A PROPOSAL TO AMEND SECTION 311 OF THE CLEAN WATER ACT OF 1977

HEARING

BEFORE THE

SUBCOMMITTEE ON ENVIRONMENTAL POLLUTION

OF THE

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS UNITED STATES SENATE

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CONTENTS

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THURSDAY, OCTOBER 5, 1978

U.S. SENATE,
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,
SUBCOMMITTEE ON ENVIRONMENTAL POLLUTION,
Washington, D.C.

The subcommittee met at 10:02 a.m., pursuant to call, in room 4200, Dirksen Senate Office Building, Hon. Edmund S. Muskie (chairman of the subcommittee) presiding.

Present: Senators Muskie, Stafford, and Chafee.

OPENING STATEMENT OF HON. EDMUND S. MUSKIE, U.S. SENATOR FROM THE STATE OF MAINE

Senator MUSKIE. I do not have much of an opening statement. This hearing was convened to provide an opportunity for the committee to look at the proposal for amending section 311 of the Clean Water Act. We have such a proposal before us. None of us has had the opportunity to review this language. I am sure there are many arguments for and against approving such a change. I hope this morning, in 55 minutes, we can review those arguments.

Our witness this morning is Tom Jorling, Assistant Administrator for Water and Waste Management of EPA, who is here to represent his agency. Mr. Jorling?

STATEMENT OF THOMAS C. JORLING, ASSISTANT ADMINISTRATOR FOR WATER AND WASTE MANAGEMENT, ENVIRONMENTAL PROTECTION AGENCY

Mr. JORLING. Thank you, Mr. Chairman.

We come before your committee today with a highly unusual request regarding one of the most significant provisions of the Clean Water Act, section 311, dealing with the discharge of hazardous substances—particularly, the ability of the Government to respond to and mitigate the effects of such discharges. More than in any other environmental area, people expect quick and effective governmental response to protect public health and the environment in the event of spills of such materials. Nothing perplexes a citizen more than discovering that the Government is incapable of acting rapidly and decisively in such situations.

But, Mr. Chairman, I am here to tell you that 6 years after the section 311 mandate was enacted, the hazardous substances spill program is nonexistent. This is an extremely bleak assessment, but

I think it is important that you and your committee know the gravity of the situation. I deeply appreciate the opportunity to appear and make this status report and request this amendment in the waning moments of a very busy session of Congress. And also, Mr. Chairman, knowing your schedule, I deeply appreciate the opportunity you have afforded us to appear and explain this position.

The concept of Government response to spills was first developed in the context of oil in the late 1960's and was incorporated in the 1970 Water Quality Improvement Act. At that time uncertainty surrounding the appropriateness of including other hazardous materials in such a scheme led Congress to authorize the administration to study similar response mechanisms for them.

When the Clean Water Act was enacted in 1972, hazardous substances were included in parallel with oil, and the Administrator was granted authority to designate hazardous substances, to distinguish between substances based on their removal characteristics, to remove or mitigate the effects of spilled substances, and to assess civil penalties and cleanup costs. The Agency responded to that mandate inadequately, in part for complicated technical reasons and in part for what I think must be characterized as a lack of will.

When the new administration assumed responsibility for the program in 1977, one of its highest priorities was to complete the rule making necessary to implement the hazardous substances spill program. In this undertaking there were several uncertain elements in section 311 which led us to request legislative clarification, especially the inclusion of mitigation activities in the concept of removal. In December 1977, these clarifications were made through amendments to the Clean Water Act.

During the period I have been at EPA, and in the absence of a program, we have faced the Hopewell Kepone tragedy; carbon tetrachloride emergencies on the Ohio River; a 4-month closure of the Louisville sewage treatment plant because of a chemical spill; chemical contamination of primary drinking water supplies in Kernersville, N.C., chlorine deaths from a freight train derailment in Youngstown, Fla., and many, many more incidents.

In March of this year, the four key regulations for hazardous substances were finally promulgated. The four sets of regulations designated 271 substances, classified their removability, and established harmful quantities, units of measurement, and rates of penalty. The Agency, along with the Coast Guard, allocated resources to the task of implementing the 311 hazardous substances program. This regulatory and programmatic effort was the culmination of 6 years of activity.

Following promulgation but before the effective date of the regulations, the Federal district court for the Western District of Louisiana, acting on complaints filed by the Manufacturing Chemists Association, the American Waterways Operators, the Association of American Railroads, and others, enjoined their implementation and enforcement. The principal challenges to the regulations included allegations that EPA had illegally determined the actual removability of the designated substances, that EPA's harmful quantity determinations were arbitrary and capricious, and that EPA had unlawfully applied the provisions of section 311 to facilities with 402 permits under the National Pollution Discharge Elimination System.

The court agreed with the plaintiffs on all three issues and concluded that the regulations were "invalid, void, unenforceable, and of no legal effect." The court concluded that EPA had impermissibly ignored mitigability in determining the actual removability of substances. In addition, it held that EPA's harmful quantity determinations were unlawful because they did not consider the "times, locations, circumstances, and conditions" as required by section 311(b)(4) and, therefore, were not predictive of actual harm. Finally, the court held that discharges subject to section 402 of the act should not be subject to the reporting requirements, civil penalty liabilities, and cleanup costs of section 311.

I cannot overestimate the impact of this decision on our ability to prevent and respond to the discharge of hazardous substances. Invalidation of the removability regulation renders inoperative the entire civil penalty scheme. The rejection of our harmful quantity determinations—the cornerstone of our regulatory scheme—leaves us without mandatory reporting of spills and relieves dischargers of responsibility for civil penalties and cleanup costs.

The future of the 311 program is now in grave doubt, beyond the ability of the Agency alone to control. The courts, the Agency and a large number of interested parties are all in a position to influence the future of the hazardous substances spill program. In the absence of substantial agreement on a basic approach, these parties could endlessly delay any amendment or litigation.

In the face of the situation created by the injunction, the Agency has considered three basic options. I will summarize each:

First: We could prosecute an appeal. In reviewing this option and after consultation with the Department of Justice, we have reached the conclusion that it would take a minimum of 3, but more likely 5 years to have the matter go through the court system and ultimately be resolved by the Supreme Court. Further, there is a chance that the lower court decision halting the program would be upheld.

Next, we could attempt to rewrite the regulations to conform to the court's order. On the threshold issue—the determination of harmful quantities—EPA could not write rules to satisfy the court order and be in any way responsive to the 311 mandate. To do so would require us to establish before the fact actual harmful effects from specific quantities of chemicals covering the infinite range of circumstances in which they might be discharged. This would reestablish a pre-1972 burden of proving water quality impact as a precondition for environmental protection. Our best estimate indicates we could determine harmful quantities at a rate of 10 to 15 per year, but only at a very high resource cost. It would be decades before we achieved anything like the 271 chemicals designated in the enjoined regulations. Moreover, this decision was that of only one Federal district court; we cannot be certain of satisfying the other 91 Federal district courts with this approach.

Finally, we could seek legislative repair. There are two possibilities here, a lengthy, full-fledged effort to repair section 311 and, perhaps, related authority, or alternatively, a more focused effort addressed to the specific problems raised by the recent court decision. After intense review, I have reached the conclusion that there is no recourse but to seek quick legislative repair, if section 311 is to be implemented without

further unconscionable delay. My reasons include the belief that the existing section 311 is basically sound. If the provisions were greatly changed, even for the better, it would require an entirely new rulemaking effort. This would be time consuming. Given past experience, it would take years to achieve promulgated regulations.

I believe that the needed legislation cannot be enacted unless the affected interest groups are in substantial agreement with the basic outline of the repair. Consequently, and with acknowledged risk to all parties, I have met with some of the litigants over the last several weeks in an attempt to determine if there is "noncontroversial" legislative proposal that all parties can accept in good faith. If so, it could be grafted onto H.R. 12140, a research and development authorization bill which has passed the House and is pending in this committee.

The effort to define a legislative solution has forced us to judge what elements of the program are most important and to consider altering those which, while important, would prevent a consensus among the parties having an ability to influence the course of the program. I believe all parties have participated in this effort in good faith. No one has pressed for all of his preferences.

In discussions with the parties, I have been guided by the assumption that the Congress and the people expect to have the following basic elements of the 311 program put into effect as soon as possible: (1) The designation of substances and the determination of quantities, the discharge of which creates a duty on the discharger to notify the Government; (2) governmental response to mitigate the effects of discharged substances and to remove them where appropriate; (3) the imposition of liability on the owner for costs incurred by the Government in removal and mitigation; and (4) a penalty provision.

We have reached agreement on a legislative proposal which, in my opinion, retains these key elements of the 311 program. I am submitting as an attachment to this testimony our specific legislative recommendations, which have been developed through negotiation with a number of interested industry groups.

The recommended changes involve three basic areas. First, the proposal simplifies the determination of which discharge incidents must be reported to the Federal Government. The proposal clarifies the authority of the Administrator in designating hazardous pollutants and determining harmful quantities of such pollutants. The amendment makes it clear that the determination of harmful quantities does not require an assessment of actual harm in the variety of circumstances in which such substances might be discharged. Rather, the determination is based on the Administrator's judgment of what quantity of such pollutant may be harmful as a result of its chemical properties, not the circumstances of its release. This change would resolve the district court's objections to the previously promulgated regulations and would allow the basic elements of section 311 to be implemented right away. I might add, Mr. Chairman, it is in this area that the EPA has placed its highest priority in these negotiations.

Second, the changes we are proposing place hazardous substances on a par with oil in their relation to the major components of section 311, except that the maximum civil penalty for their discharge would be $50,000 compared with $5,000 for oil. The penalty could go as high as $250,000, however, if the discharge was the result of willful negligence or misconduct on the part of the person in charge.

We realize that the $50,000 maximum involves a significant reduction from the existing $500,000 liability for fixed facilities and $5 million for vessels. However, in view of the 1977 amendments which make it clear that dischargers are liable for mitigation costs resulting from discharges of a hazardous substance, I believe that sufficient incentive for a high standard of care exists with the combination of public disclosure of who is discharging, liability for mitigation of hazardous substance discharges provided in 1977, and the penalty provisions we are recommending today. If experience proves that higher penalties are necessary, the penalty structure could be modified accordingly. In the meantime, however, the key authorities of section 311—mandatory reporting, spill prevention requirements, Government ability to respond, and cleanup liability, all of which are now enjoined—could go into effect.

In the changes we are proposing, the criteria for determining the size of the penalty would also be streamlined. In assessing the penalty, the Administrator would consider the following factors: (1) The size of the business involved; (2) the effect of the penalty on the discharger's ability to continue in business; (3) the gravity of the violation, which we would interpret to include the size of the discharge, the degree of danger or harm to the public health, safety, or the environment, including consideration of toxicity, degradability, and dispersal characteristics of the substance, previous spill history, if any, and violations of spill prevention regulations where appropriate; and (4) the extent and degree of success of any effort by the violator to mitigate the effects of the discharge.

We would place particular emphasis on the extent of mitigation efforts by the discharger, in order to encourage prompt and effective cleanup. Mr. Chairman, we would include these criteria and other elements governing gravity of the violation in our regulations implementing the civil penalty provision.

The third area of change would clarify jurisdiction over discharges of oil and hazardous substances from point sources with NPDES permits, and discharges permitted under sections 318 and 404 of the act. The issue of which section of the act governs these discharges is a principal source of controversy in the litigation. This proposal only affects the jurisdiction over certain discharges permitted under sections 402, 318, and 404 of the act.

Basically, our changes make it clear that discharges from a section 402 permitted source, which are associated with manufacturing and treatment, are to be regulated under sections 402 and 309. The quantities established under section 311(b)(4) would not be the basis for effluent limitations in permits issued under section 402.

"Classic spill" situations will be subject to section 311, however, regardless of whether they occur at a facility with a 402 permit. For example, onsite industrial spills such as truck or rail accidents, or substantial or large-scale failures, or ruptures of containers or vessels would be considered subject to section 311, unless such onsite spills were processed through a treatment system capable of eliminating or abating such spills, in which case, such discharges would be regulated under sections 309 and 402.

On the other hand, situations such as the following would be regulated under sections 309 and 402, not 311: System upsets caused by control problems or operator error, system failures or malfunctions, equipment or system startups or shutdowns, equipment washes,

production schedule changes, noncontact cooling water contamination, storm water contamination, or treatment system upsets or failures at facilities with treatment systems capable of eliminating or abating such discharges. While most discharges from permitted point sources will, therefore, be regulated solely under the section 402 permit system, the oil spill program under section 311 will remain intact, and other classic spill situations will continue to be subject to section 311.

I should point out that none of the changes we are recommending affects the designation of 271 substances as hazardous. If the proposed legislative changes are enacted, the Agency will withdraw the regulations, make the necessary adjustments, and promulgate the same 271 designations and quantities without change as soon as possible. I believe that the amendments we are proposing would allow us to build on the rulemaking effort we have conducted for the last few years and to get a basic program into operation within a few months after enactment.

The Agency and the Coast Guard have already expended considerable resources for training, information dissemination, and related preparations premised on the 271 substances and the harmful quantities we designated. I would like to make some materials descriptive of these extensive preparations available for the record, including a printout of the computer program supporting the Government's response capability in the field. Industry, notwithstanding its litigation posture, is prepared to comply with the program through personnel training and other implementing actions. In short, a very valuable program is ready to go, but it is now in a state of suspended animation. The situation is hard for us to accept. For the public, already suspicious of our ability to govern, it is impossible to understand.

Mr. Chairman, without trying to subject you to a sensory overload, I would like to run through a couple of these preparations so you have some idea of what has been done in preparation for this program. We have transferred approximately 80 positions to the regions to be on-scene coordinators in the event of hazardous substance spills.

In addition, we have established emergency response teams—one in the East and one in the West—to develop the kind of expertise necessary to respond with knowledge and effective tools in these situations. Similarly, the Coast Guard has incorporated much of this into their standard enforcement personnel, and we are now working with the States to include these efforts through grants. The basic theme for our preparation has been training and information. In crisis situations a calm presence is needed. This is what we have attempted to do with on-scene coordination.

I would also like to run through some sets of materials. First of all, we have published in the Federal Register a program which allows us to establish spill prevention plans for each of the designated hazardous pollutants, preventive measures. We think this is certainly one of the most important aspects of section 311. We can point to the oil program as evidence of success. The oilspill records are now showing marked declines in spills from fixed facilities. For instance, in 1976 there were 337 onshore bulk storage spills of oil; in 1977, the number declined to 219. We attribute that decline to the success of the spill prevention plans which have been established for onshore bulk storage. We would like to do the same with hazardous pollutants.

Another item I have brought is a field detection manual. I have clipped a couple of pages there. One is a diagram of the response coordinator's activity—his purpose in reaching the scene is to bring the type of information which can resolve a complicated situation. I might point out we are using GS–11 and GS–13 people to respond to these situations. They have the authority to evacuate the community and have almost martial law authority when spills occur. We think it is necessary they be well trained, and that kind of manual is sort of a standard reference.

The next item is the technical assistance data system. Again, on the theory that accurate information is essential, we have developed a system which includes a printout of information regarding any particular chemical. I have given three samples: Aniline, sulfuric acid, and benzene. There are 113 data points there. I have highlighted, for instance, No. 16, general optimum handling procedures. Information on the health effects is also very important in these situations, and that is item No. 87, called general sensation, or what effects to expect that chemical to have on humans. So we do have the ability to make informed judgments in these crisis situations.

The fourth set of information available to you is a brochure describing one of the tools of the emergency response team, an activated carbon treatment trailer. This is basically a portable granulated activator which goes around to these various sites. We have to absorb the cost of these, and they normally run in excess of $100,000 each.

Just to give you an example, in Chattanooga, Tenn., in July of this year, pesticide wastes were dumped in a swamp along with some oil. The portable machines cleansed 75,000 gallons of water in 1 week. In New Jersey in June, ethylene glycol trichloroethylene was dumped in the Ramapo River, and this machine was able to process 500,000 gallons of a concentrated portion of the river in 1 week. We have had 16 such uses of the device in the last 18-month period. All of those costs were absorbed by the Government, without the ability to go back and recover them from the discharger.

EPA is attempting to educate as broad a public as possible on the spill program. Industry's preparations are also important. I have given the staff a pamphlet that has been issued by du Pont relative to a particular du Pont plantsite. The one you have is the Bell plant. It contains instructions to employees to give notice of spills. At the end are the hazardous substances designated in our proposed regs which are found at that plantsite. I also have descriptions of Hooker Chemical's and Dow Chemical's preparations to respond to this program. In addition, there are two brochures describing industry efforts to prepare industry personnel to respond to this program.

Mr. Chairman, the longer I serve in the executive branch, the more concerned I become over the length of time and the immense difficulty associated with turning new statutory mandates into administrative actions. The average time for rulemaking in EPA is now approaching 4 years. It took more than that for section 311.

I do not believe the country should be without a hazardous spill response capability for another 4 or 5 years. We can build on the rulemaking effort that has been conducted; we can get the basic program to operate. To do so, the Agency has had to make judgements about the relative importance of the provisions of section 311. We have concluded that certain adjustments have to be make in the interests

of getting the program moving. We now come to you with a position that we and the affected interest groups support, and we hope that it can remain, in these terms of reference, noncontroversial.

I am deeply worried that if the legislation is not amended we will be unsuccessful in getting any element of the hazardous substances spill program in effect for years, a failure which would have incalculable effects on public health and safety. EPA's request is unusual, yet given the complexity, the litigation, and the rulemaking associated with section 311, we feel strongly that it is the only way to put the hazardous spill program into effect without unconscionable further delay. We hope you will agree.

Mr. Chairman, there is one other matter that I want to bring to the attention of the committee. During these negotiations, we confined our discussions to those issues in 311 which were raised by the litigation. Because of the penalty provisions, however, the international ramifications of the penalty structure cannot be avoided.

Last year, the Congress amended the statute to include language exempting foreign vessels outside of 12 miles from the penalty structure in the interest of international relations. One penalty structure in the act remained without that qualification, however, the penalty in the event of discharge of a nonremovable hazardous substance. Recommending a provision to amend the penalty provision of section 311 which has raised the issue of international consequence without conforming that amendment to the other provisions could be interpreted in the international community as a failure of a commitment that the administration has given.

The changes we propose would apply to foreign-flag vessels within 12 miles from the coast. They would thus blunt the questions regarding international law. At the same time, we would clearly demonstrate to those countries who have cooperated with us, albeit in some cases grudgingly, to improve the Law of the Sea pollution texts in significant respects, that we have taken their interests into account, while still protecting the marine environment from vessel source pollution.

The changes we will suggest do not require extensive drafting, and, indeed, they would not destroy the structure of the section. I should add that we would want both the domestic and international aspects addressed together, because it is not possible to separate the two sides of the same coin.

Mr. Chairman, Ambassador Pickering was intending to be here this morning to present the international side of the coin to the committee. I have a statement that he would like to make, and James Brown of the Office of Ocean Affairs and Mary Elizabeth Hoinkes, assistant legal adviser, of the State Department are here in case there are questions. I do want to make the connection between the amendment EPA has proposed and this international dimension so that you can consider it.

With that, Mr. Chairman, I will be happy to try to respond to questions. Again, I appreciate your willingness to allow us to be here.

Senator MUSKIE. What you are suggesting is there must be a way for Congress in the next week—a Congress overwhelmed by more lesgislative issues than we can deal with well without this—in the legislative environment, we ought to be able to solve in 1 week a problem that you don't envision being able to be solved within 4 years administratively, in less than 5 years judicially. That is about the proposition you put before us, as I see it.

Conceding the seriousness of the problem that you present, you are aware of the nature of the legislative process and have been closely associated with it for a number of years. We have this morning two Senators in attendance. Two Senators on a committee made up of Senators who have participated, I think, fully and almost unanimously—and have insisted on doing so—on all environmental issues with which we have dealt in the last 15 years. And there are several of them, if not all of them, who will want to understand fully what they are being asked to endorse, and we can't even begin the process of educating this morning because they are caught up with other legislative responsibilities: The energy conference report; I should be on the floor dealing with a major tax bill, as chairman of the Budget Committee, and we will be occupied on the floor with that for at least the next 3 days, perhaps the next week.

I don't even have time this morning before a rollcall vote at 11 a.m. to fully explore the implications or reasons for this proposed legislative solution which you present. I just don't see any possibility of acting on it—I am fully willing to learn as much about the problem in the next 35 minutes as possible. I don't know whether Senator Chafee would have a different view of that or not—unless we were just able to persuade this subcommittee to rubber stamp it and try to get it through the full committee and through the Senate without fully understanding or evaluating its validity as the best legislative solution.

There are many problems that we run into administratively that result out of half-baked administrative solutions. I have found that out. It may be that section 311 we gave you to work with was too half-baked; at least it hasn't worked.

Just to start off with one question, in your statement you say "The principal challenges to the regulations included allegations that EPA had illegally determined the actual removability of the designated substances, that EPA's harmful quantity determinations were arbitrary and capricious." You go on to say that you have been guided in producing new legislation by the following basic elements of the 311 program: (1) The designation of substances and determination of quantities, the discharge of which creates a duty on the discharger to notify the government. That question of quantity determinations is one of the three bases of the court's decision and one of the three bases of the objections of those who are regulated. What influence would we create by giving you a new form of authority which enables you to determine quantity?

Mr. JORLING. Mr. Chairman, the Court held we had acted improperly on the basis of a clause in the provision establishing our authority to designate the harmful quantity. That clause was "at such times, conditions, and circumstances." The Court interpreted that to mean we had to determine harmful quantities on the basis of the different circumstances in which substances could be discharged, before the discharges actually occurred.

What we have proposed is to negate the effect of the Court's ruling, to eliminate that clause so that it is clear that it is not necessary for us to show actual harm in the myraid circumstances in which these substances could be discharged—small streams, big streams, big rivers, small rivers—before the duty to give notice of a spill arises. What we are requesting is just to extract that clause, and remove it from the language describing our duty to act, and that would allow

those 271 chemicals to remain designated and the harmful quantities we have already established to remain in effect.

Senator MUSKIE. But your proposed test is chemical properties of such substances that in and of themselves—you are right—are harmful. Isn't that likely to be challenged in court? I can't imagine those who resist these regulations will concede that the chemical properties of substances in and of themselves inevitably create harm. The circumstances is, itself, subject to challenge. Aren't they setting another trap?

Mr. JORLING. We think removing the necessity of a different harmful quantity for each chemical will allow us to support the designations of harmful quantities we have already made by increasing administrative discretion and allowing the methodology that was used in establishment of the 271 harmful quantities. In effect, it would take out that clause the Court says we did not comply with.

Senator MUSKIE. I understand what you are saying; I am just raising the question.

Mr. JORLING. There may be more litigation, Mr. Chairman.

Senator MUSKIE. The only point I am trying to make is, not making a final judgment about your legislative solution, I am trying to make the point there are legitimate questions that ought be to raised, if we want to avoid facing another emergency request a year from now, saying you tried. Senator, you could have adopted the legislative language we recommended in the last year, but it didn't quite work, so we have another one out. If we want to avoid that kind of legislative result, it seems to me we have to give the thing a close scrutiny, which I don't see as being possible in these closing days.

Senator Chafee may have a different reaction.

I am all for responding to the urgent situations, especially if they are of an emergency nature. But what you are asking here, you describe over and over again, it is complex. It is so complex that you can't deal with it administratively; you can't deal with it speedily enough in the courts. If it is complex for those two forums, it is complex for this one. To just rush something through in the last days of the session with what would only be a very cursory examination by those who are responsible for the legislative process, it doesn't seem to me an assured way of eliminating the problem.

Senator CHAFEE. Mr. Chairman, I agree with you.

We really are in the last minutes. I just think that trying to pass legislation like this, as the chairman has pointed out, would be extremely difficult.

Let me ask you this: Take the worst case. Suppose we didn't do something. So therefore, you are enjoined from enforcing section 311 by this court in Louisiana. What does that mean? Does that mean that somebody could go dump Kepone in a river somewhere, and the Government couldn't do anything about it? What does it mean?

Mr. JORLING. The worst case is where we are. We have no program.

Senator CHAFEE. In other words, there are no hazardous substances as defined by EPA?

Mr. JORLING. There is no duty to give notice of the discharge of any disignated hazardous substance, because the harmful quantity has been held invalid by the court. Similarly, if the Government does act to respond, as I have indicated we do, we cannot charge back

against the party responsible for the discharge any of the costs of our activity. Second, we cannot impose any penalty.

Senator MUSKIE. Would you yield just a moment?

Senator CHAFEE. Yes.

Senator MUSKIE. Suppose, notwithstanding the decision by the court you were to seek to impose penalties under—you still have the law, that intent of which is clear; the purpose of which is clear. There are particularly regulations which have been ruled invalid, but the court hasn't said that the law is unconstitutional, that Congress didn't have the right to enforce the law or to pass the law. Are you telling me that those who deal in these substances, on the strength of that court decision would just arbitrarily ignore that legislative intent and law, and make no attempt whatsoever to comply with its purpose or objectives, and that if you were to seek to impose sanctions, that the court would put you in jail?

Mr. JORLING. Mr. Chairman, I find myself in the very difficult position of being responsible for a program which everyone says he wants. The court said it wanted the program to go forward, too, but it couldn't because of the failures that it found. Everyone wants the program to go forward.

Senator MUSKIE. Well, so do I.

Mr. JORLING. I realize that. I am just unable to get it to work.

Senator MUSKIE. But you have got the $5,000 penalty.

Mr. JORLING. That's correct, we may. It wouldn't be subject to more litigation if we attempted to impose it.

Senator MUSKIE. Even if we pass a new law it is going to be subject to litigation.

Mr. JORLING. No, because we will not be dependent on the formula connection to harmful quantity.

Senator MUSKIE. Is it possible to pass a law that no one would want to take to court?

Mr. JORLING. No, I hope I am not suggesting that.

Senator MUSKIE. If you have found out, I want to know.

Mr. JORLING. I am suggesting the barrier to our authority to impose penalties would be removed. That is what we are trying to achieve. Right now we are in the worst case.

Senator MUSKIE. If you pass a law, you are going to have to get into the rulemaking again.

Mr. JORLING. Part of the purpose of this is to avoid new rulemaking. We want to preserve the 271 designated harmful quantities.We would have to amend the penalty assessment procedures, but the barrier to the authority to assess penalties would be removed.

Senator MUSKIE. One of the first steps is designation of substances and determination of quantity, the discharge of which creates a duty on the discharger to notify the Government. I take it that would be done with reference to the chemical properties of substances. Isn't that designation by rulemaking?

Mr. JORLING. We have already done that. We have already designated harmful quantities for 271, based on chemical properties. What we did not do is establish different rates of harmful quantities, based on possible different circumstances of release. We would remove that requirement and, therefore, allow the present designation and present harmful quantities to go forward. We would take away the impediment the Court has found.

Senator MUSKIE. Could you, by administrative action, just arbitrarily prohibit the discharge of pollutants with those harmful chemical amounts, any discharge whatsoever?

Mr. JORLING. Mr. Chairman, there is a prohibition of discharge of any pollutant under section 301, but the sanction for those discharges is found elsewhere in the act. That would remain untouched.

The question here is whether or not there is a duty on the discharging party to notify the Government, with a criminal sanction which does not not now exist for failure to do so, and the ability of the Government to spend money in mitigation and charge back those costs.

Senator MUSKIE. This law, they are required to notify the Government of prohibited discharge.

Mr. JORLING. The statute does prohibit discharge.

Senator MUSKIE. So you could enforce that.

Mr. JORLING. If we find out about it. The thing is, there is no criminally reinforced duty to give notice to the Government of a discharge.

Senator MUSKIE. So under the present state of the law, they don't notify you, and you can't create regulations to govern appropriate notice. Then your recourse under present law is to fall back upon the absolute prohibition. Then the discharger is left with finding ingenious ways of concealing the discharge from the Government. So absolute prohibition wouldn't be enforceable.

Mr. JORLING. I think that's correct.

Senator MUSKIE. In that state of the law, it would seem to me it ought to be possible to work out a regulatory scheme under the present law. Surely they don't want that. They want to operate without those laws.

Mr. JORLING. I think what you are suggesting, Mr. Chairman, is that if we continue to labor under the worst-case condition, we could go back and attempt a new rulemaking effort. As I mentioned, a new rulemaking effort could require 4 years. and there would be no 311 program for half a decade or more.

Senator MUSKIE. Do you recall how many years it took us to enact the amendments to the Clean Air Act of 1970? It took us 3 years. And the amendments to the Clean Water Act of 1977, it took us 2 years. Now you are suggesting that we do this in 1 week. It has been trapped by the courts, and those who are regulated into the result that you have described in the Louisiana court, we are not likely to move so quickly that we don't try to avoid that result again from our legislative effort.

Mr. JORLING. I agree 100 percent. Every promulagation of this act has been subject to judicial difficulty. We have 70 cases pending under the Clean Water Act. We are in a situation where the Congress can act and not have its expectations achieved in a 6-year period.

What I am trying to say—and I may have made a serious error of judgment in attempting this at the end of the Congress—the reason I chose this way finally is because there are many areas where there is great controversy under the Clean Water Act, and in the next Congress those are going to start being amended. Each amendment is going to add on another subject. I suspect we are experiencing the beginning of a 3-year effort to amend the Clean Water Act. If that is what we have to wait for to get 311, I don't think it is responsive to the mandate

Congress gave us 6 years ago. So this is strictly an attempt to untangle a program Congress has given us so that it can go into effect.

Senator MUSKIE. I fully understand why you are here, and I don't criticize your coming here to present the problem at all; it is your duty to do so. I am just trying to identify the difficulties of producing these legislative miracles in the closing days of a Congress that is overwhelmed by issues it can't deal with effectively. Just this week the Eximbank legislation has sunk under its own weight, because it was overloaded with legislative baggage people try to add, in order to get other legislative objectives served. And I don't even want to have the reputation of a legislative miracle worker, because once you get that reputation, you are asked to perform more things that are not possible.

The best I can do is present this problem through staffs to members of this subcommittee, and see how they react to the possibility of getting this legislation passed. I will even conceal from them, if they are willing, the transcription of what I have said this morning. so what I have said won't have the effect of chilling their response. I would be amazed, knowing the members of this committee—one or two of them might be willing to give the green light, but there are others who I am sure would want to be present and ask all kinds of questions before they are willing to pass on legislation. I don't know how you are going to get that quorum for that kind of action or speedy result. I will do that. I will circulate your statement and indicate that we consider it urgent—and I would concur it is urgent—and let's see if I have been wrong in estimating the difficulty of getting this thing passed.

Mr. JORLING. Again, I understand what you are saying. I fully appreciate the stress that you and all members of the committee are under during the last stages of this session. I hope that if this effort does fail, we can preserve this issue separately from other issues under the Clean Water Act, so that it can be considered early in the next Congress.

Senator CHAFEE. Mr. Chairman, we are going to vote now. Are you going to be able to come back?

Senator MUSKIE. I may or may not. I have this tax bill to deal with.

Senator CHAFEE. I would like to come back. We have taken an informal poll of some of the minority members, and they indicate—just to cheer you up, Mr. Jorling—they indicate that they are in favor. That doesn't mean there is a majority. I would like to come back to discuss this in a little more detail.

[Brief recess.]

Senator CHAFEE [presiding]. Mr. Jorling, let me ask you a question. Let's suppose that the proposed amendments were adopted. As I understand it, that would resolve the specific case, the *Western Louisiana* case, because all of the litigants have agreed to that solution. But do we have any sort of assurance that future litigants wouldn't be able to attack on the same grounds that the Louisiana court litigants did, or would this legislation eliminate the grounds for their obtaining the judgment down there?

Mr. JORLING. Senator, our best guess is that if the amendment were adopted, it would remove the elements of the combination of the statute and regulations which have allowed the court not just to remand the regulations, but to declare them null and void.

There is other litigation pending concerning the regulation, but our judgment is that none of it goes to the essence of the program. In

other words, the courts would be unlikely to declare our entire effort null and void as this one has done. They may find a particular element that needs clarification, but the program itself could go forward. There would be no litigation that would result in the total injunction that we have received.

Senator CHAFEE. Suppose Congress didn't do anything now, as the point was set forth by Senator Muskie, and we came back in late January, early February and did tackle the problem and pass legislation, say, in early March. That is another 6 months. What would happen in the meantime? Again, we are getting back to the worst-case situation that you and I discussed earlier. A flagrant violator, would we be able to penalize him, or would there be no definition of what is a hazardous substance?

Mr. JORLING. If the matter continued as it is for another 6 months, I think the situation would be very much as it is now. If there were a flagrant discharge of pollutants into the waters of the United States and we found out about it, we would resort, to the extent we could, to the sanction authority of section 309, but the ability of the Government to respond and take mitigation actions would be limited. We wouldn't have had notice, and our ability to charge back would not be there. If we moved the EERU units into place, we would have to absorb those expenses out of our operating funds, as we have been doing.

Senator CHAFEE. This EERU, that is the cleanup machine you referred to earlier?

Mr. JORLING. Portable carbon unit, yes.

Senator CHAFEE. But the situation would really be no different than it has been for a good number of years; isn't that so? When did you put out your 311 regulation?

Mr. JORLING. The first and final promulgation of these regulations was in February of this year—hazardous substances, that is—there were oil regs.

Senator CHAFEE. I am talking about hazardous substances. So up until February this year, there were no regulations?

Mr. JORLING. That's correct.

Senator CHAFEE. Then the regulations were in effect until this case was just decided?

Mr. JORLING. They did not have the opportunity to go into effect. The regulations were promulgated with two effective dates, one for fixed stationary facilities, which was in June of this past year; and the other for vessels, which was September. The vessel requirements were delayed in their effective date because, under 311, vessels have to provide the Federal Maritime Commission with evidence of financial responsibility to meet liability. The 6-month date was to provide the opportunity to go through the machinery of the Federal Maritime Commission.

The June date represented the time judged necessary for fixed facilities to do the kind of thing I have shown you in the du Pont pamphlet informing its employees of the program. There was an injunction prior to the effective date, so the program has never operated.

Senator CHAFEE. What is our argument, our defense, to those who say, all right, it is not a very good situation, but we have struggled along with the existing situation ever since 1972—ever since the

beginning of the Republic—and 6 months isn't going to make all that much difference, with the alternative of legislation being passed that none of us really understands? What is your answer to that?

Mr. JORLING. I think, in fairness, it is clear that another 6 months would be another 6 months of status quo. Does that jeopardize the public health and welfare? A lot of that will be determined by whether or not we have a serious spill of one of these chemicals during that period. If we do, then obviously everybody will hold us responsible for not having a program in being. If there is no such spill, it will be just more of these ad hoc efforts.

Senator CHAFEE. Except the legislation doesn't prevent spills. It makes people liable for spills and encourages them to prevent spills.

Mr. JORLING. The legislation will enable us to put into operation the Government's response mechanisms.

Senator CHAFEE. But even with this legislation, there can be spills.

Mr. JORLING. Absolutely, but the question is whether or not we respond effectively, and that is what the public reacts to.

Senator CHAFEE. Respond effectively how? You mean by fining people?

Mr. JORLING. If the notice provision operates, and in the oil scene we think it operates quite well, then the Government will be informed and will be on scene to take the necessary steps for protection of public health and the environment. If notice is not received, Government looks helpless. And I must say, we do look helpless.

Senator CHAFEE. Say some type of so-called responsible company has a spill. I presume they are the ones that would notify.

Mr. JORLING. Generally, they do.

Senator CHAFEE. The du Ponts and so forth, I suppose they notify.

Mr. JORLING. They furnish voluntary notice, yes.

Senator CHAFEE. I am generalizing a bit, but see if this is so. It is sort of a fly-by-night and irresponsible company that won't notify, try and cover it up. If your legislation passed, when would they be subject to a severe penalty?

Mr. JORLING. In the event they did not give us notice, and we had the program in being, a criminal penalty would be available. We think the criminal sanction for lack of notice is a very effective one. We are having a tremendous difficulty now around the Nation in siting and in keeping operating facilities which are called hazardous waste receiving facilities. There are approximately 30 of them in the country.

Senator CHAFEE. What kind of a facility would that be?

Mr. JORLING. They handle the type of wastes that includes the chemicals we are discussing here. There is a very strong public reaction to the management of hazardous wastes, and at the present time, our evidence is that we have about eight of these facilities which are subject to close efforts on the part of public officials. As it becomes more and more difficult to manage hazardous materials properly, there is more and more incentive to dump them into streams, rivers, and waste treatment plants. Without the 311 mechanism, we may increase that likelihood.

If there is a strong penalty for discharging into the waters of the United States, we think the Government's posture is good. That does not mean we can prevent all these spills from occurring or that we will always receive notice, but at least the program could go into effect.

Senator CHAFEE. I am sympathetic. I am game to try it. I suppose I

am thinking of the argument, well, don't rush; you haven't put it into effect yet; you are not going backwards; you are just not going forward.

Mr. JORLING. I know, and legislation deserves to be considered and thoroughly evaluated in its context. But the thing that led me to make the judgment that I did—which I admit might have been an error—was the difficulty we are having now in implementing the statute Congress has passed. We are being prevented from implementing it. What I attempted to do is take the elements that prevent the congressional mandate from being carried out and repair them. My proposal is confined to repairing the paralysis we have as a result of this litigation. It is simply an attempt to allow the congressional program to go into effect after 6 years.

Senator CHAFEE. Suppose we pass just exactly what you are outlining and were successful, where would that put us when we came back and wanted to take a more lengthy, careful look at it in February? Would we have locked ourselves into any kind of a position that might be an unhappy one for us?

Mr. JORLING. Senator, I don't think so. What we are trying to do is allow the basic elements of the program to go forward. We are not entirely satisfied with parts of it. There might be some things that could be improved—a better penalty system, a better mechanism for assessing liability but we don't have the basic operation of the program yet. If at a later point some elements of that basic program need revision, they can be changed without stopping its ongoing implementation.

We are simply trying to get the program moving so people can gain enough experience to make decisions and judgments as to whether further repair is necessary. I don't think it forecloses any opportunity to review the 311 structure, either in this context or a broader context.

Senator CHAFEE. I am mixed up on the 404 situation, how that ties in here. Certain discharges under these 311 discharges would be covered by the permits in the 404 section, wouldn't they?

Mr. JORLING. They could be. Let me preface this by saying your confusion and uncertainty are appropriate. Nothing in this legislation is going to eliminate some amount of confusion on your part or my part, simply because it is very, very difficult to draw lines between regulatory authorities in a given statute. The problem with 404 and 402, and 318 is that the Agency is regulating to achieve certain differing objectives under each. Industry found that they, under our program, were laboring under what might be called double jeopardy. We were regulating under one set of circumstances, then trying to cover some other things under 311. They wanted to avoid overlap and know with some precision which regulation they were subject to and hold us, the regulator, accountable to that regulation.

So the attempt at clarification that is part of our package, and includes 404, specifies that where you are regulated under 404, 318, or 402, the Government is to hold itself to that system of regulation and leave 311 out of it.

The 404 problem gets even more complicated because of the difficulty of imposing the 311 system on discharges of dredge and fill. Consider these difficulties, for instance: You have a port which has sediments that are hazardous pollutants under 311. If you have a shovel and you extract some of that, do you measure the quantity of hazard-

ous pollutants for the purpose of 311 by that shovel, or by several shovels in a truck, or truckloads in a land fill? All of those are very difficult and complicated issues.

We hope we can clarify them so that everyone knows the game he is playing. With the combination of this activity and our 404(b) regulations, which we are still in the process of developing under the Clean Water Act amendments of 1977, we think we can give the regulated industry the clarity it needs and still protect the environment under 404 and the rest of the provisions of the statute. Our proposal here basically states that where you issue permits under 404, you protect the environment through that device, rather than through 311.

Senator CHAFEE. Yes; but the trouble with the 404, we have arranged for rather general, nationwide permits, and they wouldn't be related to a specific situation. I can see that this problem you pointed out would be compounded.

Mr. JORLING. But under the 404 regulation, general permits cannot be used where hazardous pollutants are found. General permits are to accommodate those situations where the material is inert—sand, gravel, other kinds of sediments which are not contaminated with these pollutants. General permits are not issued where hazardous or toxic pollutants are found.

Senator CHAFEE. We have some specific questions here, and I just don't want to inundate you with questions for the record, but we haven't got much time. But in acting as an advocate for your position, what you are proposing will put into effect the notification—compulsory notification procedures—which I think is a good thing. What it does is it sinks it into the criminal realm. If it didn't pass, there wouldn't be any criminal penalty.

Mr. JORLING. Not under section 311.

Senator CHAFEE. You seem very pessimistic in your indication about winning this case on appeal, recognizing the time it would take.

Mr. JORLING. That is true. I have gone back and asked, and asked, and reasked, because I would have concluded otherwise, knowing what I know about the legislative process that led to that provision. I have gone to people who are not privy to that personal experience and asked them to read the complaints and to head the judge's decision and evaluate whether or not they, as lawyers. would conclude there is a chance of the Government's prevailing. They conclude it is an iffy thing, 50/50; it could go either way.

The biggest problem, however, is using the process of litigation to make public policy. This appeal would be taken in the fifth circuit. The fifth circuit may be split because of case overload and pending judicial business. Its docket is unbelievably encumbered. We could not expect movement in that circuit for a considerable length of time.

Let me give you another example of the difficulty in translating what you tell us into regulations. Under the 1972 amendments we were to define and give effluent deadlines. That authority was questioned in court. It went through 8 of the 10 judicial circuits. It reached the Supreme Court. The Supreme Court finally reached res judicata on the issues in February 1977, which was 4 months before the deadlines that were supposed to have been reached with that level of performance.

So notwithstanding the expectations of Congress, the uncertainty of litigation prevents us from doing as good a job as we should. Every-

one should have his interests protected, and there should be due process. Perhaps I am arguing for a central court of appeals for national rulemaking. We now have a divided circuit route to the Supreme Court, and it takes a long time to make public policy that way.

Senator CHAFEE. I was thinking about the ramifications on the superfund bill. Would this change have any effect on the superfund legislation?

Mr. JORLING. An accurate answer to that is going to require a little bit of explanation. First of all, when I met with the interested parties, I indicated to them that the issues we were worried about in this litigation context were separate from superfund, and the negotiations we had were independent of it. They honored that, and I think the EPA has honored that.

There is a possible connection that everyone recognizes, but it depends a great deal on the ultimate form superfund takes. If superfund were enacted as the House bill, it would have very little effect. If the Senate bill were enacted, there would be a connection.

The Senate bill includes coverage of hazardous substances under the framework of superfund. If this legislative accommodation were not made, then those elements of the Senate bill which rely on the hazardous program in 311 would also carry the same injunction that this program now carries. If we were able to get the 311 program working, and a superfund bill like the Senate bill were enacted, then it could operate under the hazardous substance program of 311.

Senator CHAFEE. Senator Stafford.

Senator STAFFORD. Thank you, Senator.

Tom, I want you to know that my failure to be here earlier this morning is not due to a lack of interest in this serious problem. I have been at the dentist's. I find that is one way in which a Senator's mouth can be closed for a few hours.

I do want to commend everybody involved here, because I understand that all interested parties seem to be pretty much in agreement that something needs to be done. So I am glad for the efforts that have come forward thus far, and I hope that drafting problems that may be involved here can be resolved so that this amendment can go forward to be considered by the Senate. I hope in the bipartisan way this committee usually functions that our partners on the committee on the other side will join us in getting this bill through the committee and in front of the Senate.

Mr. JORLING. Thank you, Senator, very much.

Senator CHAFEE. That about does it. Thank you. There are some questions for the record. We will try and narrow these down, because time is of the essence.

Mr. JORLING. We will be happy to assist the staff in any way. Thank you again for making available this time on such short notice.

[Whereupon, at 11:45 a.m., the subcommittee recessed, to reconvene subject to call of the Chair.]

[Mr. Jorling's prepared statement and letters from the American Waterways Operators, Inc., and Manufacturing Chemists follow:]

STATEMENT OF

THOMAS C. JORLING

ASSISTANT ADMINISTRATOR FOR

WATER AND WASTE MANAGEMENT

BEFORE THE

SUBCOMMITTEE ON ENVIRONMENTAL POLLUTION

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

UNITED STATES SENATE

OCTOBER 5, 1978

Mr. Chairman, we come before your Committee today with a highly unusual request regarding one of the most significant provisions of the Clean Water Act, section 311, dealing with the discharge of hazardous substances--particularly, the government's ability to respond to and mitigate the effects of such discharges. More than in any other environmental area, people expect quick and effective governmental response to protect public health and the environment in the event of spills of such materials. Nothing perplexes a citizen more than discovering that the government is incapable of acting rapidly and decisively in such situations.

But, Mr. Chairman, I am here to tell you that six years after the section 311 mandate was enacted, the hazardous

substances spill program is non-existent. This is an extremely bleak assessment, but I think it is important that you and your Committee know the gravity of the situation. I deeply appreciate the opportunity to appear and make this status report and request amendments in the waning moments of a very busy session of Congress.

The concept of government response to spills was first developed in the context of oil in the late 1960's and was incorporated in the 1970 Water Quality Improvement Act. At that time, uncertainty surrounding the appropriateness of including other hazardous materials in such a scheme led the Congress to authorize the Administration to study similar response mechanisms for them. When the Clean Water Act was enacted in 1972, hazardous substances were included in parallel with oil, and the Administrator was granted authority to designate hazardous substances, to distinguish between substances based on their "removal" characteristics, to remove or mitigate the effects of spilled substances, and to assess civil penalties and clean-up costs. The Agency responded to that mandate inadequately, in part for complicated technical reasons and in part for what I think must be characterized as a lack of will.

When the new Administration assumed responsibility for the program in 1977, one of its highest priorities was to complete the rulemaking necessary to implement the hazardous substances spill program. In this undertaking there were several uncertain elements in section 311 which led us to request legislative clarification, especially the inclusion of mitigation activities in the concept of removal. In December 1977, these clarifications were made through amendments to the Clean Water Act.

During the period I have been at EPA, and in the absence of a program, we have faced the Hopewell Kepone tragedy; carbon tetrachloride emergencies on the Ohio River; a four-month closure of the Louisville sewage treatment plant because of a chemical spill; chemical contamination of primary drinking water supplies in Kernersville, North Carolina; chlorine deaths from a freight train derailment in Youngstown, Florida; and many more incidents.

In March of this year, the four key regulations for hazardous substances were finally promulgated. The four sets of regulations designated 271 substances, classified their removability, and established harmful quantities, units of measurement, and rates of penalty. The Agency, along with the Coast Guard, allocated regional resources to

the task of implementing the 311 hazardous substances program. This regulatory and programmatic effort was the culmination of six years of activity.

Following promulgation but before the effective date of the regulations, the Federal District Court for the Western District of Louisiana, acting on complaints filed by the Manufacturing Chemists Association, the American Waterways Operators, the Association of American Railroads, and others, enjoined their implementation and enforcement. The principal challenges to the regulations included allegations that EPA had illegally determined the actual removability of the designated substances, that EPA's harmful quantity determinations were arbitrary and capricious, and that EPA had unlawfully applied the provisions of section 311 to facilities with NPDES permits.

The Court agreed with the plaintiffs on all three issues and concluded that the regulations were "invalid, void, unenforcable, and of no legal effect." The Court concluded that EPA had impermissibly ignored mitigability in determining the actual removability of substances. In addition, it held that EPA's harmful quantity determinations were unlawful because they did not consider "times, locations, circumstances and conditions" as required by section 311(b)(4)

and, therefore, were not predictive of actual harm. Finally, the Court held that discharges subject to section 402 of the Act should not be subject to the reporting requirements, civil penalty liabilities, and clean-up costs of section 311.

I cannot overestimate the impact of this decision on our ability to prevent and respond to the discharge of hazardous substances. Invalidation of the removability regulation renders inoperative the entire civil penalty scheme. The rejection of our harmful quantity determinations--the cornerstone of the regulatory scheme--leaves us without mandatory reporting of spills and relieves dischargers of responsibility for civil penalties and clean-up costs. The future of the 311 program is now in grave doubt, beyond the ability of the Agency alone to control. The courts, the Agency, and a large number of interested parties are all in a position to influence the future of the hazardous substances spill program. In the absence of substantial agreement on a basic apporach, these parties could endlessly delay any amendment or litigation.

In the face of the situation created by the injunction, the Agency has considered three basic options. I will summarize each:

First, we could prosecute an appeal. In reviewing this option and after consultation with the Justice Department, we have reached the conclusion that it would take a minimum of three, but more likely five years to have the matter go through the court system and ultimately be resolved by the Supreme Court. Further, there is a substantial chance that the lower court decision halting the program would be upheld.

Next, we could attempt to rewrite the regulations to conform to the Court's order. On the threshold issue--the determination of harmful quantities--EPA could not write rules to satisfy the Court order and be in any way responsive to the 311 mandate. To do so would require us to establish before the fact actual harmful effects from specific quantities of chemicals covering the infinite range of circumstances in which they might be discharged. This would re-establish the pre-1972 burden of proving water quality impact as a precondition for environmental protection. Our best estimate indicates we could determine harmful quantities at a rate of 10-15 per year, but only at a very high resource cost. It would be decades before we achieved anything like the 271 chemicals designated in the enjoined regulations. Moreover, this decision was that of only one Federal district court, we cannot be certain of satisfying the other 91 Federal district courts with this approach.

Finally, we could seek legislative repair. There are two possibilities here, a lengthy, full-fledged effort to repair section 311 and, perhaps, related authority; or alternatively, a more focused effort addressed to the specific problems raised by the recent court decision. After intense review, I have reached the conclusion that there is no recourse but to seek quick legislative repair, if section 311 is to be implemented without further unconscionable delay. My reasons include the belief that the existing section 311 is basically sound. If the provisions were greatly changed, even for the better, it would require an entirely new rulemaking effort. This would be time-consuming. Given past experience, it would take years to achieve promulgated regulations.

I believe that the needed legislation cannot be enacted unless the affected interest groups are in substantial agreement with the basic outline of the repair. Consequently, and with acknowledged risk to all parties, I have met with some of the litigants over the last few weeks in an attempt to determine if there is a "noncontroversial" legislative proposal that all parties can accept in good faith. If so, it could be grafted onto H.R. 12140, a research and development authorization bill which has passed the House and is pending in this Committee.

The effort to define a legislative solution has forced us to judge what elements of the program are most important and to consider altering those which, while important, would prevent a consensus among the parties having an ability to influence the course of the program. I believe all parties have participated in this effort in good faith. No one has pressed for all of his preferences.

In discussions with the parties, I have been guided by the assumption that the Congress and the people expect to have the following basic elements of the 311 program put into operation as soon as possible:

1. the designation of substances and the determination of quantities, the discharge of which create a duty on the discharger to notify the government;
2. governmental response to mitigate the effects of discharged substances and to remove them where appropriate;
3. the imposition of liability on the owner for costs incurred by the government in removal and mitigation; and
4. a penalty provision.

We have reached agreement on a legislative proposal which, in my opinion, retains these key elements of the 311

program. I am submitting as an attachment to this testimony our specific legislative recommendations, which have been developed through negotiation with a number of interested industry groups.

The recommended changes involve three basic areas. First, the proposal simplifies the determination of which discharge incidents must be reported to the Federal government. The proposal clarifies the authority of the Administrator in designating hazardous pollutants and determining harmful quantities of such pollutants. The amendment makes it clear that the determination of harmful quantities does not require an assessment of actual harm in the variety of circumstances in which such substances might be discharged. Rather, the determination is based on the Administrator's judgment of what quantity may be harmful as a result of its chemical properties, not the circumstances of its release. This change would resolve the district court's objections to the previously promulgated regulations and it would allow the basic elements of section 311 to be implemented right away.

Second, the changes we are proposing place hazardous substances on a par with oil in their relation to the major components of section 311, except that the maximum civil

penalty for their discharge would be $50,000, compared with $5,000 for oil. The penalty could go as high as $250,000, however, if the discharge was the result of wilful negligence or misconduct on the part of the person in charge.

We realize that the $50,000 maximum involves a significant reduction from the existing $500,000 liability for facilities and $5,000,000 for vessels. However, in view of the 1977 amendments which make it clear that dischargers are liable for mitigation costs resulting from discharges of a hazardous substance, I believe that sufficient incentive for a high standard of care exists with the combination of public disclosure of who is discharging, liability for mitigation of hazardous substance discharges provided in 1977, and the penalty provisions we are recommending today. If experience proves that higher penalties are necessary, the penalty structure could be modified accordingly. In the meantime, however, the key authorities of section 311--mandatory reporting, government ability to respond, and clean-up liability, all of which are now enjoined--could go into effect.

In the changes we are proposing, the criteria for determining the size of the penalty would also be streamlined. In assessing the penalty, the Administrator would consider the following factors.

1. The size of the business involved;
2. The effect of the penalty on the discharger's ability to continue in business;
3. The gravity of the violation, which we would interpret to include the size of the discharge, the degree of danger or harm to the public health, safety, or the environment, including consideration of toxicity, degradability, and dispersal characteristics of the substance, previous spill history, if any, and violation of spill prevention regulations where appropriate, and
4. The extent and degree of success of any effort by the violator to mitigate the effects of the discharge.

We would place particular emphasis on the extent of mitigation efforts by the discharger, in order to encourage prompt and effective cleanup. Mr. Chairman, we would include these criteria and other elements governing gravity of the violation in our regulations implementing the civil penalty provision.

The third area of change would clarify jurisdiction over discharges of oil and hazardous substances from point sources with NPDES permits, and discharges permitted under sections 318 and 404 of the Act. The issue of which section

of the Act governs these discharges is a principal source of controversy in the litigation. This proposal only affects the jurisdiction over certain discharges permitted under sections 402, 318, and 404 of the Act.

Basically, our changes make it clear that discharges, from a section 402 permitted source, which are associated with manufacturing and treatment, are to be regulated under sections 402 and 309. The quantities established under section 311(b)(4) would not be the basis for effluent limitations in permits issued under section 402. "Classic spill" situations will be subject to section 311, however, regardless of whether they occur at a facility with a 402 permit. For example, on-site industrial spills such as truck or rail accidents or substantial or large scale failures or ruptures of containers or vessels would be considered subject to section 311, unless such on-site spills were processed through a treatment system capable of eliminating or abating such spills, in which case, such discharges would be regulated under sections 309 and 402. On the other hand, situations such as the following would be regulated under sections 309 and 402, not 311: system upsets caused by control problems or operator error, system failures or malfunctions, equipment or system start-ups or shutdowns,

equipment washes, production schedule changes, noncontact cooling water contamination, storm water contamination, or treatment system upsets or failures at facilities with treatment systems capable of eliminating or abating such discharges. While most discharges from permitted point sources will, therefore, be regulated solely under the section 402 permit system, the oil spill program under section 311 will remain intact, and other classic spill situations will continue to be subject to section 311.

I should point out that none of the changes we are recommending affects the designation of 271 substances as hazardous. If the proposed legislative changes are enacted, the Agency will withdraw the regulations, make the necessary adjustments, and promulgate the same 271 designations and quantities without change as soon as possible. I believe that the amendments we are proposing would allow us to build on the rulemaking effort we have conducted for the last few years and to get a basic program into operation within a few months after enactment.

The Agency and the Coast Guard have already expended great resources for training, information dissemination, and related preparations premised on the 271 substances and the harmful quantities we designated. I would like to make some

materials descriptive of these extensive preparations available for the record, including a printout of the computer program supporting the government's response capability in the field. Industry, notwithstanding its litigation posture, is prepared to comply with the program through personnel training and other implementing actions. In short, a very valuable program is ready to go, but it is now in a state of suspended animation. The situation is hard for us to accept. For the public, already suspicious of our ability to govern, it is impossible to understand.

The longer I serve in the Executive Branch, the more concerned I become over the length of time and the immense difficulty associated with turning new statutory mandates into administrative actions. The average time for rulemaking in EPA is now approaching four years. It took more than that for section 311.

I do not believe the country should be without a hazardous spill response capability for another 4 or 5 years. We can build on the rulemaking effort that has been conducted; we can get the basic program to operate. To do so, the Agency has had to make judgments about the relative importance of the provisions of section 311. We have concluded that certain adjustments have to be made in the interests of

getting the program moving. We now come to you with a position that we and the affected interest groups support, and we hope that it can remain, in these terms of reference, noncontroversial.

I am deeply worried that if the legislation is not amended we will be unsuccessful in getting any element of the hazardous substances spill program in effect for years, a failure which would have incalculable effects on public health and safety. EPA's request is unusual, yet given the complexity, the litigation, and the rulemaking associated with section 311, we feel strongly that it is the only way to put the hazardous spill program into effect without unconscionable further delay. We hope you will agree.

Mr. Chairman, the changes to Section 311 which I have discussed above are but one aspect of the problem. Those changes also directly engage certain critical international concerns, to which the President referred when he signed the 1977 amendments to the FWPCA into law. The President noted that those amendments raised certain questions regarding consistency with international law and expressed his confidence that these concerns could be alleviated by the Congress and the Administration. We believe that the consideration of Section 311 today offers the opportunity to accommodate both domestic and international concerns and to clarify that the Section only applies to foreign flag vessels within 12 miles from the coast. The changes we propose would thus blunt the questions regarding international law. At the same time, we will have clearly demonstrated to those countries who cooperated with us, albeit in some cases begrudgingly, to improve the LOS pollution texts in significant respects, that we have taken their interests into account, while still protecting the marine environment from vessel source pollution. The changes we will suggest do not require extensive drafting and indeed they would not destroy the structure of the section. I should add that we would want both the domestic and international aspects addressed together because it is not possible to separate the two sides of the same coin.

ATTACHMENT I

PROPOSED AMENDMENTS TO §311 OF THE CLEAN WATER ACT

Submitted by the Environmental Protection Agency

311(a) (2) Amend by deleting the period and adding at the end of the sentence:

> ...but excludes each of the following: (a) discharges in compliance with a permit under sections 402, 318 or 404 of the Act; (b) discharges resulting from circumstances identified and reviewed and made a part of the public record at the time a permit was issued or modified under Sections 402, 318 or 404 of this Act; (c) discharges from a point source caused by events occurring within the scope of the relevant operating or treatment systems.

This change establishes section 402 [or sections 318 or 404] as the applicable authority over the above excluded discharges of hazardous substances from point sources with NPDES permits [or other sources permitted under sections 318 or 404]. On-site industrial spills such as truck or rail accidents or substantial or large-scale failures or ruptures of containers or vessels shall be considered subject to section 311, unless such on-site discharges are processed through the treatment system, in which case such discharges are regulated under sections 309 and 402 of this Act. On the other hand, situations such as the following would be regulated under sections 309 and 402, not 311: system upsets caused by control problems or operator error, system failures or malfunctions, equipment or system start-ups or shut downs, equipment washes, production schedule changes, non-contact cooling water contamination, storm water contamination, or treatment system upsets or failures.

311(b) (2) (B) (i) Delete. This subsection requires determinations of actual removability.

311(b) (2) (B) (ii) Delete -- Obsolete.

311(b) (2) (B) (iii) Redesignate as 311(b) (2) (B) and amend to read:

> The owner, operator or person in charge of any vessel, onshore facility, or offshore facility from which there is discharged a hazardous substance in violation of paragraph (3) of this subsection shall be liable, subject to the defenses to liability provided in subsection (f) of this section, to the United States for a civil penalty, assessed by the Administrator based on consideration of the size of the business of the owner or operator charged, the effect of the penalty on the owner or operator's ability to continue in business, the gravity of the violation and the nature, extent and degree of success of any efforts by such owner, operator, or person in charge to minimize or mitigate the effects of such discharge. The amount of the penalty shall not exceed $50,000, except that where the United States can show that such discharge was a result of willful negligence or willful misconduct within the privity and knowledge of the owner, operator or person in charge, such owner, operator, or person in charge shall be liable to the United States for a civil penalty in such amount as the Administrator shall assess, based upon the gravity of the violation, but such penalty shall not exceed $250,000. No penalty shall be assessed unless the owner, operator, or person in charge shall have been given notice and opportunity for a hearing on such charge. Each violation is a separate offense. Any such civil penalty may be comprised by the Administrator. Civil penalties shall not be assessed under both sections 309 and 311 of the Act for the same discharge.

This amendment lowers the limits of liability from $5,000,000 for vessels and $500,000 for facilities to $50,000 for both vessels and facilities. Higher penalties may be imposed only in the case of willful negligence or misconduct. Since actual removability is stricken from section 311, this amendment applies to the discharge of any hazardous substance. In addition, this amendment expands those factors the Administrator shall consider in assessing a civil penalty. One of those factors, "the gravity of the violation," would be interpreted to include the size of the discharge, the degree of danger or harm to the public health, safety or the environment, including consideration of toxicity, degradability, and dispersal characteristics of the substance, previous spill history, if any, and violation of spill prevention regulations where appropriate. It encourages prompt mitigation of the discharge by making mitigation an important consideration in establishing the size of the penalty; this is particularly significant in discharges of hazardous substances which are capable of actual removal.

311(b) (2) (B) (iv) Delete. Removes determinations of "units of measurement".

311(b) (2) (B) (v) Delete. Unnecessary in view of deletion of determinations of actual removability.

311(b) (3) Amend line 8. Strike "harmful quantities" and amend to read "in such quantities as may be harmful...". This change is consistent with changes in Section 311(b)(4).

311(b) (4) Amend to read as follows:

> The President shall by regulation determine for the purposes of this section, those quantities of oil and any hazardous substances the discharge of which may be harmful to the public health or welfare of the United States, including but not limited to fish, shellfish, wildlife, and public and private property, shorelines, and beaches.

This change simplifies the determination by regulated parties of when an event involving oil or a hazardous substance should be reported and mitigation evaluated. In addition to reporting, this change also triggers potential liability under proposed subsection 311 (b) (2) (B) and subsection 311 (b) (6) without a determination that actual harm has occurred. The size of any penalty for a discharge of oil would still be determined as in subsection 311 (b) (6). The size of any penalty for a discharge of a hazardous substance would be determined as proposed in the amendment to subsection 311 (b) (2) (B) (iii). Quantities established under subsection 311 (b) (4) will not be the basis of effluent limitations in permits issued under section 402 of this Act.

311 (b) (6) Delete "or hazardous substance". This amendment ensures that discharges of a hazardous substance will be subjected to only one civil penalty provision -- that of proposed subsection 311 (b) (2) (B).

THE AMERICAN WATERWAYS OPERATORS, INC.
WASHINGTON EXECUTIVE OFFICES
1600 WILSON BOULEVARD • SUITE 1101 • ARLINGTON, VIRGINIA 22209

TELEPHONE: (703) 841-9300
TWX 710-955-0212

October 4, 1978

Honorable Jennings Randolph, Chairman
Committee on Environment and Public Works
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

The American Waterways Operators, Inc. supports, in principle, the proposed changes to Section 311 of The Clean Water Act as tendered by the U.S. Environmental Protection Agency in the attachment to their letter to you dated October 4, 1978.

As you know, we had previously requested hearings by your Committee and/or the House Committee on Public Works with the hope of resolving some very serious problems facing our industry because of the high level of penalties contained in Section 311. The new levels of penalties proposed by the EPA will provide the towing industry with more than a substantial incentive to exercise extraordinary care in the handling and transporting of hazardous substances.

While we and the other interested parties did not get everything we sought in the recent deliberations with EPA, we feel that our members can operate within the framework of penalties outlined in their proposal without the threat of being forced out of business.

The opportunity to express our views in this matter is sincerely appreciated.

Respectfully yours,

James B. Potter Jr.

James B. Potter, Jr.
President

MANUFACTURING CHEMISTS ASSOCIATION

1825 CONNECTICUT AVENUE N.W., WASHINGTON, D.C. 20009

ROBERT A. ROLAND
PRESIDENT

TELEPHONE: (202) 328-4210
TELEX: 89617 (MCA WSH)

October 4, 1978

The Honorable Jennings Randolph, Chairman
Committee on Environment and Public Works
4204 Dirksen Senate Office Building
Washington, DC 20510

Dear Mr. Chairman:

The Manufacturing Chemists Association (MCA) has been informed that the Environmental Protection Agency (EPA) has forwarded to you by letter of transmittal dated October 4, 1978, from Thomas C. Jorling, Assistant Administrator of the Office of Water and Hazardous Materials, a proposal for legislative changes to Section 311 of the Federal Water Pollution Control Act. It is our understanding that this amendment would be attached as a rider to H.R. 12140, a House-passed authorization bill. We are also informed that, as a preliminary to such action, there will be a Senate hearing on October 5, 1978, at 9:00 a.m. At that time Mr. Jorling will testify regarding EPA's proposal.

MCA is a non-profit trade association having 191 United States member companies who account for more than 90% of the production of basic industrial chemicals within the United States. You will recall that the Association was the lead litigant in the lawsuit earlier this year regarding EPA regulations under Section 311 which were held invalid; and our members are vitally concerned with Section 311.

MCA and its Environmental Management Committee have had an opportunity to review the EPA proposal in detail. Based on our review and discussion, it is MCA's conclusion that the EPA proposal constitutes an acceptable resolution of the controversy which has blocked regulation of hazardous chemicals under Section 311. Thus, MCA and the chemical industry as represented by MCA, approve the EPA proposal.

Sincerely,

Robert A. Roland

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