflicting roles under the current program. Disagreements

between States and EPA on appropriate remedial actions has helped to make the cleanup process slower and more expensive.

S. 8 provides EPA the authority to ***empower States to manage Superfund sites,*** thereby minimizing duplication and frustrating conflicts and making cleanups more efficient and effective.

Importantly, S. 8 also empowers communities to participate in the remedy development process. The bill recognizes that ***the communities around sites have a right to be involved in the selection of remedies in a meaningful, constructive fashion.*** S. 8 also increases the funding available to communities for Technical Assistance Grants.

NRD and Funding Issues

In the area of natural resource damages, ***S. 8 reforms the NRD program*** by assuring that monetary awards are based on the cost of either restoring, replacing, or acquiring equivalent services, not on the loss of so-called "non-use" values provided by natural resources. The bill also removes the troubling statutory rebuttable presumption that the trustee's natural resource damage assessment is correct. Under the bill, trustees now would be required to prove causation and damages, like any plaintiff in a civil suit, before they can receive monetary judgments.

CMA can not support reauthorization of the crude oil, chemical feedstocks and corporate environmental taxes that previously fed the Superfund program unless these taxes are part of comprehensive Superfund reform legislation. Importantly, S. 8 reinstates the crude oil, chemical feedstocks and corporate environmental taxes for five years at their previous rates as part of a complete and critically needed package of program reforms.

Any effort to reauthorize these taxes in a stand-alone bill, a brownfields bill, or any legislative vehicle other than a comprehensive Superfund reform bill could eliminate any chances of meaningful Superfund reform this Congress.

Areas for Improvement, Clarification

S. 8 addresses many of the most serious problems with the current Superfund program in a thoughtful manner. That's why we believe it is an excellent starting point for reaching a bipartisan consensus.

Some provisions of the bill, we believe, would benefit from additional work or clarification. For example, it is important to ensure that the remedy selection process for groundwater remedies considers the same criteria as reflected in the other remedy selection provisions. Also, it is unclear if and how RCRA's minimum technology requirements and land disposal restrictions apply to remedial actions. Congress also may want to enact a technical impracticability waiver that does not require construction of the remedy for more than just groundwater remediation.

In the case of liability, the definition of "codisposal landfill" needs clarification, and adequate funding for the orphan share must be ensured. Congress should clarify that the existing cap on natural resource damage awards applies to each site, and not to each release. ***We recognize other changes will need to be made too as the bipartisan legislative process moves forward. But none of these or other clarifications or changes should present any stumbling blocks to reaching consensus on a Superfund bill this Congress.***

* * * * * * *

In closing, CMA again commends Chairman Smith and the entire Subcommittee for holding this important hearing to address the problems with the current Superfund program. We urge Congress and the Administration to view S. 8 as a viable starting point for comprehensive, meaningful reform. We offer any assistance we can provide to help reach consensus on bipartisan legislation. ***We believe this bill can serve as a catalyst to completing comprehensive Superfund reauthorization and reform during this session of Congress.***

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March 4, 1997

The Honorable Robert C. Smith
Chairman
Committee on Environment and Public Works
Subcommittee on Superfund, Waste Control, and
Risk Assessment
United States Senate
Washington, D.C. 20510-6175

Dear Mr. Chairman:

Attached are materials we would like to submit for the record for the March 5 hearing on Superfund Reauthorization before the Subcommittee on Superfund, Waste Control and Risk Assessment. The materials relate to Viacom, Inc., a multi-billion media and entertainment conglomerate with responsibility for hazardous waste cleanup at at least 30 federal and state Superfund sites.

Friends of the Earth, Citizen Action and the Sierra Club believe that publicly-held corporations which are required to report their potential liabilities to the Securities and Exchange Commission in connection with Superfund sites must provide accurate information to their shareholders and the public. We are concerned that Viacom may have failed to fully disclose the extent of its potential liability for the environmental cleanup costs associated with the 30 Superfund sites for which it is a potentially responsible party.

The company's 1995 10-K annual report filed with the Securities and Exchange Commission doesn't mention the magnitude of its potential liability, leaving shareholders in the dark. Last week, we wrote Nancy Smith, Director of the Office of Investor Relations at the SEC, and asked her to look into whether Viacom's annual report misled its shareholders about its environmental responsibilities. A copy of that letter is attached.

If you or your staff have any questions, please do not hesitate to contact us.

Sincerely,

Brent Blackwelder
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Friends of the Earth

Ed Rothschild
Director, Public Affairs
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February 26, 1997

Nancy M. Smith
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Securities and Exchange Commission
450 Fifth Street, NW
Washington, DC 20549

Re: Viacom, Inc.

Dear Ms. Smith:

For several years, Friends of the Earth (FoE) has been actively encouraging U.S. corporations such as DuPont and Eastman Kodak to fully disclose their environmental liabilities through shareholder activism. Similarly, Citizen Action and its 29 member state organizations have engaged in a decade-long battle for state and federal laws requiring owners and operators of toxic waste sites not only to disclose the health hazards such sites pose to neighboring homes and communities, but also to be held legally and financially responsible for cleaning up those sites. Sierra Club, a national conservation organization with over 600,000 members, likewise has long fought to protect Americans from hazardous waste by pressuring Congress, working with affected communities and citizen groups to make polluters clean up their toxic mess.

Friends of the Earth, Citizen Action and Sierra Club believe that publicly-held corporations which are required to report their potential liabilities to the SEC in connection with toxic waste clean-up must provide accurate and timely information to their shareholders and the public with regard to those liabilities. Today we are writing with regard to Viacom, Inc., which we believe has failed to adequately disclose significant environmental liability in its 1995 10-K report.

In 1994 Viacom merged with Paramount Communications and assumed financial responsibility for dozens of hazardous waste sites which Paramount and its predecessor Gulf + Western created or helped to create. According to EPA, Viacom and its subsidiaries now are potential parties with financial responsibility for the environmental clean-up costs at more than 30 state or federal Superfund sites. According to the Congressional Research Service, the average clean-up cost for a single Superfund site is $30 million. We have enclosed information on six Superfund sites where Viacom is the sole or major party responsible for clean-up. At these six sites alone, Viacom's clean-up and remediation costs are estimated to exceed $270 million.

However, Viacom's 1995 10-K report fails to state the magnitude of its potential liability for those sites. The company believes that "the claims it has received will not have a material adverse effect on its results of operations, financial position or cash flows." Friends of the Earth, Citizen Action and Sierra Club believe that Viacom's potential Superfund liabilities indeed constitute a material liability, as deemed by the Generally Accepted Accounting Standards (GAAS). GAAS define material liability as costs exceeding 0.5 to 1 percent of revenues and/or 5 to 10 percent of net income. In the case of Viacom (according to its 1995 financial statements), material liability would translate into costs exceeding $60 - $120 million and/or $1- $20 million, respectively.

Clearly a potential Superfund liability of at least $300 million meets both thresholds for materiality. However, Viacom's 10-K filing does not report such material liability, and thus misleads investors and appears to misrepresent the company's financial position.

Friends of the Earth, Citizen Action, and Sierra Club are actively following the Viacom case and believe that it merits investigation by the Securities and Exchange Commission. Viacom's shareholders and the public at large are entitled to know about the company's potential environmental liability so that they can make informed decisions about the company's financial health. We urge you to pursue this matter.

If you have any questions, please do not hesitate to contact us.

Sincerely,

Brent Blackwelder
President
Friends of the Earth

Ed Rothschild
Director, Public Affairs
Citizen Action

Debbie Sease
Legislative Director
Sierra Club

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

FORM 10-K

ANNUAL REPORT
PURSUANT TO SECTION 13 OR 15(D) OF THE
SECURITIES EXCHANGE ACT OF 1934

FOR THE FISCAL YEAR ENDED DECEMBER 31, 1995 COMMISSION FILE NUMBER 1-9553

VIACOM INC.
(Exact Name Of Registrant As Specified In Its Charter)

Delaware	04-2949533
(State or Other Jurisdiction of Incorporation Or Organization)	(I.R.S. Employer Identification No.)
1515 Broadway, New York, NY	10036
(Address of Principal Executive Offices)	(Zip Code)

Registrant's telephone number, including area code (212) 258-6000

Securities Registered Pursuant to Section 12(B) of the Act:

Title of Each Class	Name of Each Exchange on Which Registered
Class A Common Stock, $0.01 par value	American Stock Exchange
Class B Common Stock, $0.01 par value	American Stock Exchange
Warrants Expiring on July 7, 1997	American Stock Exchange
Warrants Expiring on July 7, 1999	American Stock Exchange
6.625% Senior Notes due 1998	New York Stock Exchange
6.75% Senior Notes due 2003	American Stock Exchange
7.75% Senior Notes due 2005	American Stock Exchange
8% Exchangeable Subordinated Debentures due 2006	American Stock Exchange
7.625% Senior Debentures due 2016	American Stock Exchange

Securities Registered Pursuant To Section 12(G) of the Act:
None
(Title Of Class)

Indicate by check mark whether registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the registrant was required to file such reports) and (2) has been subject to such filing requirements for the past 90 days. Yes X No

Indicate by check mark if disclosure of delinquent filers pursuant to Item 405 of Regulation S-K is not contained herein, and will not be contained, to the best of registrant's knowledge, in definitive proxy or information statements incorporated by reference in Part III of this Form 10-K or any amendment to this Form 10-K. ☒

As of March 22, 1996, 75,099,274 shares of Viacom Inc. Class A Common Stock, $0.01 par value ("Class A Common Stock"), and 294,853,114 shares of Viacom Inc. Class B Common Stock, $0.01 par value ("Class B Common Stock"), were outstanding. The aggregate market value of the shares of Class A Common Stock (based upon the closing price of $40.875 per share as reported by the American Stock Exchange on that date) held by non-affiliates was approximately $1,207,943,150 and the aggregate market value of the shares of the Class B Common Stock (based upon the closing price of $41.75 per share as reported by the American Stock Exchange on that date) held by non-affiliates was approximately $10,366,032,214.

DOCUMENTS INCORPORATED BY REFERENCE

The Definitive Proxy of the Registrant for the 1996 Annual Meeting of Shareholders (Part III to the extent described herein).

above) include approximately 7,653,000 square feet of space, of which approximately 5,070,000 square feet are leased. The facilities are used for warehouse, distribution and administrative functions. The Company's cable television systems include a combination of owned and leased premises in California, Ohio, Oregon, Tennessee and Washington (the location of Viacom Cable's franchises) and each system's electronic distribution equipment.

The Company also owns and leases office, studio, retail and warehouse space in various cities in the U.S., Canada and several countries around the world for its businesses. The Company considers its properties adequate for its present needs.

Item 3. ***Legal Proceedings.***

On August 18, 1994, the District Court in and for Dallas County, Texas entered a judgment in favor of the plaintiffs in the action *Howell v. Blockbuster Entertainment Corporation, et al.* (Cause No. 91-10193-M). The defendants included Blockbuster Entertainment Corporation ("BEC"), which has been merged into the Company, and Video Superstores Master Limited Partnership, a dissolved limited partnership that was indirectly controlled by BEC at the time of its dissolution. The judgment was based upon plaintiffs' claims of breach of fiduciary duty, fraud, conspiracy, breach of contract and tortious interference with contract and claims under Texas partnership law in connection with the defendants' treatment, and ultimate acquisition, of plaintiffs' interest in a limited partnership which owned three Blockbuster stores. The court entered judgment against all defendants, jointly and severally, in the amount of $14,850,175, including compensatory damages, attorneys fees and prejudgment interest. In addition, the Court entered judgment totaling $108,840,030 for exemplary damages. The *Howell* action was settled in December 1995 with the payment by the Company of an amount without material adverse effect on its financial condition or result of operations. The settlement involved the vacation of the judgment and withdrawal of all the Court's findings of fact and conclusions of law.

On September 27, 1994, an action captioned *Murphy, et al. v. Blockbuster Entertainment Corporation, et al.* (Cause No. 94-10051-M) was filed in the District Court in and for Dallas County, Texas by plaintiffs representing the two other limited partners of plaintiff Howell in the litigation described above. Plaintiffs assert the same basic causes of action as in *Howell* and have claimed they are entitled to actual damages in excess of $240 million and punitive damages in excess of $1 billion. The Company believes that it has substantial defenses to these claims, including, among others, that the claims are barred by the statute of limitations and by releases entered into by the plaintiffs or their predecessors, and intends to vigorously defend the claims. (While the Company maintained that certain of these defenses were also available in the *Howell* litigation, significantly stronger facts support their application in this litigation.) In addition, the *Murphy* plaintiffs have stipulated that they will make no use of the *Howell* judgment or findings of fact or conclusions of law in their action.

Antitrust Matters. On September 23, 1993, the Company filed an action in the United States District Court for the Southern District of New York styled *Viacom International Inc. v. Tele-Communications, Inc., et al.*, Case No. 93 Civ 6658. The complaint (as amended on November 9, 1993) alleged violations of Sections 1 and 2 of the Sherman Act, Section 7 of the Clayton Act, Section 12 of the Cable Act, and New York's Donnelly Act, and tortious interference, against all defendants, and a breach of contract claim against certain defendants, including Tele-Communications, Inc. ("TCI"). The claims for relief in the complaint are based in significant part on allegations that defendants exert monopoly power in the U.S. cable industry through their control over approximately one in four of all cable households in the U.S. In addition to other relief, the Company seeks injunctive relief against defendants' anticompetitive conduct and damages in an amount to be determined at trial, including trebled damages and attorneys' fees.

The Company has announced that it has provisionally agreed to settle this action, subject to certain conditions, including, among other things, the effectiveness of a new affiliation agreement covering TCI's long-term carriage of SHOWTIME and THE MOVIE CHANNEL and the consummation of the split-off of the Company's cable television systems (see "Business—Cable Television"). The action is currently suspended pending satisfaction of certain conditions which, if satisfied, would lead to settlement of the action.

Certain subsidiaries of the Company from time to time receive claims from federal and state environmental regulatory agencies and other entities asserting that they are or may be liable for environmental cleanup costs and related damages arising out of former operations. While the outcome of these claims cannot be predicted with certainty, on the basis of its experience and the information currently available to it, the Company does not believe that the claims it has received will have a material adverse effect on its results of operations financial position or cash flows (see "Item 6. *Selected Financial Data*" and "Item 7. *Management's Discussion and Analysis of Results of Operations and Financial Condition*").

The Company and various of its subsidiaries are parties to certain other legal proceedings. However, these proceedings are not likely to result in judgments that will have a material adverse effect on its results of operations, financial position or cash flows.

Financial Information About Foreign and Domestic Operations

Financial information relating to foreign and domestic operations for each of the last three years ending December 31, is set forth in Notes 13 and 14 to the Consolidated Financial Statements of the Company included elsewhere herein.

Item 4. ***Submission of Matters to a Vote of Security Holders.***

Not Applicable

Executive Officers of the Company

Set forth below is certain information concerning the current executive officers of the Company, which information is hereby included in Part I of this report.

Name	Age	Title
Sumner M. Redstone	72	Chairman of the Board of Directors and Chief Executive Officer
Philippe P. Dauman	42	Deputy Chairman, Executive Vice President, General Counsel, Chief Administrative Officer and Secretary and Director
Thomas E. Dooley	39	Deputy Chairman, Executive Vice President—Finance, Corporate Development and Communications and Director
Vaughn A. Clarke	42	Senior Vice President, Treasurer
Carl D. Folta	38	Senior Vice President, Corporate Relations
Michael D. Fricklas	36	Senior Vice President, Deputy General Counsel
Susan C. Gordon	42	Vice President, Controller and Chief Accounting Officer
Rudolph L. Hertlein	55	Senior Vice President, Corporate Development
Edward D. Horowitz	48	Senior Vice President, Technology of the Company; Chairman, Chief Executive Officer of Viacom Interactive Media
William A. Roskin	53	Senior Vice President, Human Resources and Administration
George S. Smith, Jr	47	Senior Vice President, Chief Financial Officer
Mark M. Weinstein	53	Senior Vice President, Government Affairs

None of the executive officers of the Company is related to any other executive officer or director by blood, marriage or adoption except that Brent D. Redstone and Shari Redstone, Directors of the Company, are the son and daughter, respectively, of Sumner M. Redstone.

Statements). Such cash was obtained through the issuance of $1.8 billion of Preferred Stock (of which $600 million and $1.2 billion were issued to Blockbuster and NYNEX Corporation, respectively) and $1.25 billion of Viacom Class B Common Stock was issued to Blockbuster. The securities issued to Blockbuster were canceled upon consummation of the Blockbuster Merger.

On September 29, 1994, Blockbuster was merged with and into the Company. The total cost to acquire Blockbuster of $7.6 billion was financed through the issuance of equity securities to Blockbuster shareholders. (See Note 2 of Notes to Consolidated Financial Statements).

LIQUIDITY AND CAPITAL RESOURCES

The Company expects to fund its anticipated cash requirements (including the anticipated cash requirements of its capital expenditures, joint ventures, commitments and payments of principal, interest and dividends on its outstanding indebtedness and preferred stock) with internally generated funds and from various external sources, which may include the Company's existing Credit Agreements and amendments thereto, co-financing arrangements by the Company's various divisions, additional financings and the sale of non-strategic assets as opportunities may arise.

The Company's scheduled maturities of long-term debt, through December 31, 2000 assuming full utilization of the credit agreements are $1.6 billion (1996), $248.9 million (1997), $1.0 billion (1998), $1.5 billion (1999) and $1.3 billion (2000). The Company has classified certain short-term indebtedness as long-term debt based upon its intent and ability to refinance such indebtedness on a long-term basis. (See Note 7 of Notes to Consolidated Financial Statements). The Company's Preferred Stock dividend requirement is $60 million per year.

The Company's joint ventures are expected to require estimated net cash contributions of approximately $100 million to $150 million in 1996. Planned capital expenditures, including information systems costs, are approximately $800 million to $900 million in 1996. Capital expenditures are primarily related to capital additions for new and existing video stores and theme park attractions, and approximately $150 million for additional construction and equipment upgrades for the Company's existing cable franchises.

The Company was in compliance with all debt covenants and had satisfied all financial ratios and tests as of December 31, 1995 under its Credit Agreement and the Company expects to be in compliance and satisfy all such covenant ratios as may be applicable from time to time during 1996.

Debt as a percentage of total capitalization of the Company was 47% at December 31, 1995 and December 31, 1994.

The Company filed a shelf registration statement with the Securities and Exchange Commission registering debt securities, preferred stock and contingent value rights of Viacom and guarantees of such debt securities by Viacom International which may be issued for aggregate gross proceeds of $3.0 billion. The registration statement was declared effective on May 10, 1995. The net proceeds from the sale of the offered securities may be used by Viacom to repay, redeem, repurchase or satisfy its obligations in respect of its outstanding indebtedness or other securities; to make loans to its subsidiaries; for general corporate purposes; or for such other purposes as may be specified in the applicable Prospectus Supplement. During 1995, the Company issued $1.6 billion of notes and debentures under this shelf registration statement.

See Note 12 of Notes to Consolidated Financial Statements for a description of the Company's future minimum lease commitments.

The commitments of the Company for program license fees, which are not reflected in the balance sheet as of December 31, 1995 and are estimated to aggregate approximately $2.2 billion, principally reflect commitments under SNI's exclusive arrangements with several motion picture companies. This estimate is based upon a number of factors. A majority of such fees are payable over several years, as

part of normal programming expenditures of SNI. These commitments are contingent upon delivery of motion pictures which are not yet available for premium television exhibition and, in many cases, have not yet been produced.

There are various lawsuits and claims pending against the Company. Management believes that any ultimate liability resulting from those actions or claims will not have a material adverse effect on the Company's results of operations, financial position or cash flows.

Certain subsidiaries and affiliates of the Company from time to time receive claims from Federal and state environmental regulatory agencies and other entities asserting that they are or may be liable for environmental cleanup costs and related damages, principally relating to discontinued operations conducted by its former mining and manufacturing businesses (acquired as part of the Mergers). The Company has recorded a liability at approximately the mid-point of its estimated range of environmental exposure. Such liability was not reduced by potential insurance recoveries and reflects management's estimate of cost sharing at multiparty sites. The estimated range of the potential liability was calculated based upon currently available facts, existing technology and presently enacted laws and regulations. On the basis of its experience and the information currently available to it, the Company believes that the claims it has received will not have a material adverse effect on its results of operations, financial position or cash flows.

Current assets decreased to $5.2 billion for 1995 from $5.3 billion for 1994 reflecting the disposition of the net assets of MSG offset by increased receivables and inventory. The increased receivables principally reflect the conforming of accounting policies pertaining to the television programming libraries of Viacom Entertainment, Spelling and Paramount Communications and the effects of increased revenues. The allowance for doubtful accounts as a percentage of receivables increased to 6% for 1995 from 4% for 1994 reflecting increased reserves on Blockbuster receivables and the potential effects of the changes in the retail bookstore environment. Both current and non-current inventory increased principally reflecting the timing of the release of motion pictures at Paramount Pictures, increased production activity at Spelling and increased video and game product purchases at Blockbuster for new and existing video stores. Property and equipment increased reflecting the capital expenditures of $730.6 million and equipment acquired under capital leases of $314.5 million primarily related to capital additions for new and existing video and music stores and additional construction and equipment upgrades for the Company's existing cable franchises. Current liabilities remained constant at $4.1 billion for 1995 and 1994 primarily reflecting normal operating activity. The increase in total debt is described in Note 7 of Notes to Consolidated Financial Statements.

Net cash flow from operating activities decreased 85% to $55.6 million in 1995 from $376.9 million for 1994. Such amounts are not comparable due to the Mergers. The decreased operating cash flow primarily reflects payments of $1.4 billion for 1995 versus $429 million for 1994 for interest and taxes, as well as payments for significant levels of Blockbuster video product purchases made, as is typical, in the first quarter of 1995 partially offset by increased operating income. Net cash flow from operating activities increased 134% to $376.9 million in 1994 from $161.0 million for 1993 principally due to the inclusion of Paramount Communications' and Blockbuster's results of operations since the effective time of the respective mergers and increased operating earnings of Viacom's pre-merger businesses, prior to merger-related charges. Net cash expenditures from investing activities of $79.6 million for 1995, principally reflects capital expenditures and other acquisitions partially offset by proceeds from the sale of MSG and other dispositions. Net cash expenditures from investing activities of $6.3 billion for 1994 principally reflect the acquisition of the majority of the shares of Paramount Communications and capital expenditures, partially offset by proceeds from the sale of the Company's one-third partnership interest in Lifetime. Financing activities reflect borrowings and repayment of debt under the credit agreements during each period presented; proceeds from the issuance of senior notes during 1995; the issuance of Viacom Class B Common Stock to Blockbuster during 1994; and the redemption of the 11.80% senior notes and the issuance of the Preferred Stock during 1993.

VIACOM, INC.

A HIDDEN LEGACY OF HAZARDOUS WASTE

OVERVIEW

Viacom, Inc., headquartered in New York City, is one of the world's largest entertainment and publishing companies. In 1995, Viacom had sales of over $11 billion and profits of over $162 million.[1] Viacom owns Paramount Pictures, MTV, Nickelodeon, Simon and Schuster Publishing, Blockbuster Video and many other internationally known entertainment assets.

Viacom became the multibillion dollar company that it is today through an aggressive merger and acquisition strategy. Because of those mergers and acquisitions, particularly its 1995 merger with Paramount, Viacom now is financially and legally responsible for the cleanup of dozens of toxic waste ("Superfund") sites around the United States.

In its 1995 annual report to the Securities and Exchange Commission, Viacom stated that it does not believe that its environmental claims "will have a material adverse effect on its results of operations, financial positions or cash flows."[2] However, the cost to clean up the average Superfund site is $30 million. Viacom's liability at these sites could total ***hundreds of millions of dollars***. The following outlines Viacom's poor record of environmental responsibility at just six of these toxic waste sites.

[1] Viacom, Inc. 10-K Report for fiscal year ending December 31, 1995.
[2] Viacom, Inc. Securities and Exchange Commission Form 10-Q for the quarterly period ending September 30, 1996.

TRI-STATE MINING AREA
CHEROKEE COUNTY, KANSAS

Superfund Listing: September 8, 1983

Environmental damage: High heavy metal (lead, arsenic, zinc) pollution of air, soil, and groundwater.

The Tri-State Mining area straddles the Kansas-Missouri-Oklahoma border. Before the turn of the century, many zinc and lead mines were developed in this region. Once mine production was sufficiently high, several companies also built smelters in the area where their ore was refined. One of the larger mine and smelter operators in the area was the New Jersey Zinc Company and its subsidiary, Empire Zinc Company of Missouri. The O'Neill and Preston Mines in Cherokee County were owned and operated by New Jersey Zinc and its subsidiaries. New Jersey Zinc also operated a zinc smelting plant in Iola, Kansas (about 40 miles north, in Allen County). Most of these facilities were closed after World War II when the price of commodities such as zinc and lead fell.[3]

The environmental damage left by New Jersey Zinc and other companies which operated in Cherokee County, Kansas is huge. Over $25 million has already been spent to clean up one small town, Galena. Other towns like Baxter Springs and Treece are still awaiting EPA cleanup operations. Total costs to clean up the County could run as high as ***$100 million***.[4] Health costs are also high. Exposure studies have shown that Galena's children have blood lead contaminant levels that are much higher than levels found in noncontaminated areas.[5]

Viacom, despite being identified by the EPA as a "potentially responsible party" (PRP) for cleanup costs, has done virtually nothing. To date, Viacom has refused to participate in community meetings or help fund the cleanup operations which other PRPs including Brown and Root, Asarco Mining, and others are now paying for. Viacom has apparently made the decision that it will be to their financial advantage to wait until they are sued by EPA so that Viacom's lawyers can drag the lawsuit out in court during years of litigation.[6]

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[3]The New Jersey Zinc Company. "The First Hundred Years of The New Jersey Zinc Company."
[4]Federal and State Environmental Protection Agency officials.
[5] "Final Report: Lead and Cadmium Exposure Study." Galena, Kansas. January, 1996.
[6]Counsel for participating PRPs.

TRI-STATE MINING AREA
JASPER COUNTY, MISSOURI

Superfund Listing: August 30, 1990

Environmental damage: High heavy metal (lead, arsenic, zinc) pollution of air, soil, and groundwater.

Like the Cherokee County, Kansas Superfund sites, the Jasper County, Missouri sites lie within the Tri-State Mining Area. There were a number of zinc and lead mines operated in Jasper County from the mid-1800s through World War II. Among New Jersey Zinc's mines in Jasper County was the Eagle Mine, which produced tons of ore over many years. New Jersey Zinc also operated a zinc smelter in the city of Joplin in Jasper County. Just across the Jasper County line in Newton and Lawrence Counties, New Jersey Zinc operated the Wentworth and Miles Mines.[7]

Here again, when the profits ran out and the mines and smelters closed, New Jersey Zinc left an enormous environmental mess. In some places, so much zinc waste was left in the soil that plants are unable to grow. The lack of plant roots to fasten down the soil allows the wind to lift large amounts of zinc and lead into the air, which the citizens in and around Joplin then breathe. One recent study showed that blood lead levels in Jasper County children are significantly higher than the national average.[8] Contamination of this kind has been shown to have statistically significant associations with increased levels of stroke, kidney disease, heart disease, skin cancer, and lung cancer.[9]

Jasper County cleanup costs will be staggering. Estimates for cleaning up the city of Joplin alone approach ***$50 million***. The additional costs of cleaning other sites within Jasper County could double that amount. The EPA is just beginning to investigate the environmental damage in the neighboring counties of Newton and Lawrence.[10] Again, Viacom has been identified as a PRP but has done nothing.

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[7] The New Jersey Zinc Company. "The First Hundred Years of The New Jersey Zinc Company."
[8] Uhlenbrock, Tom. "Joplin -Area Youths Show Lead in Blood." *St. Louis Post-Dispatch*, November 21, 1991.
[9] Neuberger, John. "Health Problems in Galena, Kansas: A Heavy Metal Mining Superfund Site," and "Lung Cancer in an Abandoned Lead-Zinc Mining and Smelting Area."
[10] Counsel for participating PRPs.

CLEVELAND MILL
SILVER CITY, NEW MEXICO

Superfund Listing: March 31, 1989

Environmental damage: High heavy metal (lead, arsenic, zinc) pollution of air, soil, and groundwater. Heavy metals have contaminated Little Walnut Creek.

New Jersey Zinc built the Cleveland Mill high in the mountains of Southwestern New Mexico to process the ore mined at its Hanover mine. The mine and mill operated for decades and churned out huge amounts of heavy-metal laced wastes which were deposited in Little Walnut Creek.[11] Today those wastes have polluted Little Walnut Creek with arsenic, beryllium, cadmium, lead and zinc. Downstream aquifers used for drinking are in danger of contamination.[12]

The EPA has determined that contamination levels at the site preclude the possibility of any potential future residential use. The mine area poses such a health risk that local residents are prevented from accessing the area by fenced off entrances. Unfortunately, some residents, unaware of the danger to their health, reportedly use the area for biking, hiking, and swimming in the reservoir.[13]

In 1994, EPA and the State of New Mexico ordered Viacom to remove from the streambed and reprocess over 70,000 cubic yards of the mill and mine waste.[14] Since then, though, not one truck-full of pollution has been removed as Viacom's lawyers are arguing with EPA and the State over the cleanup plan and its estimated price tag of over ***$10 million.***[15]

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[11]The New Jersey Zinc Company. "The First Hundred Years of The New Jersey Zinc Company."
[12]*Superfund Week*, "PRPs agree to clean Cleveland Mill site." April 15, 1994.
[13] U.S. Environmental Protection Agency. "Remedial Investigation of Cleveland Mill."
[14]*Superfund Week*, "PRPs agree to clean Cleveland Mill site." April 15, 1994.
[15]Environmental Protection Agency Officials.

TAR LAKE
MANCELONA TOWNSHIP, MICHIGAN

Superfund Listing: September 8, 1983

Environmental damage: Lead, phenol, and other known cancer-causing poisons have seeped out of the Tar Lake waste pit and contaminated groundwater and wells used for drinking water.

The Tar Lake Superfund site near Mancelona Township, Michigan, is appropriately named. Industrial wastes were dumped at the site by a subsidiary of New Jersey Zinc, which operated a foundry there from 1882 to 1945. Today, the tar-like chemical wastes cover four acres of land at depths of up to 27 feet.[16]

Over the years, the pollution has seeped through the lakebed and into groundwater that supplies local well water used for drinking. According to the EPA, phenols and lead have been detected in the groundwater. Phenols and heavy metals including iron, lead, nickel, chromium, and copper have been detected in the sludge.[17] Touching sludge poses an acute health hazard. Coming into direct contact with or ingesting contaminated groundwater also poses a serious health hazard. Tests of the groundwater show lead concentrations 70 percent higher than allowable levels. Levels of phenol, a cancer-causing poison, are over 500 times the allowable levels.[18]

EPA has ordered Viacom to pay for removing the waste from Tar Lake. The estimated price tag for cleanup is $10-20 million. Since Tar Lake was placed on the Superfund list in 1983, its four acres have remained untouched by cleanup crews.[19]

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[16] United Press International, "Waste sites need more study." March 8, 1994.
[17] Environmental Protection Agency Web Page
[18] United Press International, "Northern Michigan News Briefs." March 13, 1986.
[19] Environmental Protection Agency Project Manager.

PALMERTON ZINC PILE
PALMERTON, PENNSYLVANIA

Superfund Listing: September 8, 1983

Environmental damage: Heavy metal (lead, arsenic, zinc) pollution of air, soil, and groundwater and the Aquashicola River.

In 1898, New Jersey Zinc opened what was to become its largest plant. Its first smelter at Palmerton was small. However, by 1906, two blast furnaces were operating at the site. By the 1920s, the Palmerton complex manufactured a multitude of zinc products, sulfuric acid, and iron alloys.[20]

In 1980, after over 80 years of operation and after the EPA filed documents listing the plant as a possible hazardous waste site, Gulf+Western shut down the plant, leaving behind an environmental disaster. Blue Mountain, whose peak rises immediately next to the plant, was completely devoid of plant life. Eighty years of zinc and lead residues that were belched out of the smelters' smoke stacks had contaminated the entire mountainside.[21]

Of even greater concern was zinc and lead contamination in the town of Palmerton itself. Since grass would not grow in the polluted soil, lead-laden dust swirled around the town. In addition, a mile-long pile of smoldering cinders (the waste products from the smelter furnaces) sat next to the Aquashicola River, leaching pollutants into the river with every rain storm and snow melt.

The EPA and the State of Pennsylvania have just begun cleaning up the devastation wrought by years of pollution from New Jersey Zinc. Estimates are that the cleanup may take ten years and cost as much as ***$100 million***. To date, Viacom has spent nothing to help clean up Palmerton.[22]

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[20] The New Jersey Zinc Company. "The First Hundred Years of The New Jersey Zinc Company."
[21] *The Morning Call*. Allentown, Pennsylvania.
[22] *The Morning Call*. Allentown , Pennsylvania.

EAGLE MINE
GILMAN, COLORADO

Superfund Listing: June 1986

Environmental damage: High heavy metal (lead, arsenic, zinc) pollution of air, soil, and groundwater. Heavy metals have contaminated the Eagle River.

The Eagle Mine Superfund site consists of the Eagle Mine and associated mining wastes between the towns of Gilman and Minturn in Eagle County, Colorado. This site is near the Vail ski area. New Jersey Zinc bought the Eagle Mine in 1915 and quickly developed it into one of the largest zinc mines in operation at the time. In 1919, New Jersey Zinc built an underground mill at Gilman to extract lead and zinc deposits from the ore. The mill operated until 1979 and the mine continued in production until 1984.[23]

In 1985, the State of Colorado filed notice and claim against New Jersey Zinc's successor, Gulf+Western Industries (now Viacom), for natural resource damages under Superfund because heavy metal contaminants had begun to leach out of the mine and mill into the Eagle River. Since the families in Gilman used the contaminated Eagle River water to cook, bathe and drink, the EPA was forced to move the families in 1985 and close the town.[24] Today the town where as many as 2,000 people once lived is now a ghost town.

Cleanup of the Eagle Mine and its environs began in 1988. Mountains of mine wastes were hauled away and a new water treatment plant was constructed. Today, the cleanup is nearly finished. Gulf+Western and its successor Viacom have spent over ***$80 million***. Viacom must continue to fund indefinitely the operations of the water treatment plant at an annual cost of about $1 million.[25]

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[23]The New Jersey Zinc Company. "The First Hundred Years of The New Jersey Zinc Company."
[24] Obmascik, Mark. "Mine cleanups start to pay off, but positive results have a price." *The Denver Post*. November 12, 1995.
[25] State Environmental Protection Agency Project Manager.

SELECTED ADDITIONAL SITES WHERE VIACOM AND ITS SUBSIDIARIES ARE LISTED BY THE U.S. ENVIRONMENTAL PROTECTION AGENCY OR BY STATE ENVIRONMENTAL REGULATORY AUTHORITIES AS A "POTENTIALLY RESPONSIBLE PARTY" FOR HAZARDOUS WASTE SITE CLEANUP COSTS

The following information was compiled from the United States Environmental Protection Agency's listings on the Federal National Priorities List, CERCLIS, and State Analogs.

GULF+WESTERN

LASKIN/POPLAR OIL CO.
JEFFERSON TOWNSHIP, OHIO

SULLIVAN'S LEDGE
NEW BEDFORD, MASSACHUSETTS

WESTERN SAND & GRAVEL
BURRILLVILLE, RHODE ISLAND

BUTTERWORTH #2 LANDFILL
GRAND RAPIDS, MICHIGAN

LIQUID DISPOSAL, INC.
UTICA, MICHIGAN

YELLOW WATER ROAD DUMP
BALDWIN, FLORIDA

KLOCK MACH/GULF+WESTERN
MANCHESTER, CONNECTICUT

GULF+WESTERN TAYLOR FORGE
MEMPHIS, TENNESSEE

GULF+WESTERN MANUFACTURING TAYLOR FORGE DIVISION
ACKERMAN, MISSISSIPPI

GULF+WESTERN MANUFACTURING COMPANY, BOHN ALUMINUM AND BRASS
GREENSBURG, INDIANA

FORMER GULF+WESTERN/ BUCKEYE FORGE
CLEVELAND, OHIO

HEATCRAFT REFRIGERATION
(AKA GULF+WESTERN MANUFACTURING CO./ BOHN HEAT TRANSFER)
DANVILLE, ILLINOIS

CONTAINER CARE, INC.
(AKA GULF+WESTERN MANUFACTURING CO. TAYLOR FORGE DIVISION; AKA PIER FOURTEEN)
CICERO, ILLINOIS

GULF+WESTERN NATURAL RESOURCES GROUP
GLOUCESTER CITY, NEW JERSEY

BROWN COMPANY

THERMO-CHEM, INC.
MUSKEGON, MICHIGAN

BROWN COMPANY
PORTLAND, MAINE

THE SCHRAFFT CANDY COMPANY

PLYMOUTH HARBOR/CANNON ENG. CORP.
PLYMOUTH, MASSACHUSETTS

CANNON ENGINEERING CORP.
BRIDGEWATER, MASSACHUSETTS

THE NEW JERSEY ZINC CO.

JACKS CREEK/SITKIN SMELTING & REFINERY
MAITLAND, PENNSYLVANIA

TONOLLI CORP.
NESQUEHONING, PENNSYLVANIA

NEW JERSEY ZINC
DEPUE, ILLINOIS

WICKES

STRINGFELLOW
GLEN AVON HEIGHTS, CALIFORNIA

LANDFILL & RESOURCE RECOVERY
NORTH SMITHFIELD, RHODE ISLAND

FOLKERTSMA REFUSE
GRAND RAPIDS, MICHIGAN

EASTERN DIVERSIFIED METALS
HOMETOWN, PENNSYLVANIA

KATZENBACH & WARREN

SOLVENTS RECOVERY SERVICE NEW ENGLAND
SOUTHINGTON, CONNECTICUT

KAYSER-ROTH CORP.

STAMINA MILLS, INC.
NORTH SMITHFIELD, RHODE ISLAND

BEAUNIT CORP. (CIRCULAR KNIT & DYE)
FOUNTAIN INN, SOUTH CAROLINA

OLD STONE MILL CORP.

SOLVENTS RECOVERY SERVICE NEW ENGLAND
SOUTHINGTON, CONNECTICUT

COMMERCIAL VINYLS CORP.

ENVIROCHEM CORP.
ZIONSVILLE, INDIANA

September 19, 1990, Wednesday, BC cycle

SECTION: Regional News

LENGTH: 364 words

HEADLINE: State to study possible effects of contaminated water, soil

DATELINE: JEFFERSON CITY, Mo.

BODY:
The Missouri Department of Health will start a federally funded study to determine whether some residents of Jasper County in southwestern Missouri may have health problems caused by exposure to water and soil contaminated by lead and cadmium, officials said Wednesday.

The study will focus on the areas of the county known as the Jasper County Superfund Site, which are eligible for federal cleanup assistance.

''Data from this study should help us determine what effect exposure to these metals may be having on the health and welfare of residents and whether further action is needed to ensure public health,'' said Dr. John Bagby, director of the Health Department.

Included in the study are parts of Webb City, Oronogo, Duenweg, Carterville and Joplin.

The Jasper County site is one of three areas in the Tri-State Mining District of Missouri, Kansas and Oklahoma that has been declared a Superfund site. The others were Cherokee County in Kansas and Tar Creek in Ottawa County, Okla.

The Tri-State Mining District was one of the largest lead-zinc mining areas in the world from 1850 to 1957.

Missouri produces the most lead in the nation with lead ore currently being mined in the southeastern part of the state.

Government studies have shown that mining wastes have leaked into the ground water and surface water at the Jasper County site, and about 1, 500 people get their drinking water from private wells within 3 miles of that area.

Excessive exposure to lead and cadmium is associated with cancer, damage to the kidneys and central nervous system, low birth weight, high blood pressure and developmental defects, Bagby said.

A census will be taken of residents in the area, the director said. A sample of 400 exposed and 400 people not exposed will be taken from the census.

The participants will be interviewed by health officials to determine lifestyle information, amount of exposure to the areas of contamination and possible health effects that could be linked with cadmium or lead exposure. Urine and blood samples also will be taken.

. United Press International September 19, 1990, Wednesday, BC cycle

Additional blood testing will be offered to people found to have high blood lead or cadmium levels.

STATEMENT

submitted on behalf of the

GOVERNMENT FINANCE OFFICERS ASSOCIATION

for the printed record of the

MARCH 18, 1997

SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS HEARING

on

STATE AND LOCAL CONTROL OF WASTE TRANSPORT

submitted by

Catherine L. Spain, Director, Federal Liaison Center
Government Finance Officers Association
1750 K Street, NW, Suite 650
Washington, DC 20006
(202) 429-2750

STATEMENT OF THE GOVERNMENT FINANCE OFFICERS ASSOCIATION

Introduction

This written statement is submitted on behalf of the Government Finance Officers Association (GFOA), a professional association of 13,500 state and local government officials who manage the financial resources of our nation's states, cities, counties, towns, districts, and authorities. GFOA strongly supports a grandfather provision that would, at a minimum, restore flow control for those jurisdictions that acted in good faith and relied on existing flow control statutes to finance solid waste facilities. GFOA urges Congress to pass a flow control bill this year and end the uncertainty surrounding this issue.

As a matter of policy, GFOA believes flow control is an important financing tool. Flow control has permitted governments to raise sufficient revenues to manage comprehensive waste management programs through charges on those who use a facility rather than the general taxpayers of a community. This method of financing permits revenues to be collected by beneficiaries of the system within the service area, which may encompass a county and several other separate taxing jurisdictions. Therefore, GFOA has supported federal legislation authorizing the use of flow control so that governmental entities could continue to carry out their responsibility to manage solid waste within their boundaries.

GFOA is deeply troubled that members of Congress are now questioning the need for flow control legislation that would grandfather certain existing facilities because of the lack of severe financial emergencies, such as defaults, during Congressional consideration of flow control legislation. GFOA assures members of Congress that the need for legislative action has not diminished. Communities, individual and business taxpayers, and bondholders are all affected by the lack of flow control.

In this statement, GFOA responds to several issues that have been raised by members of Congress and others concerning the need for flow control authority. These are:

- the reason for the lack of bond defaults and other severe financial emergencies,
- the meaning of issue-specific credit ratings,
- characteristics of projects secured by flow control, and
- disclosure to bondholders about flow control.

Finally, GFOA is joined in this statement by 32 finance officers from 23 states who represent jurisdictions that have experienced financial hardships as a result of the loss of flow control or who believe it is incumbent on Congress to restore flow control authority for those jurisdictions that made long-term financial commitments in reliance on flow control authority.

The Reason for the Lack of Bond Defaults and Other Severe Financial Emergencies

There is a mistaken impression that flow control legislation is not needed because governments are not failing to make debt service payments on their solid waste facility bonds or filing for bankruptcy. This does not mean, however, that jurisdictions are not experiencing severe financial hardships. Default and bankruptcy are options of last resort and are not actions entered into unless all other financial alternatives have been exhausted. Governments provide services that are essential to the general welfare of communities and they need continued access to the municipal bond market to perform their essential functions. If they default on their bonds or file for bankruptcy, they will be denied future access to the bond market.

In the lengthy history of state and local debt financing, defaults have occurred rarely. The confidence of the municipal bond market is essential and municipal issuers make every effort to honor their debt obligations. As a result, debt repudiation is very uncommon. Since 1839, there have been less than 10,000 defaults by state and local government issuers. Almost half of those defaults occurred during the Great Depression. In 1937, federal legislation was passed to permit governments to file for bankruptcy protection. Since then, only 437 units of government have sought such protection. Furthermore, for some governments, bankruptcy is not even an option because federal law now requires that state statutes specifically authorize a bankruptcy filing. At this time, governments in approximately 60 percent of the states are not even authorized to file for bankruptcy under Chapter 9 of the federal bankruptcy laws.

The stigma of a default or bankruptcy and the difficult question of access to the bond market thereafter place extreme pressure on issuers of municipal debt to do everything in their power to repay their debt. Therefore, governments that relied on flow control have taken various remedial actions to maintain their fiscal stability and prevent a financial emergency. Remedies necessarily cause financial hardships for affected jurisdictions because already-scarce resources must be diverted to the repayment of outstanding debt. The following is a list of actions that have been taken by governments to maintain their credit ratings, prevent further downgrades in their credit ratings and avoid default or bankruptcy:

- the restructuring of existing debt to reduce the amount of annual debt service payments that need to be paid to bondholders,
- reductions in other capital expenditures,
- modifications in the use of a facility to extend its expected life,
- the imposition of new fees on all real property owners,
- water and sewer bill surcharges,
- the imposition of surcharges on other services,
- staff reductions,
- reductions in other governmental services and programs,

- o drawdowns of unrestricted reserves,
- o loans from other governmental funds to offset revenue losses,
- o cancellation of future projects, and
- o delay of maintenance on existing facilities.

In addition to the financial hardship caused by these actions, affected governments have been adversely affected by

- o the threat of litigation and legal expenses for litigation,
- o the need to renegotiate contracts with municipalities and private haulers,
- o the payment of legal, underwriting and other expenses associated with restructuring troubled debt,
- o higher financing costs caused by downgrades,
- o taking over the debt of troubled issuers,
- o bumping up against tax and expenditure limitations, and
- o bumping up against debt limits.

The flow control problem has not gone away. Many governments still rely on flow control while litigation is pending to determine whether their particular state law or local ordinance is unconstitutional. Therefore, these jurisdictions have not yet had to deal with the full impact of the C & A Carbone, Inc., et al v. Town of Clarkstown, NY decision. For some governments that are already trying to adjust to reduced tipping fees and the diversion of waste to other facilities, the situation is becoming even more urgent as they are running out of stop-gap measures and the further delays or even abandonment by the Congress is an ever-increasing possibility.

The Meaning of Issue-Specific Credit Ratings

GFOA is concerned that there has been some confusion about the meaning of solid waste credit ratings. In its written statement to the Committee on Environment and Public Works, Standard and Poor's provides important information about solid waste credit ratings, explaining they are *issue-specific* as contrasted with *issuer* ratings. Issue-specific ratings provide a current opinion of creditworthiness with respect to a specific bond issue for a project and not a governmental entity. Such factors as the security provisions of the specific financing, the service area economy, system operations, and project finances and costs are the basis for assessing the credit of these bonds. An issue-specific credit rating does not reflect the creditworthiness of a government. To determine the credit-worthiness of a government, an analysis is performed that focuses on a review of the government's debt and financial performance, it's management, and the local economy.

Issue-specific ratings only evaluate a specific project, such as a solid waste facility, and include a review of that project's financial operations. The rating takes into account the

ability of the system to set and increase rates for the project, the flexibility it has to establish new fees and revenue sources, and the revenues that are pledged to the repayment of the bonds. While revenue increases and other financial adjustments necessitated by the lack of flow control are causing financial pain in affected governments, that would not necessarily mean that ratings for the project would be expected to change, because the ability to make these financial adjustments was factored into the ratings analysis.

Furthermore, governments that are not the issuers of bonds also have been affected by the loss of flow control because of the agreements they entered into with the issuers of solid waste bonds. Even though these participating governments are having to make higher payments to cover the debt service on bonds or are experiencing other financial hardships, these financial consequences do not affect the rating on the bonds issued to finance the facility. Bond ratings tell only part of the story. Even in the absence of ratings changes, there can be severe financial hardships.

Characteristics of Projects Secured by Flow Control

During the recent Senate hearing on flow control, several comments were made concerning the selection, financing and operation of projects. This statement provides additional information about these various topics.

It was suggested that flow control is not necessary because it permits underwriters to support facilities that are poor investments. Governments, not underwriters, issue bonds and assume the serious financial obligation to repay the debt over the life of the bonds. The preparation and approval of a bond issue is a complex process involving both appointed and elected public officials and many outside professionals, including financial advisors, bond lawyers and other counsel, engineers, trustees, rating analysts, bond guarantors and underwriters. The sale of debt requires the preparation of detailed disclosure documents, detailed feasibility studies, complex agreements between other jurisdictions and the private sector, various certifications, and governmental approvals. To suggest that underwriters ramrod inappropriate projects through this process oversimplifies the complexity and expense involved in bringing a bond issue to market.

Additionally, GFOA believes that it is important to provide some historical perspective about flow control. In the 1980s, there were shortfalls in disposal capacity and flow control was viewed as an innovative solution to a public-policy problem--the disposal of waste. The shortfalls caused fees at existing facilities to rise to the levels that were commonplace before the Carbone decision. The fees that were set to sustain new facilities were viewed as sound financial options, even though today they may seem unjustified. As the supply curve shifted and more options for waste disposal became

available, users of the facilities sought to employ the least cost option, thus providing the impetus for challenging flow control.

It has been suggested that the sale of solid waste bonds on a negotiated basis rather than a competitive basis was a questionable practice. As a matter of practice, a large number of bonds have been sold on a negotiated basis in recent years. While GFOA recommends the competitive method of sale rather than a negotiated sale in many instances, it recognizes that conditions may warrant a negotiated sale. Solid waste transactions, in fact, did exhibit some of these conditions as they were complex transactions and the debt was not backed by an issuer's full faith and credit or a strong, known or historically performing revenue stream. Moreover, the use of the negotiated sale process was expected to reduce borrowing costs because the underwriter would be familiar with the details of the transaction, having been an active participant in the planning process.

During the recent Senate hearing, the Committee was informed of an unidentified project for which bonds had been issued, but construction had not occurred. This development is a rather unusual occurrence in the municipal market, which could have serious financial repercussions for an issuer. Presumably, the issuer would "call" the bonds at the first opportunity and pay off the bondholders before the bonds matured, because of the borrowing costs that are being incurred. There are several federal tax and securities law provisions that need to be considered in this context. Current federal tax law provisions permit an issuer to invest bond proceeds that are not spent for construction purposes, but the law also requires the issuer to rebate to the federal government any investment earnings above the bond yield. (These earnings are called arbitrage earnings.) As a result, there is no financial incentive to issue bonds for a project that is not likely to go forward. Additionally, issuers incur significant borrowing costs that cannot be recovered by investment of the bond proceeds, so the issuer is actually "out of pocket" for the expenses.

Another consideration is the fact that federal securities laws provide that state and local governments have a duty to produce disclosure documents that do not contain misstatements or omissions of "material" facts. Failure to meet these requirements could result in a Securities and Exchange Commission enforcement action or private litigation. Proceeding with a project that is not viable and using bond proceeds in a manner inconsistent with the way in which the disclosure documents describe their use could invite an SEC investigation.

At the hearing, it was suggested that solid waste issuers are "awash with cash" because of the high fees that were charged. As we have explained above, the economics of the industry at the time many of these facilities were financed justified the rate levels that were established. Additionally, from a financing perspective, it is important to remember that some regional solid waste authorities that sold solid waste bonds were independent entities that did not have taxing authority, so they were completely

dependent on the revenues earned by the system. As a result, it is necessary for them to establish reserves for debt service coverage or replacement of property and to have resources on hand to respond to such contingencies as technology failures, economic downturns, business closures and other events affecting the operations of the facility.

Disclosure to Bondholders about Flow Control

Since the 1970s, the GFOA has prepared and updated disclosure guidelines for issuers of state and local government securities that set forth the items that should be included in the official statements of municipal bond issuers. Among the items that are highlighted for so-called enterprise facilities such as solid waste, are the sources of revenue to pay the debt service and any legal matters such as any pending judicial, administrative or regulatory proceedings that may significantly affect the enterprise's ability to perform its obligations to the holders of the securities being offered.

During the Senate's recent flow control hearing, the question of bondholder disclosure was raised. Attached to this statement are several examples of official statement disclosures concerning issuers' ability to control the flow of solid waste and state law enabling legislation. It will be noted that these documents are for transactions before 1988. After this time period, the pace of solid waste financings that relied on flow control declined dramatically because the supply of disposal options had increased and such projects were not financially feasible. There is no discussion of any legal challenges to flow control because during this time period there had been no attacks on the practice on Commerce Clause grounds. There is some discussion of whether flow control laws were anticompetitive and violated antitrust laws. However, by the mid-1980s, the courts had clarified that if there was state enabling legislation authorizing flow control, there would be no antitrust violation. Therefore, the bondholders who purchased flow control bonds did not receive any warning about the risk that their bonds might decline in value because of the possibility of the invalidation of flow control authority. This disclosure was not warranted at the time because flow control was a legally permitted financing tool of unquestioned status.

Concluding Comments

The U.S. Supreme Court's Carbone decision changed the rules in the middle of the game for many communities that relied on flow control. The relief that governments are now seeking to prevent greater financial instability is a reasonable request that will prevent the imposition of further burdens on governmental units whose financial condition has been imperiled; taxpayers who are paying higher taxes, fees, and surcharges; and bondholders who have seen a diminution in the value of their securities. It would be unfair to deny this request.

To suggest that a vote for a limited grandfather exception is a vote for a tax increase demonstrates a complete lack of understanding of our system of public finance. Without flow control, many governments are having to impose new taxes, fees or surcharges on general taxpayers to avoid the untenable--a default or bankruptcy. In effect, assets are being diverted to waste haulers from local taxpayers. Ironically, because of the small number of large firms that control landfills, transfer stations and other facilities in many areas, customers may not benefit from lower fees. The ability of firms to control market prices means the market is not purely competitive and the demise of flow control will not guarantee more price competition and greater consumer protection.

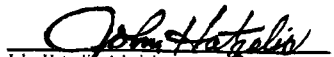
The federal government and state and local governments are partners in our federal system. The federal government should be helping local governments to live up to the financial commitments that were made when flow control was the law of the land. Unlike other federal actions that are needed to help governments, the passage of flow control legislation does not even cost a dime. Flow control does not affect every government, but that should not be the measure of its importance. Just because it is not front page news does not mean it is not of great significance.

Mr. Chairman and members of the Committee, GFOA reiterates its support for a grandfather provision and appreciates this opportunity to submit a written statement. The Association would be happy to provide additional information, as needed.

Additional Support for Flow Control Legislation

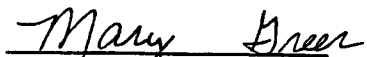
The Government Finance Officers Association is joined in its written statement by finance officers from throughout the United States. They represent jurisdictions that are experiencing financial hardships brought about by the lack of flow control authority or who believe it is incumbent upon the Congress of the United States to restore flow control for those governmental units that made long-term financial commitments based on that authority. They are:

Robert P. Schaeffler, Deputy Director
Onondaga County Resource Recovery Agency
Onondaga County, New York



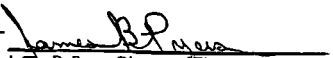
John Hatzelis, Administrator
Sussex County Municipal Utilities Authority
Sussex County, New Jersey

Richard L. Roe, Finance Director
Eau Claire County, Wisconsin



Mary Greer, Finance Director
City of Greer, South Carolina

M. Phillip Amodeo, Commissioner of Finance
Dutchess County, New York



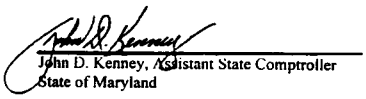
James B. Pyers, Director of Finance
City of Wooster, Ohio

Susan Bassi, Senior Controller
Olmsted County, Minnesota

Lou D. Hoffman, Treasurer
City of Albuquerque, New Mexico

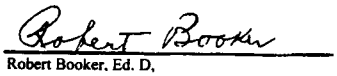
Donald L. Phillips, Chairman
Craven County Commissioners
Craven County, North Carolina

Erroll G. Williams, Assessor
Orleans Parish Board of Assessors
New Orleans, Louisiana

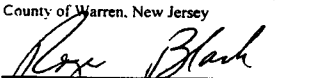


John D. Kenney, Assistant State Comptroller
State of Maryland

Charles L. Houck, Chief Financial Officer
County of Warren, New Jersey



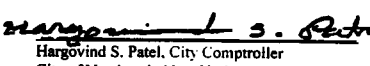
Robert Booker, Ed. D,
Chief Financial Officer/ Auditor and Controller
County of San Diego, California



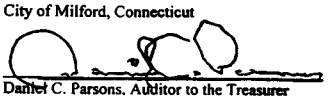
Roger Black, Director, Management Services
Salt Lake City Corporation
Salt Lake City, Utah

Michael B. Brown, City Manager
City of Savannah, Georgia

Antoinette J. Anderson, Director of Finance
City of Milford, Connecticut



Hargovind S. Patel, City Comptroller
City of Newburgh, New York



Daniel C. Parsons, Auditor to the Treasurer
City of St. Louis, Missouri

Rick J. Sanborn, Finance Director
City of Mt. Pleasant, Michigan

John T. Payne, Deputy Treasurer
Clark County, Washington

Johnnie E. Tripp, Chairman, Coastal Regional Solid Waste Management Authority and Commissioner, Pamlico County, North Carolina

Thomas C. Setchell, CPA, County Treasurer
LaSalle County, Illinois

Durwood S. Curling, Executive Director
Southeastern Public Service Authority of Virginia

James R. Ufer, Acting Director of Budget and Finance
Hennepin County, Minnesota

Michael P. O'Keefe, Finance Director
Village of Villa Park, Illinois

Ronald A. Morris, Budget and Accounting Manager
New Castle County, Delaware

Stanley Allen, Finance Director
Bucks County, Pennsylvania

Richard M. Evans, Finance Director
City of Savannah, Georgia

Richard A. Schnuer, Finance Director
City of Champaign, Illinois

Steve Sayler, Finance Director
Jefferson County, Alabama

Thomas G. Marcoux, Finance Director
Town of York, Maine

Theodore F. O'Neill, Executive Director
Chester County Solid Waste Authority
Chester County, Pennsylvania

Attachments

naiop
National Association of Industrial and Office Properties
The Forum for Commercial Real Estate

March 13, 1997

The Honorable Bob Smith
Chairman
Senate Subcommittee on Superfund, Waste Control, and Risk Assessment
Committee on Environment and Public Works
410 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Smith:

On behalf of the National Association of Industrial and Office Properties (NAIOP), I am pleased to provide you and the committee this written testimony on S. 8, "The Superfund Cleanup Acceleration Act of 1997."

NAIOP is comprised of more than 5,000 members nationwide and represents major developers, owners and investors of industrial, office and related commercial real estate.

In particular, our comments focus on Brownfields revitalization and the liability issues associated with these sites. In addition, we are concerned with the current Superfund liability scheme as being a major impediment toward getting these hazardous waste sites cleaned up and put back into productive economic use. Finally, we advocate a strong state role in managing the rehabilitation of these hazardous waste sites. Your legislation addresses all of these issues in a positive way and we commend you for once again taking a leadership role in advancing comprehensive Superfund reform.

NAIOP looks forward to working closely with you and the committee staff to ensure that the concepts outlined in S. 8 remain intact and that this much-needed legislation is signed into law. We stand ready to assist you in this effort.

Sincerely,

Robert D. Landis
Vice President for Government Affairs

enclosures

Woodland Park, 2201 Cooperative Way • Herndon, Virginia 22071 • 703 904-7100 FAX: 703 904-7942

STATEMENT

NATIONAL ASSOCIATION OF INDUSTRIAL AND OFFICE PROPERTIES (NAIOP)

SENATE SUBCOMMITTEE ON SUPERFUND, WASTE CONTROL, AND RISK ASSESSMENT

MARCH 12, 1997

The National Association of Industrial and Office Properties (NAIOP) appreciates this opportunity to comment about Brownfields Redevelopment, in conjunction with the recent hearings and expected mark-up of S.8, "The Superfund Cleanup Acceleration Act of 1997". NAIOP is comprised of over 5,000 members nationwide and is the nation's premier real estate organization for major developers, owners, and investors of industrial, office and related commercial real estate. NAIOP provides support and guidance to its members to help create, protect, and enhance the value of commercial and industrial real estate.

The organization promotes grassroots public policy related to real estate development, investment and property rights. NAIOP members work with various public sector entities, particularly local governments and regional economic and industrial development agencies, authorities, and corporations in helping to bring unused or underutilized properties back as productive sources of jobs and tax revenues. As the owners, purchasers, and developers of properties whose revitalization and restoration to productive economic use will be directly effected by Superfund reform and Brownfields legislation, NAIOP members are among the most important stakeholders in the outcome of this important legislative initiative.

Woodland Park, 2201 Cooperative Way • Herndon, Virginia 22071 • 703 904-7100 FAX: 703 904-7942

Brownfields and the Superfund Liability Scheme

From our perspective, a Brownfield is any real property which, due to actual or suspected environmental contamination, may lie idle, unoccupied, underutilized, unused, or have any one or combination of these characteristics. Although there are exceptions, in many, if not most instances, a Brownfield will not be the subject of an active investigation, remedial, or enforcement action by the U.S. Environmental Protection Agency (U.S.E.P.A.) or a state environmental agency.

The contamination at a Brownfield may stem from activities that took place or conditions that arose before current ownership and operation of the property, and as a result of lawful non-negligent conduct. Liability for Brownfields cleanup arises under the federal Superfund and similar state statutes, and extends to all past and current owners and operators of the property and to any party responsible for generating or transporting any hazardous substances requiring cleanup at the property. Liability under this scheme is "joint and several," i.e., each potentially responsible party ("PRP") bears the entire responsibility for all remedial expenses to a person who cleans up a site, notwithstanding the amount or nature of contamination for which the PRP may be individually responsible. Allocation among PRPs usually takes place in lawsuits or in other adversary contexts in which the PRPs seek equitable contribution among themselves. This liability scheme has discouraged parties who own properties which they believe may have contamination from putting these properties on the market and likewise has discouraged parties who could purchase and rehabilitate these properties from doing so.

The Superfund liability scheme has in itself created and continued the sorry state of many Brownfields. The absence of development of these properties arises not only from fear of

enforcement action by U.S.E.P.A. or other governmental agencies, but also from the concern that any involvement with Brownfields property could result in a never ending source of liability.

Recent State Initiatives Supported by NAIOP

NAIOP applauds recent developments in various states that have improved the picture for Brownfields development. These state voluntary remediation programs facilitate the sale and redevelopment of Brownfields by allowing cleanups based on the specific future use of the site and risk-based standards in lieu of an inflexible standard which may be technologically or financially unfeasible. These programs also provide binding government approvals which allow parties in real estate and commercial transactions to quantify risk.

In Pennsylvania, for example, NAIOP actively participated in the legislative process that resulted in passage of "The Land Recycling and Environmental Remediation Standards Act", a landmark Brownfields bill. Under this statue, parties may choose to clean up contaminated properties to one or more of three different levels, after which they receive a release from liability under state environmental laws. Pennsylvania's voluntary remediation statute has been adopted as model legislation by the American Legislative Exchange Council, an organization represented by legislators from all 50 states. Under Pennsylvania's program, in effect only since July of 1996, 64 sites have already been cleaned up and a total of 195 sites have begun the formal process toward redevelopment. In comparison, only eight of Pennsylvania's 103 Superfund sites on EPA's "National Priority List" have been cleaned up in the last 16 years.

NAIOP's Position

NAIOP members have found that state Brownfields revitalization efforts, such as Pennsylvania's, are significant steps forward. However, it is important to stress that these state programs do not protect our members from liability arising under the federal Superfund statute. NAIOP therefore supports the concept of EPA deferring to state voluntary remediation programs, and for statutory relief from federal Superfund liability for any party that successfully cleans up a site under a state voluntary remediation program. At the very least, NAIOP strongly favors a Brownfields provision which gives states greater authority in cleanup decisions at these sites as a vehicle for expediting redevelopment.

In addition, NAIOP strongly supports reforms that will expedite the cleanup process by providing state voluntary cleanup programs with more flexibility on cleanup requirements and incentives for environmental remediation of certain properties with development potential. We also support changes that will more clearly define the specific due diligence prerequisites for qualifying a party as an "innocent purchaser." Qualifying for an exemption from liability allows for the purchase of property affected by federally-regulated hazardous substances without the buyer acquiring the associated cleanup liability. NAIOP seeks the removal of legal obstacles for obtaining financing for the acquisition and environmental remediation of certain properties with development potential. And finally, NAIOP advocates changes to what it currently views as an inequitable application of the law's retroactive and joint and several liability provisions and believes a compromise needs to be reached on this issue.

Conclusion

S. 8 appears to make substantial progress toward achieving goals consistent with NAIOP's position, particularly with respect to Brownfields redevelopment. The more limited "stand alone" approach of S. 18, however, would provide access to only a limited amount of federal funds for Brownfields vitalization and does not adequately address the problems that give rise to Brownfields. Moreover, its enactment would poses the danger of creating an impression that Congress has found a "cure" for Brownfields when it has only applied a short-term and inconclusive solution to the problem.

We appreciate this opportunity to provide these comments and look forward to working closely with the Committee toward the enactment of comprehensive Superfund reform outlined in S. 8 which includes substantive provisions that deal effectively with those problems associated with Brownfields redevelopment.

Oregon

DEPARTMENT OF ENVIRONMENTAL QUALITY

Good morning. I am Langdon Marsh, and I am the Director of the Oregon Department of Environmental Quality. I am speaking today in support of Superfund reform, and I want to provide you with one state's perspective on a few critical issues.

Introduction

While Oregon may be unique in the particulars of its state superfund, I believe there are many interests that are shared: our primary shared interest is to have both a federal and state superfund program that protects our citizens and our environment.

Oregon recently reformed its state superfund law. On July 18, 1995 Gov. Kitzhaber signed into law a reform measure that was sponsored by industry and was a collaborative effort among my agency, environmental groups, and the citizens of Oregon. We completed additional rulemaking on January 10, 1997, and I believe Oregon now has a framework where we will get more cleanup done at a lower cost while we protect our citizens and our natural resources.

Our legislature was quite receptive to state superfund reform, but they were adamant that Oregon's resources would not be impaired. First and foremost was the protection of our citizens, but protection of our groundwater was also imperative. Like most Western states, Oregonians rely heavily on groundwater: over 75% of Oregonians rely on groundwater as at least a backup water supply and almost 50% rely on groundwater exclusively. We cannot afford to write off beneficial uses of water. Let me re-emphasize that we need to protect for all beneficial uses -- whether for drinking water, agricultural use, industrial use, or for the maintenance of viable ecosystems.

I believe that our reformed state superfund has the appropriate balance between protection and cost. My gravest concern with many of the proposed reforms is that they will result in an even greater amount of delay and litigation with fewer environmental gains. In each and every reform package there are ideas Oregon could support, but we cannot support measures which, cumulatively, undermine what we regard as essential and viable programs: both the federal Superfund program and the Oregon environmental cleanup program. We believe that there should be limited fixes for the limited problems.

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I will address some of the proposed reforms in some detail, but first let me offer a potential solution which was a prominent part of Oregon's superfund reform: "hot spots." Oregon believes determining where hot spots exist is a critical step to ensure treatment is employed where it is appropriate and cost-reasonable. Containment or other lower cost options should be used when there are less serious threats. A "hot spot" is an area of high concentration, high mobility, or one not readily contained that presents a risk to human health or the environment taking into account future land use and current and future beneficial uses of water. This does NOT mean that all groundwater must be cleaned up to drinking water standards, but it does mean that the responsible party (RP) must consider treatment remedies if there are reasonably likely future uses of the land or water where a non-treatment option would present an unacceptable risk. Even though treatment is preferred at hot spots, the remedy selection is still subject to balancing factors.

These balancing factors are: (1) effectiveness of the remedy; (2) technical and practical implementability; (3) long-term reliability; (4) short-term risk from implementation; and (5) reasonableness of cost. So, while treatment is preferred for hot spots, any remedy must be cost reasonable.

Brownfields

Oregon supports the provisions to increase brownfields redevelopment. Oregon has an active Voluntary Cleanup Program and has employed prospective purchaser agreements to facilitate redevelopment. We believe that a clean environment and a strong economy are not mutually exclusive, but actually complement one another. When we redevelop brownfields, we want to make sure that both the land and the water are put back into productive use. Often, lack of information is the biggest impediment to redevelopment. By making both grants and loans available for site characterization and assessment, we can "jump start" the redevelopment process.

Oregon has had an effective Voluntary Cleanup Program since 1991, and, while we would welcome funds to enhance or refine our program, we are concerned that an overly complex system to determine whether a state program is a "qualifying" one, will detract from our current success. We believe cleanups conducted under a state program should not also be subject to federal oversight so long as progress continues at the site. Also, states must have an appropriate degree of latitude to differ with the federal program without losing "qualifying" status.

State Role

Oregon supports some form of delegation of Superfund to the states. We believe the flexible structure allowing as much delegation as the state desires and can handle is the best structure. Likewise, we support self-certification and making the state share 10%. Our biggest concerns are: (1) the override of state standards; (2) an overly-complex and time-consuming delegation process (like RCRA authorization); and (3) the potential of delegating authority without adequate funding.

Oregon does not believe that state standards are in any way requiring "gold-plated" cleanups; we are requiring that cleanups protect our citizens and restore our resources for current and future use. The provisions for charging the state for selecting more expensive remedies will lead to endless speculation, and denying cost recovery for those remedies seems to be doubly punitive. While we share the concept that states should be able to assume as much delegation as they desire and are suited to assume, the different draft proposals make delegation too complex and subject to second-guessing. We support the "10% or less" state cost share revision, but we do have lingering concerns that greater orphan shares may place an increasing burden on strapped state finances.

Community Participation

Oregon believes that Superfund remedies must be community remedies and we support measures that will garner more participation and do a better job of communication. Remedial actions are often quite complex and technical so providing Technical Assistance Grants should be an element in any reform legislation. While prescribing the composition of community response organizations may be appropriate for the most complex Superfund sites, we would prefer a more flexible approach that secures participation without following overly-detailed steps.

Selection of Remedial Actions

Oregon supports consideration of current and future land use and beneficial uses of water when evaluating remedial actions. First and foremost, however, remedial actions must protect human health and the environment. It

is reasonable to estimate what exposures will result from various land and water uses, but we must take a reasonably long view as to what those uses will be and to allow corrections if our estimates are incorrect.

Many proposals have retained an acceptable risk range and place these standards in statute. My concern with retaining the risk range while changing the whole of the risk calculus is that we will simply be juggling numbers and not protecting our citizens or our environment. If we change the risk protocol (how risk is calculated) and automatically favor the lowest cost remediation, we may be changing *cleanup* programs to *containment* programs that pose continuing and unacceptable risks to our citizens.

Oregon elected to move to prescribed single risk levels (1×10^{-6}; Hazard Index <1; and point before significant adverse impact to ecological receptors) rather than retaining its process-determined standard ("lowest feasible") or adopting the Superfund cleanup ranges (the cancer risk range of 1×10^{-6} to 1×10^{-4}; a hazard index not to exceed 1; or protects ecosystems from significant threats to their sustainability). Oregon does not require treatment to the 10^{-6} level, but it does require protection to that level -- the protection may include institutional or engineering controls that limit exposure.

Oregon also believes that revisions to risk assessment and risk protocols will be clearer if the "hot spot" concept is employed. To determine what is a "high concentration" or what is "highly mobile," one must have a reasonable baseline as to what any risk is from a contaminant. Oregon supports the quest to quantify actual risk, but we do not support the idea that risk can be defined away. While there is great uncertainty in the risk assessment process, we believe that there are very real risks being faced by our citizens that live next to or even on cleanup sites. Let us make sure that we improve risk assessment rather than merely discredit what is an imprecise yet essential tool. We strongly support developing implementing regulations rather than attempting to prescribe technical protocol in statute.

Liability

Oregon supports the retention of the basic Superfund strict, joint, and several liability scheme. We also share the view that limited "carve-outs" (e.g., municipal landfills and de micromis parties) are appropriate, and that an allocation system can make cost of remediation more equitable. We do have concerns with the potential breadth

of some of the proposed exemptions such as the small business exemption or the recyclers' exemption. While we do not want to unduly burden those who make relatively minor contributions, we do believe that owners and operators should clean up the property they contaminated rather than forcing the public-at-large to bear those costs.

Federal Facilities

Oregon shares the goal of cleaning up and putting federal facilities back into productive use. As stated before, we believe all RPs, including those responsible for federal facilities, should be held to the same standards. State standards should prevail at these sites, and the states should not be penalized for holding federal facilities to the same standards as other RPs. Federal facilities may afford the opportunity to use innovative technologies for remedial action, and we support that concept. However, we also believe that community participation in the remedial action is essential for any successful remediation so innovation should not come at the cost of participation.

Natural Resources Damages

Oregon believes that the reform bill must continue to allow restoration costs for injuries to natural resources, and we continue to oppose any set dollar cap. We concur that recovery for lost uses that occurred wholly before December 11, 1980 should not be allowed and, if possible, damages should be limited to costs of restoration, replacement or acquisition of the equivalent resources. However, we do not believe the recovery of lost use and nonuse values should be categorically eliminated. As under remedy selection, we believe the details of damage assessments should be left to regulations rather than being overly-specific in statute.

Miscellaneous

Oregon cannot support capping or sunsetting of the National Priorities List. We believe that sites that warrant listing should be listed rather than imposing an arbitrary cap or an automatically declining number of sites per year. We do support state concurrence in listing, but we believe that we must address problems as they arise rather than using a lottery approach to which sites are listed. While Oregon has only a dozen Superfund sites, we have over 250 state superfund sites. Very few of these sites would ever be of Superfund caliber, but we believe that

there are many more than the 100 or so Superfund sites across the country that might be listed in the next 5 years, and more than the 2 that might be Oregon's fair share of the cap amount.

Funding

Finally, I would like to say a little bit about funding and the long-term future of Superfund. We believe that reauthorization is essential and that Superfund must continue. While we support and would seek delegation of Superfund to the state, we are concerned that the level of funding and support that come with delegation may be inadequate.

Conclusion

Oregon is on the right path to balance protection with reasonable cost. However, we have grave concerns that many proposed reform measures will undermine the ability of the states to carry out an effective environmental cleanup programs. Oregon believes states must have the ability to set and enforce cleanup standards; require treatment of "hot spots"; enforce cleanups of all RPs in an equitable manner; and provide oversight and assistance to those who wish to redevelop brownfields. There are some good ideas to reform Superfund, but some of the proposals go too far by either weakening the level of protection our citizens and environment need and deserve, or by drastically reducing the amount of money that goes to actual cleanup. I urge you to look carefully at many of the reforms and weigh how these changes will affect state programs. While states may desire to run their own superfund program, we have relied on the federal Superfund as a safety net. Without Superfund's political and financial muscle, many states, including Oregon, will be facing enormous pressure to allow the degradation of our environment in the name of short-term cost savings. I ask that you recognize the continued need for Superfund and that you allow the states to customize their cleanup laws to the unique requirements of their states. We hope to continue to work with you to refine your bill so real reform is gained while we continue to demonstrate that environmental protection and economic development can work hand-in-hand.

Thank you for the opportunity to testify today. I would be more than willing to answer any questions you may have.

Superfund Briefing Paper

Oregon DEQ Approach to Superfund Reform

Limited Fixes to Limited Problems

The 1995 Oregon Legislature passed a state superfund reform bill that Governor Kitzhaber signed into law in July, 1995. The bill required rulemaking on three key areas:

- Hot spots;
- Risk protocol; and
- Remedy selection

Rulemaking was completed in January, 1997, and DEQ, industry, and the environmental community believe we have a state superfund that works. The liability scheme remains intact, but remedial actions are both protective and cost reasonable. The points below are areas we believe Oregon can provide a national model to break the reauthorization impasse.

Hot spots

Hot spots are areas of high concentration of contaminants where DEQ requires treatment rather than containment. With the passage of the new law and subsequent rules, DEQ moved away from treatment of all contamination and now requires treatment, if feasible, where the risk to people and the environment would remain unacceptable if only control measures were to be employed. Treatment is still subject to balancing factors that keep remediation costs reasonable.

Risk Protocol

Oregon moved from "background" or "lowest feasible concentration" standards to an explicit risk-based standard for both human health and ecological receptors. The risk assessment is based on the most recent science and allows the use of other than default assumptions and probabilistic methods. Risk assessments for both human and ecological receptors are based on reasonable, not worst case or "reasonable maximum," assumptions.

Protect Beneficial Uses of Water

Oregon does not require all groundwater to be cleaned up to drinking water standards, but it does require that all beneficial uses be restored or protected. For example, an aquifer not used for drinking water but used for irrigation must be restored for that use. Oregon will not require the impossible (forcing cleanups to unrealistic standards or inordinate costs), but neither will it allow routine "writing off" of aquifers. This is <u>not</u> an aquifer classification approach, but an approach that does not require groundwater cleanup as long as the long-term beneficial uses are protected.

Consideration of Land Use

Just as Oregon protects water for its current and future uses, it will also protect land for its uses. Not everything will be cleaned up to a "residential" standard, but every citizen and the environment will be protected.

Remedy Balancing Factors

While each remedy must be protective, the rules provide that the least expensive remedy be selected unless there are proportionately greater benefits gained in effectiveness, reliability, or implementability or less implementation risk. Treatment of hot spots has a higher cost threshold since risks from hot spots are greater.

Enhanced Public Participation

More Oregon citizens were involved in the last round of state superfund rulemaking than ever before, and more citizens will be involved in risk management decisions. The determination of reasonably likely land and water uses will be a public process, and the eventual remedy will be one where citizens have had an early and meaningful opportunity to participate.

Brownfields

Oregon supports brownfield initiatives and has implemented a number of measures to move brownfields from being a good idea to a reality. Oregon's Voluntary Cleanup Program has used tools such as expedited cleanup processes, phased cleanups, prospective purchaser agreements, and liability exemptions (e.g., lenders and gov't) to get more cleanups done and more land back into productive use. More can be done and Oregon supports using Superfund moneys to leverage these improvements.

Limited "Carve-outs"

Oregon supports the continuation of the strict, joint, several, and retroactive liability scheme, but we also believe that there are legitimate exemptions or carve-outs such as municipal solid waste facilities. However, where there are legitimate carve-outs, there must be adequate funding to ensure that necessary remediation occurs to protect human health and the environment.

Concluding Comments

Oregon believes that certain federal Superfund reforms are essential, but some of the previous Congressional proposed reforms went too far and would have undermined both the federal and the state programs. We recommend the following general measures:

- Retain strict, joint, several, and retroactive liability, but provide limited carve-outs;
- Perform risk assessments on reasonable, scientifically-sound assumptions;
- Retain treatment as the preferred remedy at hot spots;
- Consider reasonably likely land use and beneficial use of water in remedy selection;
- Involve all stakeholders in the cleanup process;
- Select cost-reasonable remedies that are protective;
- Use states as "experimental stations" for ideas that work without burdening states with disproportionate costs or hurdles; and
- Make brownfields redevelopment a reality.

Oregon believes its voluntary cleanup program and brownfields initiatives have shown that cleanups can be done cooperatively, at reasonable cost, and can put land back into productive use while still protecting our citizens and our environment. If you would like details on how the Oregon approach might be employed with the federal Superfund reforms, please contact:

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