FOIA Number: 2012-0769-F

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Collection/Record Group: Clinton Presidential Records

Subgroup/Office of Origin: Council on Environmental Quality

Series/Staff Member: Kathleen (Katie) McGinty

Subseries:

OA/ID Number: 2888

FolderID:

Folder Title:
Superfund Reform Ideas

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March 27, 1993

MEMORANDUM FOR KATIE

FROM: PAM

SUBJECT: SUPERFUND MEETING WITH CONGRESSMAN SWIFT

You will be meeting with Cong. Swift (D-WA) and staff of Swift's subcommittee on Transportation and Hazardous Materials of House Energy and Commerce to discuss timing of reauthorization of Superfund. Staff members will include Dick Frandsen, Skip Endres, Subcommittee staff director, and Anne Forristall and Len Barson of the professional staff of the Subcommittee.

BACKGROUND:

In 1980, prompted by concern over Love Canal, NY, Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act (CERLA). The law created a five-year, $1.6 billion "superfund" to pay for a national cleanup of hazardous waste sites, chemical spills and other releases of environmental contaminants.

Superfund was then reauthorized in 1986 to add $8.5 billion to the clean up effort from 1987-1991. The reauthorization, however, was characterized by much acrimony and a three year delay. For example, the conference committee that met to resolve the House and Senate passed versions had to meet for 8 months and took the personal involvement of the Majority Leader to resolve.

Superfund requires the EPA to determine the most dangerous waste sites in the nation and gives the agency power to force those responsible to undertake a cleanup. To ensure prompt actions, EPA can conduct cleanups itself using the superfund and later sue responsible parties to recover the costs. EPA also can put states in charge of cleanups. The law also established a "strict liability" system that make all those connected with a contaminated site potentially responsible for the entire cleanup cost, without regard to fault. Courts can divide the costs among liable parties based on fairness consideration, and the parties can sue each other for cleanup costs. Those liable include past and present owners and operators of contaminated property - as well as entities that generated the waste, transported it to the site, and disposed of it. Although superfund is generally considered excessively litigious, remember that memo we did for the President that noted that only about 20% of superfund costs -- both government and private -- go to litigation; the rest goes to clean up. However, insurance companies do spend about 80% of their superfunds costs on litigation.

The most dangerous of the contaminated sites are put on a national priorities list for cleanup. As of 1992 there were 1,200 sites on the list. EPA has estimated the average cost of cleaning up an NPL site at $25 million. A 1990 EPA report estimates that it would cost the superfund program $17.1 billion to clean up the sites than on the NPL.

CURRENT ISSUES:

These are some of the substantive issues that reauthorization will have to address -- in addition to of course setting funding levels for the program for the next five years.

o Lender liability. The banking industry wants legislation to protect lenders from liability, under federal and state laws, for the cleanup of hazardous substances on borrowers property. The industry says recent court interpretations of superfund law have left banks and other lenders increasingly vulnerable to liability for contamination they did not cause. The chemical, oil and manufacturing industry groups oppose special relief for the banking industry. So do enviros because they feel it would weaken the existing liablity system by slowing rapid discovery and clean up.

o Municipal liability. In several sites across the country, industrial companies are suing municipalities and small businesses to force them to help pay for hazardous waste site cleanups on grounds that they contributed garbage to the sites. The municipalities counter that municipal solid waste in superfund sites contributes negligibly to the clean up problems and that the industries are just trying to find scape goats for the problem. A bill sponsored by Sen. Lautenberg that would have exempted municipalities from liability and blocked lawsuits by industrial companies seeking to force payment from municipalities for cleanups passed the Senate in the 102nd Congress but did not pass the house. He has reintroduced the bill this year and I have attached a summary of it.

o Voluntary cleanup. Lautenberg will be introducing soon, along with Baucus and Chafee, a bill to speed cleanup of the 100,000 non-priority hazardous contamination sites that are not destined for cleanup under Superfund. The bill would allow a government "signoff" for privately funded, voluntary cleanups. Any person who desires a government signoff on a cleanup that they are willing to perform would be able approach the state and enter into an agreement to perform a cleanup under government supervision. In return, the private party would agree to pay the oversight costs of the government. The government "stamp of approval" would supposedly go a long way toward assuaging the concerns of lenders, investors and buyers of once-contaminated property. Several states, such as New Jersey, have tried this approach and it seems to be fairly successful in getting small businesses and investors to look at cleanup of property.

CLINTON PLAN:

The budget document claims that we will save $109 million by 1997 by increasing private sector cleanup of sites. Currently, the private parties pay about 69% of cleanup costs. OMB estimated that by increasing that to about 70-71% through "more aggresive use of Superfund's enforcemnt mechanisms" we could save the government money. OMB's knowledge of how this proposal would work is really sketchy right now, but I guess they want to preserve Federal superfund money only for sites where there are NO viable private parties to untake the clean up. In other sites, the government would force PRP's to do all the cleanup themselves.

TIMING:

There are several dynamics at work here. Lautenberg has control over Superfund on the Senate side; Swift on the House. My sense is that they aren't well coordinated on this issue -- it may take intervention from the Administration to work through timing of reauthorization.

For example, Swift has announced his retirement in 1994. Staffers suspect that he will try to ram through a Superfund program this year as a last crowning achievement. He would like to begin hearings April 15, conclude hearings by July, and have legislation ready by August.

However, Lautenberg very much disagrees with this schedule. They would not like to begin hearings until early May, end in October, and not introduce legislation until Jan of 1993 (they'd like to coincide with State of the Union especially in light of Clinton's remarks about Superfund during this years state of the union.) Lautenberg's folks are really looking to us to help broker a timing plan b/w the House and Senate.

Political motives also are prompting Lautenberg's scheduling as well. He's up for reelection in 94 and it will be a very tough year for him since the unpopular Democratic governor Florio is also up for reelection and Lautenberg may feel some backlash from that race. Because N.J. has a large proportion of Superfund sites, Lautenberg would like to announce a comprehensive reauthorization in the middle of his campaign for the voters in 1994. His top priorities for the reauthorization are to cut transaction costs, speed up the cleanups, and be fairer to municipalities.

Swift will try to persuade you to go with his schedule. Its up to you how you want to respond. Lautenberg's folks suggested our office help establish a working group on reauthorization with House and Senate folks, us and EPA to create a mutually agreeable timeline. If you are interested in that idea you might bring it up with Swift.

SUPERFUND:

HILL ACTION

Lautenberg's staff tells me that EPA will announce the formulation of a 12 member review board to make recommendations on Superfund reform this year. Since an independent contractor will be doing this review, Lautenberg thinks there is potential for embarrassment if this board issues recommendations that the administration might find inappropriate.

For example, if Administrator Browner says everything is on the table, groups like the CMA will asks for major revisions of the polluter pays principle. CMA is seeking proportionally liability (those who can afford to pay do, regardless of responsibility). More radical ideas are out there -- they just aren't getting an audience since the Clinton administration is seen as a strong proponent of polluter pays.

Also, Lautenberg fears that if you open up liability question, suits currently pending will come to a screeching halt as folks wait to see if they can get out of their responsibility. Lautenberg feels strongly enough about all of this that he may be making personal calls to folks. Remember that this is a very politically charged issue for him. He is up for re-election this year and this issue is of paramount importance to New Jersey. He feels he must have a reauthorization that strengthens the polluter pays principle and is wary of large overhauls of Superfund (and is wary of the Prez.'s statements on how horrible superfund is).

Also, TIMING! You owe Rep. Swift a call next week about how we want to handle the timing issue. Please resolve with EPA soon.

CURRENT ISSUES:

o Lender liability. The banking industry wants legislation to protect lenders from liability, under federal and state laws, for the cleanup of hazardous substances on borrowers property.

o Municipal liability. In several sites across the country, industrial companies are suing municipalities and small businesses to force them to help pay for hazardous waste site cleanups on grounds that they contributed garbage to the sites. The municipalities counter that municipal solid waste in superfund sites contributes negligibly to the clean up problems and that the industries are just trying to find scape goats for the problem.

o Voluntary cleanup. Lautenberg will be introducing soon, along with Baucus and Chafee, a bill to speed cleanup of the 100,000 non-priority hazardous contamination sites that are not destined for cleanup under Superfund. The bill would allow a government "signoff" for privately funded, voluntary cleanups.

Any person who desires a government signoff on a cleanup that they are willing to perform would be able approach the state and enter into an agreement to perform a cleanup under government supervision. In return, the private party would agree to pay the oversight costs of the government. The government "stamp of approval" would supposedly go a long way toward assuaging the concerns of lenders, investors and buyers of once-contaminated property. **Lautenberg's folks are bugging me to death about getting an Administration nod toward this. Please ask Vandenberg about it.**

United States Senate

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
WASHINGTON, DC 20510-6175

March 5, 1993

Dear Colleague:

We are writing to invite you to become an original cosponsor of legislation which is designed to create jobs and boost the economies of communities where environmental pollution has prevented the fullest use and development of property. This legislation could benefit over 100,000 non-Superfund sites spread across every state in the country, and embodies principles that both the business community and environmentalists support. We plan to join Senator Lautenberg in introducing this legislation, called the "Voluntary Cleanup and Economic Redevelopment Act of 1993," in the near future.

This legislation, similar to recently enacted state laws that have been widely hailed by business and environmental interests alike, is designed to promote the economic redevelopment of properties that are currently lying fallow and unused because of minor contamination with toxic wastes. By quickly removing the stigma of environmental contamination from these properties, our bill would catalyze economic redevelopment and stimulate the economy of our communities. The result is a true marriage of environmental and economic goals.

Our legislation would have two parts: an economic redevelopment program, and a voluntary cleanup program.

First, the legislation would provide seed money to States to establish or develop further a voluntary cleanup program. Under the voluntary cleanup program, owners of contaminated sites that are not destined for cleanup under the federal "Superfund" or other hazardous waste cleanup laws would be able to obtain government signoff for privately funded, voluntary cleanups under a simple administrative procedure. Any person who desires a government signoff on a cleanup that they are willing to perform can approach the state and enter into an agreement to perform a cleanup under government supervision. In return, the private party will agree to pay the oversight costs of the government. The government "stamp of approval" will go a long way towards assuaging the concerns of lenders, investors, and buyers of contaminated property.

The private sector will truly drive the scope of such a voluntary cleanup program. Programs similar to this have already been well received in New Jersey, Oregon, and Massachusetts. In those states, private parties have been able to perform speedy cleanups under "real time" constraints that have met their immediate business needs.

Second, our legislation would create an economic redevelopment program. This program would provide seed money targeted to cleanup of sites which have a demonstrable potential for economic development. Such funding would be used by the owner or prospective owner to clean up the property and thereby assuage any concerns by lenders or investors to develop or purchase contaminated property.

This legislation offers numerous benefits. It will be responsive to the needs of small businesses and individual landowners whose only obstacle to converting their now fallow property to productive uses is the prompt cleanup of environmental contamination. It will be designed to minimize federal bureaucracy and red tape. And it will ensure that cleanups are performed responsibly and in a fully protective manner. We believe that this approach can lead to a real synergy between the environmental and economic goals that are so important to our citizens.

If you are interested in becoming an original cosponsor for this legislation, please call us or have your staff contact Leonard Shen, at 224-6226, Cliff Rothenstein, at 224-9097, or Claudia McMurray, at 224-5761. We look forward to your support.

Sincerely,

John H. Chafee
Ranking Minority Member

Max Baucus
Chairman

Dave Durenberger
Ranking Minority Member,
Subcommittee on Superfund,
Recycling, and Solid Waste
Management

Frank R. Lautenberg
Chairman
Subcommittee on Superfund,
Recycling, and Solid Waste
Management

John W. Warner

Harry Reid

Howard M. Metzenbaum

Harris Wofford

Barbara Boxer

United States Senate
Committee on Environment and Public Works
Washington, D.C. 20510-6175

Telecopier: (202) 224-2322 Office: (202) 224-3597

TO: Pam McElwee FAX: 456-2710

OFFICE: Office of Envtl Policy PHONE: 456-6224

FROM: Leonard Shen DATE: 3/26/93

NUMBER OF PAGES 6 + THIS COVER SHEET

MESSAGE/COMMENTS:

Enclosed per our conversation are a short description of the municipal liability bill and some materials on the voluntary cleanup/economic development bill. We look forward to coordinating closely with the Administration and the House as we proceed with Superfund reauthorization. I look forward to hearing from you next week; feel free to call me at anytime at 224-6226. Thanks.

Leonard

ACTION ITEMS:

Voluntary Cleanup and Economic Redevelopment Act of 1993

Voluntary Cleanups

* This bill would establish a federal grant program to facilitate state voluntary cleanup programs, under which private parties may volunteer to pay all state oversight costs and the state would provide a certification stating the cleanup had been performed to the state agency's satisfaction.

* States would be eligible to receive grants after satisfying uniform criteria developed by the EPA regarding the sufficiency of the state's program to identify appropriate sites and properly oversee voluntary cleanups.

* EPA would have authority to check on the continuing adequacy of the State voluntary cleanup program.

* Voluntary cleanups performed under this program would be completed to the same level of "cleanliness" as required under existing Superfund, RCRA, and other applicable state and federal laws.

* The voluntary cleanup program would be restricted to low priority sites with minor levels of contamination.

* Communities and citizens affected by the cleanup would be entitled to participate in cleanup decisions.

Economic Redevelopment

* The legislation would also establish two funding mechanisms -- a separate grant program and a revolving loan program -- to promote cleanup of contaminated sites that have demonstrable potential for economic redevelopment.

* First, a municipality could apply for a grant to conduct assessments on facilities that have a demonstrable potential for stimulating economic redevelopment once cleaned up.

* Second, property owners (including municipalities, current private party owners and prospective purchasers) could apply for a low interest loan to be used for cleanup of environmentally contaminated property, where a loan cannot be obtained otherwise, the facility could stimulate economic redevelopment, and the applicant needs financial assistance to achieve cleanup.

Superfund Amendments and Reauthorization Act of 1986

PL 99-499

Passed the Senate in final form Oct. 3, 1986. Passed the House in final form Oct. 8, 1986. Signed into law by President Reagan Oct. 17, 1986.

Contents

Spending and taxes

Overview: The revenue provisions provide $8.5 billion for superfund over the 1987-1991 period, up from $1.6 billion during the program's first five years. Another $500 million is provided for a new cleanup program for leaking underground gasoline tanks.

Of the total for superfund, $2.75 billion is to come from taxes on petroleum, $1.4 billion from taxes on feedstock chemicals (raw materials that are the basic building blocks of chemical products), $2.5 billion from a broad-based tax on corporate income, $1.25 billion from general revenues, and $600 million from interest on money in the fund and from money recovered from companies responsible for waste sites.

The law authorizes appropriations of $8.5 billion from superfund. The Environmental Protection Agency's authority to spend money from the fund is controlled by annual appropriations acts.

Petroleum tax: Domestic crude oil is taxed at an 8.2-cent-per-barrel rate to raise $1.25 billion. Imported petroleum is taxed at an 11.7-cent-per-barrel rate to raise $1.5 billion.The tax is imposed on crude oil received at a U.S. refinery, and petroleum products imported into the United States for consumption, use or warehousing.

Broad-based tax: The broad-based tax is a $12-per-$10,000 levy on a corporation's "alternative minimum taxable income" (before net operating losses and deduction for the tax) under the new tax reform legislation. The tax, which would be deductible for corporate income tax purposes, would be imposed even if the corporation pays no minimum tax for regular tax purposes because the corporation's regular income tax liability exceeds its minimum tax liability. The first $2 million in taxable income would be exempt.

Feedstocks taxes: The tax on feedstock chemicals is levied at varying rates on the sale of 42 organic and inorganic substances by a manufacturer, producer or importer. Rates, except for xylene, are the same as in the original superfund law. An exemption for coal-derived feedstocks is retained. New exemptions are added for certain substances used in manufacturing animal feed and for domestically recycled nickel, chromium or cobalt. Exported feedstocks are not taxed.

A new tax is levied on 47 imported substances — for example, nickel wire, synthetic rubber and formaldehyde — produced abroad using feedstock chemicals taxed in the United States. The tax is not effective until the treasury secretary lists the substances. The secretary can modify the list.

General revenues: The tax title authorizes appropriations of $250 million annually (but section 111 authorizes $212.5 million annually) in fiscal years 1987 through 1991 from the general treasury to superfund. Availability of the money is subject to annual appropriations acts.

Tank cleanup fund tax: A 0.1-cent-per-gallon tax on gasoline and other motor fuels is levied to raise up to $500 million over five years for the new underground petroleum tank cleanup fund. Liquified petroleum gas is not taxed. A reduced rate of 0.05 cent per gallon is imposed on methanol.

Spending of fund money is subject to appropriations acts. (See tanks section below for program provisions.)

Post-closure fund: The post-closure liability fund and its hazardous waste tax are repealed, and the money refunded to taxpayers with interest. The fund was to provide money for maintenance and cleanup of any properly closed waste disposal facility with a permit under the Resource Conservation and Recovery Act, the federal hazardous waste management law.

No liability may be assumed by the federal post-closure fund pending a study by the General Accounting Office. GAO is to study options, such as insurance or a new or modified program, to manage liabilities associated with closed sites (section 201).

Cleanup standards

General standard: The degree of cleanup must ensure protection of human health and the environment. Cleanup actions must be cost effective.

Detailed standards: Long-term cleanups (remedial actions) must meet standards and criteria of all other federal environmental laws, and of state environmental or facility siting laws, if the standards are legally applicable or relevant and appropriate to the circumstances. EPA, however, can waive standards in specified circumstances (see below). The federal laws include the Clean Air Act; Solid Waste Disposal Act; Safe Drinking Water Act; Clean Water Act; Toxic Substances Control Act; and Marine Protection, Research and Sanctuaries Act.

On two controversial points, the bill specifically requires cleanups to meet recommended maximum contaminant levels (RMCLs) issued under the Safe Drinking Water Act and water quality criteria issued under the Clean Water Act, where relevant and appropriate. EPA can set alternate concentration limits for groundwater cleanup at superfund sites only if certain conditions are met.

For a state requirement to apply, the state must have identified it to EPA in a timely manner.

Waivers: Standards can be waived if:

- the cleanup action is only part of a total cleanup that will attain the standard;
- compliance will result in greater risk to health and the environment;
- compliance is technically impracticable;
- an equivalent standard will be reached through another method; or
- compliance will not provide a balance between the need to protect health, welfare and the environment at a site and the availability of fund money to clean other dangerous sites. This applies only to superfund-financed cleanups.

In the case of state standards, EPA also can waive standards if:

- a state agrees with EPA's decision to waive the standard; or
- the state has not consistently applied the requirement.

State laws and standards: If EPA decides not to require a cleanup at a site to meet a state standard, the state can ask a court to require the cleanup to meet the standard. This applies at sites where EPA requires parties responsible for sites to conduct cleanup, and at federally owned or operated sites. The state must show that EPA's decision was not supported by substantial evidence.

When EPA chooses a cleanup action involving land disposal of superfund waste, a state requirement that could result in a statewide prohibition of land disposal of hazardous substances generally would not apply. The requirement would apply nonetheless if it met several criteria — including that it was based on hydrologic, geologic or other relevant considerations — and the state arranged for and paid the cost of out-of-state disposal.

State role: A state may enforce any federal or state standard that applies.

EPA must issue regulations providing for state involvement in choosing sites and cleanup actions.

Permits: No federal, state or local permit may be required for a long- or short-term cleanup (remedial or removal action) conducted entirely on the superfund site, where the remedial action is selected and carried out in compliance with the standards section.

Permanent cleanup and periodic review of sites: EPA must select cleanup actions that utilize permanent solutions and alternative treatment technologies or resource recovery technologies to the maximum extent practicable. If any hazardous substances remain at a site after cleanup, EPA must review the site every five years to ensure that human health and the environment are being protected.

Off-site standards: Superfund waste can be transferred only to facilities in compliance with the Solid Waste Disposal Act and other applicable federal and state requirements. Land disposal is permitted only at land disposal units not leaking into the groundwater, surface water or soil.

Effective date: New requirements do not apply to remedial actions (long-term cleanups) for which the record of decision (the written record of the cleanup action chosen and alternatives considered) was signed, or the consent decree (judicially approved cleanup settlement agreement) was lodged, before the date of enactment. For those signed or lodged within 30 days of enactment, EPA must certify that the action complies to the maximum extent practicable.

Cleanup schedule

The bill sets a non-binding schedule for EPA to evaluate whether sites are dangerous enough to warrant long-term cleanup (remedial action) under the superfund program, and sets a binding schedule for starting cleanup planning and actual cleanup work.

Preliminary assessments: The bill sets a non-binding goal for EPA to complete preliminary assessments of all potential superfund sites (those on EPA's computerized list as of enactment, some 25,000 sites) by Jan. 1, 1988, and to complete site inspections where warranted by Jan. 1, 1989.

NPL listings: Another non-binding goal calls for EPA to evaluate the sites within four years of enactment to determine which are dangerous enough to warrant being placed on the national priorities list for superfund program cleanup. The statement of managers says EPA is expected to add (or propose to add) 1,600 to 2,000 sites to the list and urges the agency to meet that goal by 1988.

Cleanup studies: EPA must ensure that cleanup planning studies are commenced (by EPA, states or parties responsible for waste sites) at no fewer than 275 sites within three years of enactment. If EPA fails, the agency must ensure commencement of an additional 175 studies in the fourth year and an additional 200 in the fifth year, for a total of 650 within five years of enactment.

Cleanups: EPA must ensure that substantial and continuous physical on-site cleanup (remedial action by EPA, states or responsible parties) begins at no fewer than 175 sites farms that handle any of approximately 370 extremely hazardous chemicals must participate in local planning.

Facilities that handle more than threshold amounts of dangerous chemicals must file as many as three kinds of reports for use by fire departments, local emergency planning committees, state emergency response commissions, environmental agency personnel and the public. The first two reports are to provide information on the health hazards, amounts and locations of chemicals handled at a facility. The third report, required annually from manufacturing facilities, discloses releases of extremely hazardous chemicals to air, water and soil. (For more, see Laws section of *Briefing Book*.)

Problems: Many reports criticizing the superfund program were issued in 1988 and 1989. Environmentalists and the Office of Technology Assessment said EPA was relying too heavily on temporary cleanup methods. The House Appropriations Committee said the agency relied too heavily on superfund rather than responsible parties to finance cleanups, failing to recover cleanup costs from polluters and contracting in a manner that invited waste and abuse. The General Accounting Office criticized EPA enforcement efforts and contracting procedures and said half of superfund statutory deadlines were not being met. OTA charged that contractors were doing work that should be performed by EPA.

After a 90-day review of the program, EPA Administrator William K. Reilly in June 1989 announced policy shifts to address those complaints and increase citizen involvement.

The Washington Post reported in June 1991 that nearly a third of the $200 million spent by superfund since 1988 for contractor cleanups had gone to compensate the companies for the costs of paperwork and coordination of their hundreds of cleanup projects. In response, Reilly appointed a national superfund director and a staff of 20 "trouble shooters" to improve program management, and announced steps EPA would take to limit management costs. Simultaneously, he announced an initiative to shorten the seven- to 10-year cleanup process by two to three years.

Current issues

Lender liability: The banking industry wants legislation to protect lenders from liability, under federal and state laws, for the cleanup of hazardous substances on borrowers' property. The industry says recent court interpretations of superfund law have left banks and other lenders increasingly vulnerable to liability for contamination they did not cause. For example, banks risk liability either by foreclosing on contaminated property or by participating in the management of a business. As a result, lenders are more reluctant to make loans to businesses, particularly small companies.

The Federal Deposit Insurance Corp. and the Resolution Trust Corp. also want liability protection. The FDIC, which insures bank deposits, and the RTC, which protects depositors of failed thrift institutions, fear that courts may hold them liable for cleanup of properties inherited from failed financial institutions.

Environmental groups contend that the lending industry is falsely threatening a crisis. They say proposals to help lenders would weaken a superfund liability system that is intended to promote rapid discovery and cleanup of existing sites and prevent new contamination problems. Chemical, oil and manufacturing industry groups oppose special relief for the banking industry.

EPA on April 24, 1992, issued a final rule to safeguard lenders and federal financial agencies, but those facing potential liability say legislation still is needed to protect them adequately.

Municipal liability: In at least 14 cases, industrial companies are suing municipalities and small businesses to force them to help pay for hazardous waste site cleanups on grounds that they contributed garbage to the sites. Garbage contains hazardous substances and can make cleanups more expensive by adding to the volume of waste that must be treated, the firms say.

Cities and towns say that hazardous substances generally constitute only one-half of 1 percent of municipal solid waste, and that trash did not create the toxic messes that must be cleaned up. Congress never intended those who generated, transported or disposed of garbage to be liable for cleanup of hazardous waste dumps, they say.

102nd Congress action

The Senate July 1, 1992, passed a bill (S 2733) to improve regulation of government-sponsored housing enterprises after adding amendments to limit the cleanup liability of lenders and municipalities. A corresponding House-passed bill contains no such provisions.

One Senate bill provision sponsored by Sen. Jake Garn (R-Utah) would protect private lenders from liability under federal waste laws for cleanup of environmental contamination on borrowers' property. Liability protection under both state and federal waste laws would be provided to federal financial agencies.

A second provision, by Sen. Frank Lautenberg (D-N.J.), would block lawsuits by industrial companies seeking to force municipalities and small businesses to help pay for cleanup of hazardous waste sites based on their contributions of solid waste or sewage sludge.

Lender liability hearings were held in 1991 by the House Banking subcommittee on policy research. A July 1991 hearing by the Senate Environment superfund subcommittee focused on a bill (S 1557) to prevent companies from suing municipalities for a portion of cleanup costs based on their handling or disposal of municipal solid waste. The House Public Works subcommittee on investigations held superfund hearings in late 1991 and 1992 to prepare for reauthorization efforts in the 103rd Congress. —*Jim Ketcham-Colwill (8/92)*

Background

In 1978, chemical waste dumped into the abandoned Love Canal decades earlier by Hooker Chemical Co. was discovered seeping into basements in Niagara Falls, N.Y. President Carter declared a federal emergency. Two hundred homes were boarded up and a school was closed. Studies found high incidences of miscarriages and low birth-weight babies among residents, and questions were raised about birth defects, cancers and other illnesses.

The public outcry prompted enactment of the Comprehensive Environmental Response, Compensation and Liability Act (PL 96-510) in December 1980. The law created a five-year, $1.6 billion "superfund" to pay for a national cleanup of hazardous waste sites, chemical spills and other releases of environmental contaminants. In 1986, after finding the problem much larger than anticipated, Congress passed amendments authorizing $8.5 billion over the 1987-1991 period.

Congress extended superfund taxes for four years, through the end of 1995, and the authorization of appropriations for three years, through fiscal 1994, as part of the fiscal 1991 budget reconciliation act (PL 101-508). The extension did not change taxes or annual funding levels.

The superfund law requires the Environmental Protection Agency to determine the most dangerous waste sites and gives the agency power to force those responsible to undertake a cleanup. To ensure prompt action, EPA can conduct cleanups itself using the superfund and later sue responsible parties to recover the costs. EPA also can put states in charge of cleanups.

The law also established a "strict liability" system that makes all those connected with a contaminated site potentially responsible for the entire cleanup cost, without regard to fault. Courts can divide the costs among liable parties based on fairness considerations, and the parties can sue each other for cleanup costs. Those liable include past and present owners and operators of contaminated property — as well as entities that generated the waste, transported it to the site and disposed of it.

EPA has received reports of approximately 36,000 sites that could prove hazardous. The most dangerous of those are put on the national priorities list for superfund program cleanup. As of February 1992, there were 1,183 sites on the NPL, and 52 sites were proposed to be added. About 100 sites are added each year.

The NPL sets priorities for long-term cleanups (remedial actions) by EPA, and for EPA's enforcement program to compel private parties to conduct the cleanups. Removal actions — emergency cleanups and other measures that generally take no more than $2 million and 12 months to complete — can be conducted both at listed and non-listed sites. Cleanups at federal facilities must be financed through federal agency budgets.

The cleanup effort will take decades. EPA has estimated the average cost of cleaning up an NPL site at $25 million. A December 1990 EPA report estimated that it would cost the superfund program $17.1 billion to clean up the sites then on the NPL. An October 1989 Office of Technology Assessment report estimated the national cleanup effort could cost $500 billion over many decades. OTA said that another 9,000 sites could be added to the NPL during the next 10 years — 10 times the EPA figure.

EPA's early administration of the superfund program prompted charges of sweetheart deals between EPA and industry, as well as political manipulation of superfund to help Republican candidates. By late 1983, superfund head Rita Lavelle and EPA Administrator Anne Burford had resigned. Lavelle was convicted of perjury.

As of March 31, 1992, an EPA progress report said, construction work necessary to carry out cleanup plans had been completed at 80 NPL sites, with half of those sites removed from the list because no further cleanup action was needed. Planning, design work or cleanup work was under way at more than 1,000 other sites.

Removal actions were completed at 1,916 sites, most of them not on the NPL.

Reauthorization: The 1986 Superfund Amendments and Reauthorization Act (PL 99-499), a statute that took three years to craft, expanded the program more than five-fold. The act reflects a compromise on the thorny question of who is responsible for hazardous wastes and who should bear the tax burden: the oil and chemical industries, or a broad spectrum of business and the public.

Highlights of SARA:

• The law authorized $8.5 billion for superfund over five years, through fiscal 1991. The money pays for cleanups, enforcement efforts and other program costs.

Of the total, $2.75 billion was to come from increased taxes on petroleum, $1.4 billion from existing taxes on feedstock chemicals (those used to make other chemicals), $2.5 billion from a new broad-based tax on corporate income, $1.25 billion from general revenues, $300 million from interest on money in the fund and $300 million from money recovered from companies responsible for waste sites.

• Cleanups must meet federal and state environmental standards that are legally applicable, but standards can be waived in specified circumstances. Permanent waste treatment is required to the maximum extent practicable.

• Other provisions established a schedule to accelerate the national cleanup effort, procedures to encourage negotiated cleanup settlements, a schedule for cleaning up federally owned or operated sites, and research programs on treatment technologies and hazardous substances.

• In response to the toxic gas disaster that killed more than 3,000 people in Bhopal, India, Title III required states to establish emergency planning districts with local committees to devise emergency plans. Industrial plants, businesses and

U.S. House of Representatives
SUBCOMMITTEE ON TRANSPORTATION
AND HAZARDOUS MATERIALS
COMMITTEE ON ENERGY AND COMMERCE
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Subcommittee on Transportation and Hazardous Materials

Fax #: (202) 225-0173

TO: Ms. Katie McGinty

FROM: Arthur Endres

DATE: 3/15/93

RE: Memo- Superfund

TOTAL NUMBER OF PAGES: 2
(INCLUDING COVER PAGE)

Please call (202) 225-9304
If you do not receive all of the pages.

1/2

FAX: 456-2710

ONE HUNDRED THIRD CONGRESS

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STAFF DIRECTOR/CHIEF COUNSEL

U.S. House of Representatives

SUBCOMMITTEE ON TRANSPORTATION
AND HAZARDOUS MATERIALS

COMMITTEE ON ENERGY AND COMMERCE
WASHINGTON, DC 20515-6121

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M E M O R A N D U M

TREY

TO: Ms. Katie McGinty
Director
White House Office of Environmental Policy

FR: Arthur P. Endres (225-9304)
Staff Director
Subcommittee on Transportation and Hazardous Materials
Committee on Energy and Commerce

DA: March 15, 1993

RE: Meeting to Discuss Legislative Reauthorization of Superfund

Chairman Swift indicated today he would be most anxious to sit in on the proposed staff meeting requested by Dick Frandsen in a March 11th fax to you. I hope that this does not present a problem.

Mickey Hornbacher, Mr. Swift's Scheduler (225-2506) will contact you tomorrow to arrange a mutually convenient time and location.

I advised Dick Frandsen of this development and he suggested I follow this procedure.

I look forward to meeting you and working with you on environmental issues this Congress.

purpose is to discuss (not substance) rather timing on this Reauthor. possibly March 29 4:00 it was the only

Cathy whom should I give this one to?

Trey said couldn't wait someone. We're hiring

If we could delay until after 4/2... -CZ 3/16

U.S. House of Representatives
Committee on Energy and Commerce
Room 2125, Rayburn House Office Building
Washington, DC 20515-6115

FAX COVER SHEET

DATE: 3/11/93

TO: Katie McGinty

FROM: Dick Frandsen

FAX NUMBER 456-2710

NUMBER OF PAGES (INCLUDING COVER) 2

COMMENTS:

If there are any problems with the transmission, please call (202) 225-3147.

o 86 reauthorized thru acinony - Conference commit - 8 mo

prevent for this year.

different views

Swift - retiring in 94 - Significant legacy
April 15

Conclude by July
legis. in Aug.

Faster than Senate

o need to know Administration
o ideal is that House/Senate act together on core bill.

o start early May - Carol
o end Oct w/ hearings. Nov/Dec on substance
Into in Jan - State of Union - a year later -
he's what I'm doing.
end point will be a lot faster.

When met w/ KM, appreciate WH/Carol key coordinate.

Substance - Swift no goal.

Lautenberg - key for state - 94 - large vulnerabilities. - ready [illegible] to reform etc.
sub - liability scheme - insurance ind. dumping - litigations cost.

2

House of Representatives
Committee on Energy and Commerce
Room 2125, Rayburn House Office Building
Washington, DC 20515-6115

March 11, 1993

MEMORANDUM

TO: Ms. Katie McGinty
Director, White House Office of Environmental Policy

FROM: Dick Frandsen Dick
Committee on Energy and Commerce
U.S. House of Representatives

SUBJECT: Meeting To Discuss Legislative Reauthorization of Superfund

Mr. Swift's staff of the Subcommittee on Transportation and Hazardous Materials and I would like to discuss the timing of Superfund reauthorization initiatives, the Subcommittee hearing schedule, and the Administration's environmental reauthorization priorities. In addition to me, those also attending the meeting will be Skip Endres, Subcommittee staff director, Anne Forristall and Len Barson of the professional staff of the Subcommittee.

We would like to arrange a meeting at your office at the earliest convenient opportunity.

We suggest the following dates: either Monday, March 15; Tuesday, March 16; Thursday, March 18; or Monday, March 22, 1993. If these dates are not convenient or you have any questions concerning this request, please contact me at (202) 225-3147.

- nervous about polluter pays principle - enviros want address root causes,

1) cut transaction

2) speed up

3) fair to municipalities,

$56m

hindrances cities brought into suits. industry lawsuits

Counting municipalities - brought suits on town - get more pissed off at suers instead of. Nat'l municipal. league of cities. to develop meetings commun/.

11. voluntary cleanup for economic dev. Marcus FPW like idea of it C/G on env/ec. are 2nd multi - use for economic development. States would get enormous benefits in NJ where

U.S. House of Representatives
SUBCOMMITTEE ON TRANSPORTATION AND HAZARDOUS MATERIALS
COMMITTEE ON ENERGY AND COMMERCE
WASHINGTON, DC 20515-6121

M E M O R A N D U M

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Director
White House Office of Environmental Policy

FR: Arthur P. Endres (225-9304)
Staff Director
Subcommittee on Transportation and Hazardous Materials
Committee on Energy and Commerce

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possibly March 29 4:00 it was the only

PDM – Could you coordinate & get me some briefing materials. They really want to discuss timing of it.

U. . House of Representatives
Committee on Energy and Commerce
Room 2125, Rayburn House Office Building
Washington, DC 20515-6115

March 11, 1993

M E M O R A N D U M

TO: Ms. Katie McGinty
Director, White House Office of Environmental Policy

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Committee on Energy and Commerce
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United States Senate
Committee on Environment and Public Works
Washington, D.C. 20510-6175

Telecopier: (202) 224-2322 Office: (202) 224-3597

TO: Pam McElwee FAX: 456-2710

OFFICE: White House PHONE: 456-6204

FROM: Leonard Shen DATE: 3/26/93

NUMBER OF PAGES 9 + THIS COVER SHEET

MESSAGE/COMMENTS:

ACTION ITEMS:

SUPERFUND TRANSACTION COSTS: HOW MUCH ARE THEY, WHY ARE THEY INCURRED, HOW CAN THEY BE REDUCED?

How much are Superfund litigation costs--really?

* In the only independent study to date, RAND Corp. has found that from 1985-89, the vast bulk (80%) of large companies' expenses on Superfund went to actual cleanup, and only 20% to litigation costs.

* Even less (16%) was spent on litigation costs at sites where all cleanup had been completed.

* By contrast, insurance companies spent 88% of their Superfund expenses on litigating against policyholders and the government.

* Preliminary studies indicate that medium and small sized companies spent about 30% on litigation costs and 70% on actual cleanup.

* Even these figures likely overstate the ratio of litigation to cleanup costs.

  - RAND examined only the period from 1985-89. The Superfund law was reauthorized in 1986, creating new terms and procedures that were naturally litigated and settled by the courts in the years immediately following enactment of the law. The analysis was done at a point where transaction costs were highest (since liability issues were still being resolved) but cleanup costs had not yet ramped up.

* Therefore, if one looks across the full lifetime of the Superfund program, the actual ratio of transaction to cleanup costs is likely to be much lower. Indeed, RAND found transaction costs to comprise only 16% at those sites which had progressed to completion.

Are these costs excessive or unique to Superfund?

* Superfund transaction costs are fully in line with -- or less than -- many other fields of tort litigation. E.g., RAND has found that 61% of asbestos-related expenses were spent on litigation and only 39% on paying the claims. RAND has also found that 50% of all expenses related to the average general tort case is spent on litigation and the other 50% on paying tort claims. Given the complexity of litigating a Superfund liability case and the high stakes involved, the 16-20% spent by companies on Superfund transaction costs is actually remarkably low.

Why have insurers spent so much more on transaction costs compared to even the polluters themselves?

* Three types of Superfund transaction costs: 1) between the government and the potentially responsible parties, or "PRPs", 2) among the PRPs when they dispute with each other to determine their respective liability, and 3) between PRPs and their insurers, when the PRPs seek coverage for their Superfund liability.

* Government-PRP litigation. This is the smallest category. Only 13% of the Superfund is spent by the government on enforcement, and for every dollar spent by the U.S. on enforcement, it obtains an 8 to 1 return in PRP cleanup dollars.

* PRP-PRP litigation. Although significant PRP resources are spent on disputing with other PRPs over their respective share of liability, RAND has shown that these costs are dwarfed by the amount these PRPs spend on actual cleanup. Furthermore, much of those transaction costs arise at the relatively few Superfund sites where there are many responsible parties at a single site -- with more parties, there are more opportunities for disputes over who owes how much.

* Insurer-PRP litigation. A large source of transaction costs is the litigation between insurers and policyholders who are Superfund PRPs. The basis for insurance coverage of Superfund liability lies in the thousands of standard form "Comprehensive General Liability" (CGL) policies issued by insurers over the past few decades. An adverse court decision on one CGL policy could therefore provide direct precedent for many other policies following the same standard form language in the same court jurisdiction. Insurers have consequently "fought to the death" over Superfund CGL policy cases. When they win, the transaction costs are 100%; their payment for cleanup is 0%.

* Insurer-policyholder litigation is also high because the insurers who drafted the original CGL policies left numerous ambiguities, requiring litigation over a dozen different terms and issues regarding the applicability of those policies to Superfund liability. The large body of caselaw is split down the middle over the meaning of those ambiguous terms.

* One of the most litigated ambiguities is the meaning of the "pollution exclusion" to coverage that insurers inserted into CGL policies in the early 1970s. To obtain permission to introduce this pollution exclusion at that time, the insurers represented to regulators that the pollution exclusion was not intended to bar coverage of gradual pollution -- the type of pollution at the root of many Superfund sites. That representation has come back to haunt the insurers, who are now facing enormous Superfund exposure and naturally insist today that the pollution exclusion was intended to bar coverage of gradual pollution.

What are the benefits of the liability scheme that produces this litigation?

* Superfund transaction costs arise in large part from the "polluter pays" principle: the policy of making the people responsible for pollution at a site, or their successors, liable to clean it up.

* Holding PRPs liable saves taxpayers' dollars: either a site is cleaned up using the PRPs' money, or it must be cleaned up using taxpayers' money. Thus, the $7.4 billion of Superfund cleanup that responsible parties are now performing saves the American taxpayers, or others with absolutely no nexus to a Superfund site, from having to pay for those cleanups.

* Although the PRPs may try to pass on these costs to their customers, they suffer an appropriate competitive disadvantage when they do so. The tough liability scheme is forcing them to internalize the costs of their pollution, which otherwise would be completely externalized to the rest of society, and it creates a powerful market force to drive irresponsible PRPs out of business.

* The threat of liability also encourages pollution prevention and waste minimization: if a company fears that its improper disposal of waste will result in liability, it will try to improve its manufacturing process to reduce the amount of toxic waste that it produces, and it will handle the waste that it does produce in a careful manner. The result is to prevent future Superfund sites from ever being created.

How can Superfund transaction costs be reduced?

1. Provide strong incentives for Alternative Dispute Resolution (e.g., arbitration) for determining each party's fair share of payment. This will take the issue out of the courts and speed up the determination of each PRP's fair share. By using ADR at an early point in the cleanup process to resolve liability early, there would be less of a need for parties to hire lawyers just to watch out for their interests over the several years typically needed to study and clean up these large, complex sites.

2. Exempt parties who currently bear a disproportionate amount of transaction costs compared to their actual liability.

a) Cut de minimis parties out of the system in return for a sum certain tax payment. Since the fair share that these de minimis parties would end up paying would be very small, it makes sense to eliminate them from the scheme rather than force them to spend on lawyers an amount that could end up being even greater than their underlying liability.

b) Exempt/reduce the shares of towns, small businesses, churches, and others who sent only ordinary household trash to landfills that became Superfund sites. Thousands of these parties, never pursued by EPA, have been sued by larger PRPs seeking to share Superfund costs as broadly as possible.

c) Reduce the share of municipalities who owned or operated landfills that became Superfund sites. These towns were typically performing a public service, sometimes required by state law, in running these sites and thus should not be held to the same liability as commercial landfill operators.

3. A large source of transaction costs (an estimated $400+ million spent by insurers fighting policyholders and the government) could be diverted to cleanup by a) relieving insurers of having to indemnify their individual Superfund policyholders, but b) adding to the existing Superfund the amount they would otherwise have spent on transaction costs and on indemnifying victorious policyholders. This expanded fund (perhaps adding $1-2 billion a year from the insurance industry) could then be used to pay for the share of parties exempted above: de minimis parties and the towns/businesses which sent household trash to sites.

* This compromise balances the competing concerns of industry, insurers, and environmentalists. Industry will reduce its transaction costs under the ADR system and in the many cases where it would qualify for the de minimis or household garbage exemption. Insurers will obtain a sum certain limit on their currently unknown liability, and will be able to factor a fixed levy for the Superfund into their future premiums. Environmentalists will have preserved the basic "polluter pays" principle, with its pollution prevention and deterrent effects.

__What about abolishing the liability scheme and turning the whole program into a broadly-funded public works program?__

A few of the major Superfund insurers headed by the American International Group (AIG) have set aside $6 million to lobby for abolition of the Superfund liability scheme and creation of a "National Environmental Trust Fund" that would be used to clean up __all__ wastes sent to a Superfund site prior to December 31, 1986. AIG has suggested funding the NETF through either an increase in the alternative corporate minimum tax (estimated to require at least an 800% tax increase to provide the equivalent of the current Superfund), or an increase in insurance premiums charged to all companies.

The AIG proposal, which has so far been opposed by other insurers, virtually all of industry, States, towns, and the environmental community, suffers most strongly from the fact that it will replace the current "polluter pays" principle with a broad-based tax increase -- a politically unpopular double whammy. But in addition, the AIG proposal falls short of all three of its stated goals of eliminating transaction costs, improving the fairness of Superfund, and speeding cleanups.

I. __AIG will only generate new transaction costs, arising from:__

A. Litigating which portion of waste sent by any person to a site qualifies for the 1986 cutoff date (stimulating extensive discovery/litigation over who sent what waste when to a site).

B. Litigating other terms/constitutionality of the new law.

C. Litigating two liability systems at the same site: the current liability system for wastes sent after the cutoff date, and the public works system for wastes sent beforehand.

D. Litigating at the same site a new federal liability system inconsistent with the two dozen State "mini-Superfund" laws that were modeled closely on the current Superfund law.

E. Deciding whether and how to refund the $7 billion spent by or committed by thousands of parties over the history of the Superfund program. (Without such a refund, the AIG proposal would send a message that rewards parties who refused to clean up under the "old" Superfund and penalizes companies that stepped forward and did the cleanup under the prior law.)

II. __AIG will exchange the "unfairness" of the current joint and several liability scheme for another unfairness.__

A. The AIG scheme destroys the "polluter pays" principle. It charges parties who had absolutely no connection to a site for the mess created by someone who may even have acted with gross negligence.

B. AIG relies on an arbitrary cutoff date that unfairly penalizes parties who sent wastes a day after the cutoff date, yet were similarly or even better situated than parties who sent waste prior to the cutoff. AIG has admitted that the cutoff date was chosen as much to include in the public works program as many Superfund sites as possible as for any other rationale.

C. By creating a finite cleanup fund, AIG will create competition among sites based on cost, not just threat.

III. <u>AIG will slow down, not speed up cleanups.</u>

A. AIG argues that it will speed up cleanups by eliminating the litigation associated with the existing liability scheme. But as pointed out above, it will in fact create many new sources of litigation and transaction costs. The sheer disruption to the program caused by an entirely new liability system will certainly slow the cleanup process over the next few years of transition.

B. AIG also incorrectly assumes that the existing litigation from enforcement actions slows down the cleanup process. EPA studies show that sites where EPA has brought an enforcement action take only 3-6 months longer to cleanup -- over the eight to ten year timespan for cleaning up sites -- than sites where there is no enforcement and the Superfund performs the entire cleanup.

C. This is because EPA has rigid timeframes -- some set by statute -- that control the speed of the cleanup process and that are changed only in very rare cases because of ongoing litigation or negotiation with responsible parties.

D. The current law produces two forms of cleanup -- those performed by EPA using Superfund trust fund monies (about $400 million in FY 1992), and those performed by PRPs using their own money under the compulsion of EPA enforcement actions (about $1.5 billion in FY 1992). AIG's proposal, by eliminating the liability scheme, would eliminate the second, much larger source of private-sector funded cleanups.

E. While the current law insulates the private sector-cleanups generated by the government's Superfund enforcement program from the annual appropriations cycle, under AIG <u>all</u> cleanups each year will be subject to yearly appropriations. The amount of cleanups will be determined by the amount the appropriations committees provide out of the trust fund.

F. Total conversion from private sector to a public works program will increase the size of the federal bureaucracy needed to run such a program and multiply the potential for waste, fraud, and abuse by poorly managed government cleanup contractors.

FRANK R. LAUTENBERG
NEW JERSEY

COMMITTEE:
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DEFENSE
FOREIGN OPERATIONS
VA, HUD AND INDEPENDENT AGENCIES

United States Senate

WASHINGTON, DC 20510-3002

COMMITTEE:
BUDGET

COMMITTEE:
ENVIRONMENT AND PUBLIC WORKS

SUBCOMMITTEES:
SUPERFUND, OCEAN AND WATER PROTECTION, CHAIRMAN
ENVIRONMENTAL PROTECTION
WATER RESOURCES, TRANSPORTATION AND INFRASTRUCTURE

HELSINKI COMMISSION

March 26, 1993

*Christian -- please remind me to call Peter, Scher & Lautenberg's Staff re: their superfund hearing. Please also set up a meeting w/ Mike Vandenberg this week to discuss Superfund. TM

The Honorable
Bill Clinton
The White House
Washington, D.C.

Dear Mr. President:

In the State of the Union and other speeches in recent weeks you have expressed concerns about the Superfund toxic waste cleanup law. As Chairman of the Senate Subcommittee with jurisdiction over the Superfund program, I look forward to working with the Administration as the Congress sets out to extend and review its authorizing statute. In connection with this undertaking, I have enclosed materials on some of the issues you have raised regarding Superfund.

While I would like to see less litigation, independent studies have shown that less than 20% of companies' Superfund resources go toward legal expenses, with the vast bulk of monies going to actual cleanup. Superfund transaction costs are fully in line with, or less than, the cost in many other fields of tort law. The Superfund liability scheme has created strong incentives to minimize production of hazardous waste and prevent pollution through the use of innovative technologies. It also avoids loading the lion's share of cleanup costs on the taxpayers, and retains responsibility for clean up with the polluter.

I agree that we should reduce Superfund transaction costs and provide the most effective incentives to prevent pollution. Congress should also reform the law to see that less money is spent on litigation and more resources are devoted to cleanup. But analysis of the program indicates that its fundamental goals and liability system -- based on "polluter pays" principles -- are sound.

I look forward to working with Carol Browner and your Administration in developing administrative and legislative reforms for one of the country's largest environmental programs. Of course, I would very much like to discuss these and related issues with you when the Administration moves toward formulating its proposal for Superfund reauthorization.

Sincerely,

enclosure
cc: Vice President Al Gore
Kathryn McGinty
Carol Browner

OFFICE ON ENVIRONMENTAL POLICY

KATIE McGINTY,
DIRECTOR AND DEPUTY ASSISTANT TO THE PRESIDENT

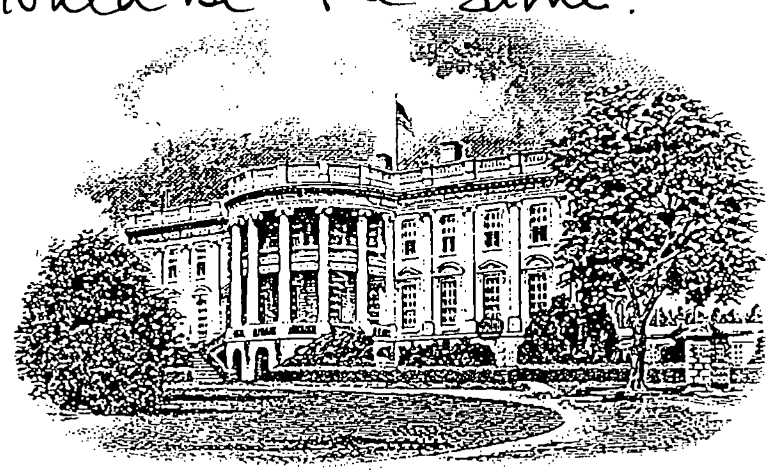
TO: Leonard Shen

FROM: Pam McElwee

DATE:

number of pages including cover: 2

COMMENTS: Here's our draft response that we sent to the President for signature -- we never got a signed copy back but the text should be the same.



PHONE - (202) 456-6224 FAX - (202) 456-2710
ROOM 360 OLD EXECUTIVE OFFICE BUILDING
WASHINGTON, D.C. 20501

April 12, 1993

Dear Senator Lautenberg:

Thank you for your letter and supporting materials regarding the reauthorization of Superfund. It was good hearing from you.

I agree that we should work toward reducing Superfund transaction costs and providing effective incentives for pollution prevention. The Vice President and I are commited to the "polluter pays" principle and will work to see Superfund reauthorized in that vein. I very much appreciate your forward thinking work on this issue.

I look forward to working with you on these matters in the future.

Sincerely,

BC

FRANK R. LAUTENBERG
NEW JERSEY

COMMITTEE:
APPROPRIATIONS

SUBCOMMITTEES:
TRANSPORTATION, CHAIRMAN
COMMERCE, JUSTICE, STATE AND JUDICIARY
DEFENSE
FOREIGN OPERATIONS
VA, HUD AND INDEPENDENT AGENCIES

United States Senate
WASHINGTON, DC 20510-3002

COMMITTEE:
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ENVIRONMENT AND PUBLIC WORKS

SUBCOMMITTEES:
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WATER RESOURCES, TRANSPORTATION AND INFRASTRUCTURE

HELSINKI COMMISSION

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REPLY TO:

506 HART SENATE OFFICE BUILDING
WASHINGTON, DC 20510-3002
(202) 224-4744

ONE GATEWAY CENTER SUITE 1001
NEWARK, NEW JERSEY 07102-5311
(201) 645-3030

BARRINGTON COMMONS
208 WHITE HORSE PIKE
SUITES 18-19
BARRINGTON, N.J. 08007-1322
(609) 757-5353

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enclosure
cc: Vice President Al Gore
Kathryn McGinty
Carol Browner

ENVIRONMENTAL PROGRAMS

REFORM SUPERFUND

Proposed Program

Superfund (or CERCLA) governs the clean-up of contaminated waste sites and abandoned industrial facilities. It is funded by a special tax and contains elaborate provisions for imposing clean-up liability on private parties. Reforms in the law would include:

- The tax base for the Superfund Trust Fund would be increased through higher excise taxes on chemical feedstocks and petroleum products and/or increases in the broad environmental surcharge on corporate income taxes.

- The expanded Fund would be used for greater "mixed funding" of clean-ups -- i.e., to cover the share of clean-up costs attributable to unknown, defunct or bankrupt waste generators.

- EPA would also be directed to develop guidelines for allocating clean-up costs among identified parties. These guidelines would define how such factors as the volume and toxicity of the waste contributed to a site should be weighted in the cost apportionment process.

- Efficient administrative dispute-resolution procedures would be created for resolving allocation issues among potentially responsible parties.

- The scientific and engineering base for Superfund clean-ups would be improved to encourage development of less costly, more cost-efficient clean-up techniques.

- EPA would be directed to revise the National Contingency Plan (NCP) to set more realistic clean-up goals which protect public health but reduce the scope of the clean-up effort at contaminated sites.

- EPA would also be directed to streamline the NCP's procedures for site assessment and preparation of remediation plans.

- Lenders and municipalities would be exempted from Superfund liability.

Justification for Proposal

Disenchantment with the current Superfund clean-up and liability scheme is nearly universal. More than $14 billion has been expended or committed to date for clean-up efforts, yet most of the sites on the national priority list (NPL) have not been addressed. Moreover, 33,000 potential Superfund sites have been identified, and estimates for potential clean-up costs are as high as $500 billion. Critics of the existing Superfund program complain that too much money is being spent on resolving allocation and liability issues among potentially responsible parties. This problem is attributed to the broad liability provisions of the current law and the lack of clear standards for apportioning clean-up responsibility. Another criticism of the program is that inordinate resources are now devoted to site assessment and to costly remedies that are needlessly protective. It is asserted that a more flexible clean-up approach could achieve adequate public protection at a fraction of the current cost.

As part of an overall program for Superfund reform, partial relief from liability should be provided to lenders and municipalities, who have complained bitterly about their involvement in the Superfund clean-up process.

Winners and Losers as a Result of Proposal

Losers would include contractors and attorneys, whose share of Superfund dollars would be reduced. Local communities and environmental groups might be losers if they felt that the scope of public protection from contaminated waste sites was being limited. Companies forced to pay higher taxes to support the Superfund might consider themselves losers, but could benefit greatly if their overall Superfund liabilities are reduced. Winners would include the taxpayer (assuming long-term savings are achieved) and many Potentially Responsible Parties (PRPs) at Superfund sites (assuming that transaction costs are reduced and clean-up liabilities are apportioned more equitably).

State and Local Impact of Proposal

None.

Any Political Landmines Associated with Proposal?

While the need for Superfund reform is widely recognized, intense differences of opinion exist on how to achieve it. Groups disappointed by the direction of reform efforts will be unhappy.

Campaign Positions that Affect the Proposal

Superfund reform is a campaign proposal.

Funding Summary

(Dollars in Billions)

	1994	1995	1996	1997	1998	Cumulative Five-year Deficit Impact
Revenue	$5.6	$5.6	$5.6	$5.6	$5.6	$28
Budget Authority (= or -)	—	—	—	—	—	
Outlays (+ or -)	+ $5.6	+ $5.6	+ $5.6	+ $5.6	+ $5.6	+ $28

Under the above proposal, the size of the Superfund would increase, as would its tax base. EPA's Superfund-related budget would increase as well, particularly if the Agency must establish an administrative dispute-resolution procedure for resolving apportionment disputes. We are assuming that total tax collections (divided between oil/chemical companies and all corporations) will increase by 400 percent above 1991 levels of $1.4 billion. These increased revenues would be matched by increased expenditures for Superfund cleanups.

ENVIRONMENTAL PROGRAMS

CREATE A SOLID WASTE REDUCTION PROGRAM

<u>Proposed Program</u>

The existing hazardous waste management program under RCRA would be expanded to promote source reduction and waste minimization. New programs would include:

- Required reporting for the Toxic Release Inventory (TRI) would be expanded to cover more industries and additional chemicals and to require greater public disclosure of source reduction and waste minimization activities.

- Permitting systems under RCRA, the Clean Water Act and the Clean Air Act would be expanded to require the development of facility-specific programs for developing pollution prevention plans, implementing these plans and reporting to EPA or state agencies on waste minimization progress. Guidelines for developing such programs would be issued by EPA and would include waste minimization targets for different industries. Incentives would be provided for exceeding EPA goals. These might include extensions of compliance deadlines or other regulatory requirements (as in the new Clean Air Act) or marketable permit schemes whereby plants exceeding EPA source reduction targets could sell permit allowances to firms lagging behind these targets.

- RCRA provisions governing industrial recycling of hazardous waste would be reexamined and streamlined.

- Federal facilities generating waste would be subject to the same emission reporting and source reduction requirements as the private sector.

Justification for Proposal

Source reduction and waste minimization represent important new environmental tools. They are based on the concept that preventing pollution at the source is ultimately more effective and less costly than end-of-pipe controls to minimize the release of waste into the environment. If industry can avoid creating waste, the efficient use of raw materials will increase and waste management and disposal costs would be reduced. In addition, end-of-pipe controls often have the effect of simply transferring waste from one environmental medium to another. For example, the incineration of solid or liquid waste from industrial processes creates harmful air emissions. In the last few years, new regulatory requirements and government/private sector initiatives have demonstrated the value of source reduction programs. An expanded national effort in this area should increase the benefits that have already been achieved.

Winners and Losers as a Result of Proposal

Losers would be companies or industries subjected to overly stringent targets for source reduction and increased compliance costs. Winners would be companies who achieve increased operating efficiencies and lower waste management costs because of source reduction efforts.

State and Local Impact of Proposal

Could increase state regulatory burdens if implementation is a state function.

Any Political Landmines Associated with Proposal?

Proposals for source reduction and increased emissions reporting were a focal point for the debate on RCRA reauthorization during the last Congress. Sharp disagreements among affected groups prevented new legislation from being enacted.

Campaign Positions that Affect the Proposal

This is a campaign proposal.

Funding Summary

(Dollars in Billions)

	1994	1995	1996	1997	1998	Cumulative Five-year Deficit Impact
Revenue	NA					
Budget Authority (= or -)	—	—	—	—	—	—
Outlays (+ or -)	+ \$.04	+ \$.04	+ \$.04	+ \$.04	+ \$.04	+ \$.16

Increased funds would be required to support expanded regulatory programs of EPA and state agencies. We are assuming a \$40 million increase in EPA's budget.

Katie –

I thought you would
be interested in the
final version of the
Environmental issue papers
we prepared. I believe
(but am not sure) that
they were included in
a comprehensive "new
initiatives" book to be
presented to Gov. Clinton

I also wanted to
thank you for your
thoughts on my paper
-- as I'm sure you've
seen, I changed it quite
a bit, largely to reflect
your reactions. I've
seen your paper and it
looks real good although
I'm not done yet.

I hope we can continue
working together and can spend
more time sharing thoughts.

By the way, Mark
Creighton was very helpful!

See you soon –

Bob [illegible]

ENVIRONMENTAL PROGRAMS

PROVIDE REVENUE-NEUTRAL TAX INCENTIVES THAT FAVOR USE OF RECYCLED MATERIALS

Proposed Program

Increasing the national recycling rate will minimize the generation of waste and help reduce the enormous burdens now placed on the nation's systems for solid and hazardous waste management. Tax incentives encouraging recycling would be one element of a comprehensive national recycling program.

To implement a tax credit scheme, EPA could be given new authority under the Resource Conservation and Recovery Act (RCRA) to develop recycling goals for particular industries (plastics, glass, batteries, rubber, newsprint and metals). For each industry, EPA would set progressive year-by-year recycling goals. These could involve specifying that the finished product contain certain percentages of recycled material or that manufacturers achieve certain minimum "take back" goals for discarded products. Companies that meet or exceed the EPA targets would receive a tax credit. Those that fail to meet the targets would pay a surtax. By adjusting the recycling targets, credits and surtaxes on a year-by-year basis, EPA and the IRS would attempt to assure that net tax revenues neither increase nor decrease. A program of tradable credits would also be introduced whereby firms that have exceeded EPA's recycling goals could sell unused tax credits to firms that have been unable to meet these goals.

In addition to creating tax incentives, a program to encourage recycling would have the following elements:

- More stringent federal guidelines for procuring recycled materials would be established.
- Regulations would be issued requiring local communities to meet certain minimum standards for source-separating their waste.
- New requirements for the labeling of products made from recycled materials would be issued.
- The federal government and private sector would jointly sponsor demonstration projects to develop new recycling technology.

Justification for Proposal

The recycling rate in the U.S. is low compared to other industrialized countries, even though local governments and some industries have made great strides in developing recycling programs. As a result, the burdens now being placed on the U.S. system for managing solid and hazardous waste are enormous. Recycling can reduce the amount of waste sent to landfills or incinerated, facilitate recovery of hazardous substances, promote energy efficiency by decreasing consumption of virgin raw materials, and ultimately lower manufacturing costs.

It would be possible to increase recycling by establishing national recycling goals which would be directly enforceable by EPA or states. Such an approach, however, would require a significant expansion of existing regulatory programs. The use of tax incentives to encourage compliance with non-mandatory guidelines could achieve recycling goals more efficiently and with less government intervention.

Winners and Losers as a Result of Proposal

Losers would be industries or individual companies who cannot use recycled products without significant investment in R&D or plant modifications. Winners would be industries or plants that already have aggressive recycling programs. In addition, new business opportunities may be created for entities that process recycled products and sell raw materials back to primary producers.

State and Local Impact of Proposal

Since local governments are extensively involved in the handling of municipal waste and implementation of recycling programs, any new federal initiatives could greatly affect their activities.

Any Political Landmines Associated with Proposal?

If recycling goals are too ambitious, strong opposition would be mounted by industry and local government.

Campaign Positions that Affect the Proposal

This is a campaign proposal.

Funding Summary

(Dollars in Billions)

	1994	1995	1996	1997	1998	Cumulative Five-year Deficit Impact
Revenue	NA					
Budget Authority (= or -)	=					
Outlays (+ or -)	+ $0.03	+ $0.03	+ $0.03	+ $0.03	+ $0.03	$0.15

Assuming tax incentives and surtaxes offset each other, the program would be revenue-neutral. Development of implementing regulations, however, would be resource-intensive for affected agencies. We are assuming an annual increase of $30 million in agency budgets.

March 27, 1993

MEMORANDUM FOR KATIE

FROM: PAM 1502L

SUBJECT: SUPERFUND MEETING WITH CONGRESSMAN SWIFT

You will be meeting with Cong. Swift (D-WA) and staff of Swift's subcommittee on Transportation and Hazardous Materials of House Energy and Commerce to discuss timing of reauthorization of Superfund. Staff members will include Dick Frandsen, Skip Endres, Subcommittee staff director, and Anne Forristall and Len Barson of the professional staff of the Subcommittee. Jim Cumberland.

BACKGROUND:

In 1980, prompted by concern over Love Canal, NY, Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act (CERLA). The law created a five-year, $1.6 billion "superfund" to pay for a national cleanup of hazardous waste sites, chemical spills and other releases of environmental contaminants.

Superfund was then reauthorized in 1986 to add $8.5 billion to the clean up effort from 1987-1991. The reauthorization, however, was characterized by much acrimony and a three year delay. For example, the conference committee that met to resolve the House and Senate passed versions had to meet for 8 months and took the personal involvement of the Majority Leader to resolve.

Superfund requires the EPA to determine the most dangerous waste sites in the nation and gives the agency power to force those responsible to undertake a cleanup. To ensure prompt actions, EPA can conduct cleanups itself using the superfund and later sue responsible parties to recover the costs. EPA also can put states in charge of cleanups. The law also established a "strict liability" system that make all those connected with a contaminated site potentially responsible for the entire cleanup cost, without regard to fault. Courts can divide the costs among liable parties based on fairness consideration, and the parties can sue each other for cleanup costs. Those liable include past and present owners and operators of contaminated property - as well as entities that generated the waste, transported it to the site, and disposed of it. Although superfund is generally considered excessively litigious, remember that memo we did for the President that noted that only about 20% of superfund costs -- both government and private -- go to litigation; the rest goes to clean up. However, insurance companies do spend about 80% of their superfunds costs on litigation.

The most dangerous of the contaminated sites are put on a national priorities list for cleanup. As of 1992 there were 1,200 sites on the list. EPA has estimated the average cost of cleaning up an NPL site at $25 million. A 1990 EPA report estimates that it would cost the superfund program $17.1 billion to clean up the sites than on the NPL.

CURRENT ISSUES:

These are some of the substantive issues that reauthorization will have to address -- in addition to of course setting funding levels for the program for the next five years.

o Lender liability. The banking industry wants legislation to protect lenders from liability, under federal and state laws, for the cleanup of hazardous substances on borrowers property. The industry says recent court interpretations of superfund law have left banks and other lenders increasingly vulnerable to liability for contamination they did not cause. The chemical, oil and manufacturing industry groups oppose special relief for the banking industry. So do enviros because they feel it would weaken the existing liablity system by slowing rapid discovery and clean up.

o Municipal liability. In several sites across the country, industrial companies are suing municipalities and small businesses to force them to help pay for hazardous waste site cleanups on grounds that they contributed garbage to the sites. The municipalities counter that municipal solid waste in superfund sites contributes negligibly to the clean up problems and that the industries are just trying to find scape goats for the problem. A bill sponsored by Sen. Lautenberg that would have exempted municipalities from liability and blocked lawsuits by industrial companies seeking to force payment from municipalities for cleanups passed the Senate in the 102nd Congress but did not pass the house. He has reintroduced the bill this year and I have attached a summary of it.

o Voluntary cleanup. Lautenberg will be introducing soon, along with Baucus and Chafee, a bill to speed cleanup of the 100,000 non-priority hazardous contamination sites that are not destined for cleanup under Superfund. The bill would allow a government "signoff" for privately funded, voluntary cleanups. Any person who desires a government signoff on a cleanup that they are willing to perform would be able approach the state and enter into an agreement to perform a cleanup under government supervision. In return, the private party would agree to pay the oversight costs of the government. The government "stamp of approval" would supposedly go a long way toward assuaging the concerns of lenders, investors and buyers of once-contaminated property. Several states, such as New Jersey, have tried this approach and it seems to be fairly successful in getting small businesses and investors to look at cleanup of property.

CLINTON PLAN:

The budget document claims that we will save $109 million by 1997 by increasing private sector cleanup of sites. Currently, the private parties pay about 69% of cleanup costs. OMB estimated that by increasing that to about 70-71% through "more aggresive use of Superfund's enforcemnt mechanisms" we could save the government money. OMB's knowledge of how this proposal would work is really sketchy right now, but I guess they want to preserve Federal superfund money only for sites where there are NO viable private parties to untake the clean up. In other sites, the government would force PRP's to do all the cleanup themselves.

TIMING:

There are several dynamics at work here. Lautenberg has control over Superfund on the Senate side; Swift on the House. My sense is that they aren't well coordinated on this issue -- it may take intervention from the Administration to work through timing of reauthorization.

For example, Swift has announced his retirement in 1994. Staffers suspect that he will try to ram through a Superfund program this year as a last crowning achievement. He would like to begin hearings April 15, conclude hearings by July, and have legislation ready by August.

However, Lautenberg very much disagrees with this schedule. They would not like to begin hearings until early May, end in October, and not introduce legislation until Jan of 1993 (they'd like to coincide with State of the Union especially in light of Clinton's remarks about Superfund during this years state of the union.) Lautenberg's folks are really looking to us to help broker a timing plan b/w the House and Senate.

Political motives also are prompting Lautenberg's scheduling as well. He's up for reelection in 94 and it will be a very tough year for him since the unpopular Democratic governor Florio is also up for reelection and Lautenberg may feel some backlash from that race. Because N.J. has a large proportion of Superfund sites, Lautenberg would like to announce a comprehensive reauthorization in the middle of his campaign for the voters in 1994. His top priorities for the reauthorization are to cut transaction costs, speed up the cleanups, and be fairer to municipalities.

Swift will try to persuade you to go with his schedule. Its up to you how you want to respond. Lautenberg's folks suggested our office help establish a working group on reauthorization with House and Senate folks, us and EPA to create a mutually agreeable timeline. If you are interested in that idea you might bring it up with Swift.