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Superfund [1]

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10/30/92
Lautenberg

**A CLINTON-GORE SUPERFUND REFORM AGENDA:
SLASH LEGAL EXPENDITURES AND WASTE
SPEED UP CLEANUPS
ENHANCE FAIRNESS
JOB CREATION, TECHNOLOGY, AND ECONOMIC DEVELOPMENT**

Established in 1980, and reauthorized in 1986, the Superfund program authority expires in 1994 and the Superfund tax expires in 1995. Reauthorization of Superfund will be an early and major focus of the Senate Environment and Public Works Committee in the 103rd Congress. Congressman Dingell has announced his intention to move quickly to open the Superfund debate when the Congress reconvenes in January.

For the past two years, insurers and polluters have been actively promoting schemes to eliminate strict, joint and several liability under Superfund and shift the burden of cleanup to taxpayers. With the Congress poised to take up Superfund reauthorization, industry work groups and conferences have been established and are already meeting to develop broad support for radical changes to the Superfund program. The goal of such efforts is to relieve insurers and responsible parties from liability, and to shift clean up expenses to the public.

The Clinton-Gore Administration should move quickly to halt the momentum of these efforts and define the Superfund debate on its own terms. It should work with key Congressional Democrats, and a coalition of core Democratic constituencies and State enforcement officers to address the problems of the Superfund program while ensuring that its original goals are preserved.

CUT LEGAL COSTS: Shift spending from lawyers to cleanup.

SOLUTIONS:

- a) Authorize greater protections and possibly an automatic out from liability for de minimis or the even smaller "de micromis" contributors to take them entirely out of the transaction costs loop. (Short term agency policy, resource adjustments, and long term legislation)
- b) Require Alternative Dispute Resolution in appropriate cases, drawing from a national panel of ADR professionals, to short circuit the litigation process. (Short term agency policy, resource adjustments, or Executive Order, to be supported by long term legislation)
- c) Consider charging attorneys' fees to parties who, after receiving the judgment of an ADR panel, nonetheless choose to litigate and end up receiving essentially the same judgment from a court (as in Michigan tort ADR law, which has cut in half the amount of time on tort litigation). (Long term legislation)

d) Strengthen "carrots and sticks" to encourage settlement within strict timetables and punish recalcitrants who choose protracted litigation (e.g., along the lines of treble damages "bounty hunter" provisions currently used in NJ and CA, discounts for early settlers and surcharges for late settlers, use of mixed funding or broader use of contribution protection in exchange for earlier or more favorable settlements). (Long term legislation)

ACHIEVE FASTER AND MORE EFFICIENT CLEANUPS

SOLUTIONS:

a) Expand upon existing "Superfund Accelerated Cleanup Model" to speed up cleanups, by focusing on activities after the remedy has been selected (at the point of detailed design and actual construction of remedies). The "SACM" model has focused largely on the early part of the cleanup pipeline, even though most sites have moved into the later stages of design and construction and would therefore benefit little from SACM. (Short term agency program initiative or policy statement, with adjustment to resources, to be supported by long term legislation)

b) Enhance training and retention programs for Superfund staff, considering ways to get private parties to pick up the tab for this as part of settlement or cost recovery. (Short term agency program initiative, as well as enforcement policy statement and adjustment to resources, to be supported by long term legislation)

c) Eliminate waste from cleanup contracting process through better management accountability, aggressive oversight teams for contracting, legislative and OMB adjustments to the mix of private and public personnel devoted to cleanup, tough limits on the percentage of cleanup contracting costs that can be used for non-cleanup and non-site-specific activities. (Short term agency and OMB program initiatives, as well as adjustment to resources, to be supported by long term legislation)

d) Eliminate duplication and friction in Federal-State cleanup relationship. (Short term agency program initiative, to be supported by long term legislation)

MAKE THE PROGRAM MORE FAIR

SOLUTIONS:

a) Assure "Environmental Justice" so that Superfund resources and effort are distributed based on environmental and health needs, and in a manner that does not discriminate against low-income and minority communities affected by sites. (Short term agency program initiatives and policies, to be supported by long term legislation)

- b) Steer enforcement and private lawsuits away from those not intended to be liable (e.g., generators/transporters of municipal garbage), and those contributing truly de minimis amounts to sites. (Short term agency policy, to be supported by long term legislation)
- c) Give local communities and individual citizens more access to the cleanup and settlement process and break down the bureaucratic stone wall that has characterized some EPA-community relationships. (Short term agency policy, adjustment to resources, and long term legislation)

PROMOTE HAZARDOUS WASTE R&D, INNOVATIVE TECHNOLOGIES, AND JOBS CREATION

SOLUTIONS:

- a) Bring Superfund into the overall "Rebuild America" program for promoting innovative technologies, and authorize special settlement incentives, perhaps including tax incentives or credits, for parties using innovative technologies. As the largest environmental cleanup program in the country, with \$7 billion of work already ongoing and an additional billion dollars obtained with each passing year, Superfund can be an enormous engine for job creation and the development of new technologies. (Long term legislation)
- b) Foster voluntary, private-sector initiated cleanup of sites not currently on the Superfund list, at "Enterprise Zones" and other areas where contamination stands in the way of economic development and job creation. (Long term legislation)
- c) Reinvigorate current Superfund R&D programs to give American companies environmental cleanup expertise that can make them more competitive abroad. (Short term agency program initiative, adjustment to resources, and long term legislation)

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November 9, 1992

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Steps That Can Be Taken Promptly to Improve Superfund Without Legislation

There is a pressing need for technical and administrative improvement to stop the loss of confidence in the program. The new Administration should:

1. Dramatically simplify EPA's settlement policies. Unnecessarily complex "policy guidance" documents that are delaying settlements were adopted by the Reagan/Bush Administrations not to protect the environment but to defend themselves from criticism after the Ann Buford and Rita LaVelle scandals.
2. Improve EPA's ability to hold and attract top scientific personnel by restructuring compensation including for site on-scene coordinators, risk assessment personnel and other key scientists and engineers, and review EPA's risk assessment assumptions to eliminate scientific bias from the program.
3. Introduce greater fairness into the program by retaining "strict liability" but limiting EPA's use of "joint and several" liability to those cases where it is clearly needed consistent with common law standards of fairness.
4. Eliminate the "Bunker mentality" at EPA and mandate that it make better use of de minimis, mixed funding, and exceptional circumstance provisions already in the statute. It should try a series of initiatives including a pilot study of marketplace incentives in which companies that are willing to pay premiums "up front" are "sold" (not "given") as broad protection from future litigation as they are willing to pay for. EPA has that authority, but in six years it has never found single case in which to use it.

Step One will eliminate self-inflicted barriers to cleanup settlements. Step Two will improve the technical quality of cleanups and help assure that risks are accurately measured. Step Three will reduce transaction costs and address some of industry's concerns about those costs. And Step Four will energize EPA into making use of the authority it already has to try new ways to speed cleanup settlements.

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CERCLA Problems That May Need Legislative Solution

1. The municipality problem - one solution is the removal of municipal landfills (not municipalities) from Superfund coverage. Alternatively, a possible solution would be a broad based tipping tax applicable to all trash and garbage whether generated by municipalities or industry.

The proceeds, under this "Bernstein solution" will be placed in a separate trust fund or escrow account to be used solely for two purposes: (1) to facilitate mixed funding, "orphan share" and special circumstances settlements at municipal landfill sites; and (2) to help pay for the closing of municipal landfill sites that are on (or are added to) the NPL.

2. The problem of the Contingent Valuation Method ("CVM") of natural resource damages - this method threatens to drain tens of billions of dollars out of the private sector and result in massive increases in litigation costs. NAAOA is holding hearings - but CVM is being treated by DOJ as part of Superfund. There is no legislative guidance as to the method of evaluation for natural resource damages under Superfund. These damages should be based on actual tangible restoration costs - not "what if" costs.
3. EPA's proposal to treble its indirect cost assessments and to reduce its need to document its cleanup claims - this will encourage (not discourage) waste and inefficiency by assuring that EPA is reimbursed no matter how wasteful its costs.

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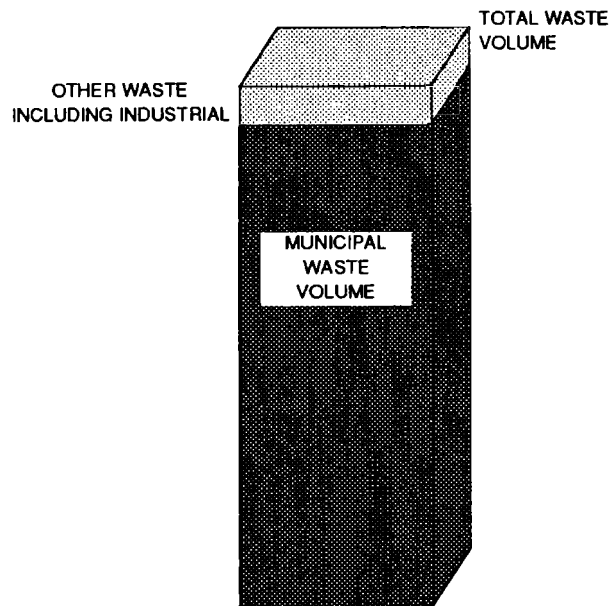
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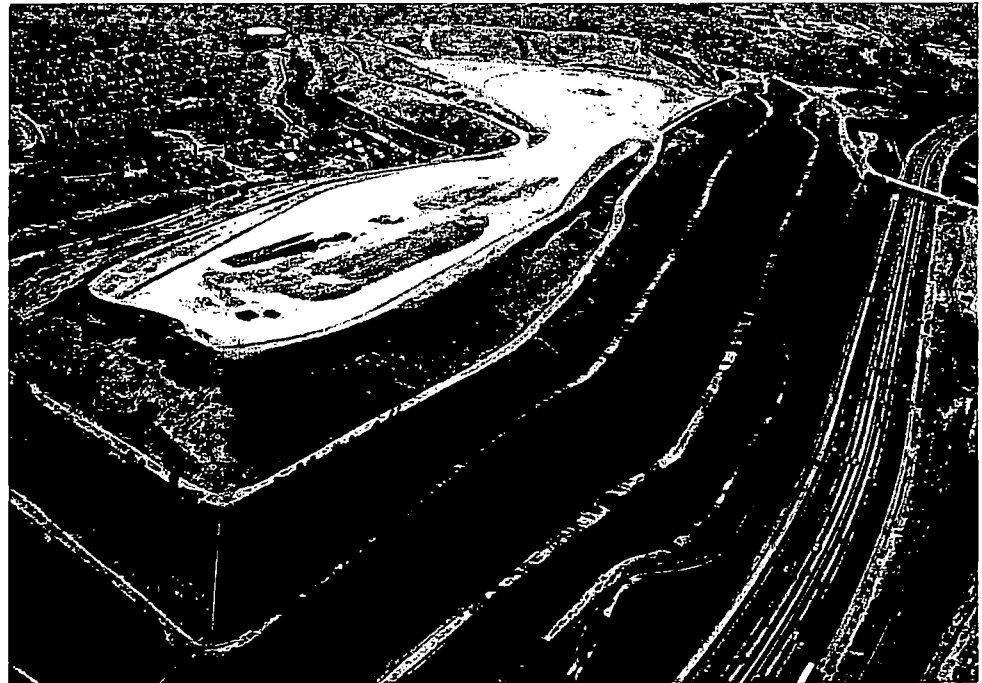
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CONDITIONS AT A MUNICIPAL - INDUSTRIAL LANDFILL OPERATING INDUSTRIES INC. (OII) LANDFILL

TYPICAL WASTE VOLUME PROPORTIONS IN THE LANDFILL

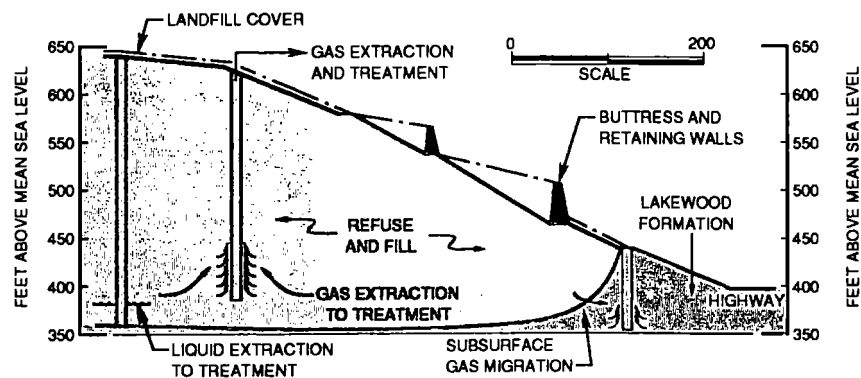


AERIAL VIEW OF THE OII LANDFILL



OII LANDFILL, MONTEREY PARK, CALIFORNIA. LOOKING WEST ALONG THE POMONA FREEWAY. (140 ACRES, 250 FEET ABOVE EXISTING GRADE, 30 MILLION TONS OF TRASH, 4 MILLION CUBIC FEET PER DAY OF METHANE GAS GENERATION).

SECTION THROUGH THE OII LANDFILL SHOWING POSSIBLE CONCEPTUAL REMEDY



DISCUSSION

MUNICIPAL LANDFILLS ARE PRIMARILY COMPRISED OF MUNICIPAL SOLID WASTE (MSW) (90-95%).

MSW CONTAINS HAZARDOUS SUBSTANCES (0.5%).

THE CLOSURE OF LANDFILLS REQUIRES COVERS, AND GAS AND LEACHATE COLLECTION AND TREATMENT.

SUPERFUND LANDFILL PROBLEMS ARE USUALLY DRIVEN BY THE GAS AND LIQUID MIGRATION, CAUSED BY THE DEGRADATION OF THE LARGE VOLUME OF MSW.

MUNICIPALITIES AS OWNER/OPERATORS, GENERATORS, OR TRANSPORTERS SHOULD PAY FOR THEIR FAIR AND EQUITABLE SHARE OF CLEANUP COSTS AND CLOSURE.

THE CURRENT SUPERFUND LAW PROVIDES FOR "FAIR SETTLEMENT MECHANISMS" USING CRITERIA SUCH AS TOXICITY, VOLUME, AND ALLOCATION FORMULAS.



tel conf. w/ Dick Franzen.

7/15/91 Superfund

IG -- failure to audit
part of Superfund program

Reingold Bilely -- Investigate

Weiskopf article -- not better
Successes → settlements

overcharges in the contracts.

part of this is 'cause OMB
forces so much

provision
into
amends

but agencies supposed to
be getting out of minor de minimis
parties -- designed to
minimize transaction
costs

promises, don't want to do
small group.

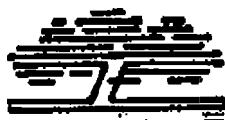
litigation costs... PRP
and paying this

Tom Grumbly.
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III. CURRENT STATUS

Twelve years of program administration (all under Republican Administrations) have resulted in obligations, and expenditures of nearly \$14 Billion (conservatively estimated, including direct program expenditures, and settlements by private parties). While over 2,300 removal actions have been taken at nearly 2,000 sites to eliminate immediate risks in the form of leaking barrels, transformers and the like, fewer than 100 sites have been taken off the federal National Priorities List (out of 1,275 total.) Although much public health risk has been eliminated, the public perception of this program is that it has not accomplished its mission. Coupled with major complaints from industry that the program's transaction costs, primarily in the form of legal fees, are astronomical, the perception of high costs and limited action is well entrenched. Increasingly, complaints are also heard from citizens and states that the EPA essentially dismisses their views about cleanup, and conducts business in a vacuum.

Since 1989, the EPA believes it has made substantial progress. It points to the following:

- Cleanup construction completed at 80 NPL sites, with significant cleanup action underway at another 357 or 28 percent of NPL sites.
- Nearly \$6 Billion collected from "polluters" to pay for cleanup under settlement agreements and another \$1.6 Billion in ordered work under various provisions of the law.
- Decisions about the appropriate cleanup to undertake at 56 percent or 710 sites, and studies underway at over 90 percent of all NPL sites.

Perhaps the most striking facts about EPA's own evaluation are the large number of sites that will incur major cleanup costs over the next five years and the amount of time required to cleanup. Nearly 800 sites will emerge from the study and design phase, and require construction dollars. Current estimates about the dollars required to implement cleanups at all NPL sites range from \$40 Billion (EPA's best current estimate) to \$100 Billion (according to researchers at the University of Tennessee). These figures do not include major federal facility or nuclear cleanups, which could raise the total worst case cleanup figure to over \$500 Billion (in today's dollars) over the next 20 years. In terms of time, it currently takes from 7-10 years to go through the entire study and cleanup process, although the Agency insists that most immediate risks are dealt with early in the cleanup process.

In the election year, EPA is attempting to play "offensive defense" in Superfund by proposing significant administrative changes to deal with its vulnerabilities. It is trying to speed up its rate of completions by transferring study dollars to cleanup dollars, and trying to find consensus based ways to speed up the entire process. On balance, the program is significantly improved over the pre-1989 program, but many knowledgeable observers, and not only in industry, believe that significant structural issues must be dealt with in the near future.

IV. MAJOR PREDICTABLE EVENTS

Several predictable events will occur between July and the election:

- The EPA will continue to declare victory in the numbers game, on the basis of its Fiscal Year 1992 performance. These numbers will be impressive, but will not address the core issues of how much health and environmental harm is being prevented.
- At the same time, the Bush Administration will convene a task force in the White House to develop a plan for major change in Superfund's liability system after the election. The combination of these two moves is designed to keep the Congress at bay, while "signalling" industry that major change is afoot.
- There will be a Congressional fight over Superfund appropriations, in which the Bush Administration will be able to claim that it cares more about Superfund than the Democrats. Bush Administration proposed \$1.6 Billion, and the House Appropriation's Subcommittee marked up only \$1.4 Billion. This is a cynical game played by the White House, which knows that the particular appropriation's subcommittees have to wrestle with other tradeoffs to meet budget caps.
- There will be a debate over whether to change or eliminate Superfund liability for municipalities that own landfills, and for lending institutions. In early July, the Senate passed a banking bill that includes an amendment capping municipal liability at four percent of total costs at any site, and eliminating the possibility of contribution actions by private parties. This amendment is designed to deal with major fiscal problems that could be caused to some cities by being entangled in Superfund suits. It is unclear whether there is sufficient support in the House for this measure to pass on its own. The Administration forced this Congressional debate by essentially forbidding the EPA to deal with the problem administratively.

V. KEY ISSUES AND ANALYSIS

A. The Municipal Debate: A Near-term Dilemma: Despite protestations from many who drafted Superfund originally, the courts have clearly held that municipalities are liable under Superfund in the same way as private corporations. The financial problems of many cities are well known, and corporations have recently begun suing many cities in contribution actions to inflict pain upon them, thereby hoping to build pressure for wholesale change in the "strict, joint and several" liability scheme. Cities have responded by seeking an exemption from contribution actions, and a cap on liability when they did not actually transport waste. The issue needs resolution, in order to speed Superfund settlements. The current Senate amendment is politically attractive to a core Democratic constituency, the cities, but it has a thin analytic basis. It is a very close call.

The remaining major issues all relate to a potential reauthorization debate in the 1994-95 time frame. The law expires and must be reauthorized, in either a perfunctory way, as was the case in 1991, or through substantial debate. The entire interest group community "took a pass" on Superfund in 1991 for various reasons, most of which were not related to happiness with the statute.

B. Liability and Transaction Costs: The most visible and contentious issue on Superfund has been the "strict, joint and several" liability standard developed by the courts in a reasonable interpretation of the statute. EPA can impose 100 percent of cleanup costs on any responsible party, even if that party has contributed much less than this to the site. The standard serves as a powerful club for getting responsible parties together to allocate costs, but it requires careful implementation if it is not to also spawn tremendous legal fees and contribution actions. In 1985, the Congress introduced several new provisions designed to give the Agency flexibility in using its powers, such as the ability to let small parties "buy out" of their liabilities, the ability to use the Superfund to fund "orphan" shares to move cleanups along, and the ability to use dispute resolution processes to encourage settlement. The EPA has been reluctant to use these measures, because they wrongly believe them to undercut their core powers.

The liability system also places insurance companies at great risk. Industrial companies try to recover their own cleanup costs from insurers, most often using policies that did not foresee hazardous waste cleanup costs. If Superfund liability were to pass directly through from the many industrial companies to the few insurance companies, some insurers could be in serious financial difficulty. The federal courts have to date produced a mixed bag of opinions.

The combination of industrial outrage over the seeming "unfairness" of the strict, joint and several system, its wasteful transaction costs, and the vulnerability of insurers, provides the steam for some to search for alternatives ranging from a fully funded taxpayer program to a proposal by one major insurer to establish a National Environmental Trust Fund to pay for the program. This fund, to be created from a surcharge on all commercial insurance, would generate revenue to cover cleanup. The idea is essentially a "no-fault" proposal, and is the opposite of the current system in which a single company can be held totally responsible. It directly challenges the current "polluter pays" concept embodied in Superfund, by urging that everyone should pay for a problem arguably created by the entire society. The concept is not compatible with the theory that Superfund encourages potentially polluting companies to prevent waste, by imposing cleanup costs directly upon them.

In a world in which a direct taxpayer-funded program for industrial cleanup seems unlikely, the examination of all other schemes tends to drive one back to a reexamination of the Congress's 1985 work. While Congress authorized the Agency to take steps to make Superfund "fairer", it did not mandate them. As a first step, it should look to put more teeth in the existing "carrots", and demand more equitable administration. As to the insurer's problem, more can be done by dealing with the total cost of cleanup directly by grappling with the scientific and engineering problems under Superfund, than by letting the financial cup pass them by.

C. The Costs and Benefits of Cleanup: There is an increasingly vigorous debate over whether EPA's cleanups are having significant health and/or environmental benefits. The

National Research Council concluded in 1991 that the benefits from hazardous waste cleanups had not been determined. EPA's own Science Advisory Board concluded that hazardous waste sites presented only "moderate" health and environmental risks, and that the unit costs of cleanup were very high. On the other side of the equation, environmental groups rightly point out that some sites are undoubtedly "underprotected" because our ability to discover risks in this area are very uncertain. There is no currently available data to determine whether the program will achieve a net positive return.

What is known is that the average cost of cleanup is now estimated to be in excess of \$25 Million per site, and that several federal facility remedies could be in excess of \$1 Billion on the nuclear reservations. We also know that our technologies for remediation are crude; incineration and landfilling are still the major choices, and the unit costs of these are often staggering. We also know that the chemical specific standards for many chemicals at sites are based on data from other programs, and may or may not be right for the hazardous waste programs. Further, human exposure assessment at many sites is based upon unrealistic assumptions that may either over or underestimate the problem.

The 1985 statute listed a number of criteria, some of them mutually exclusive, that EPA was to use to determine remedies. For example, the agency is supposed to conduct "permanent" remedies, but also weigh the costs. Serious attention needs to be paid during the next reauthorization round to the scientific and land use issues underpinning remediation decisions, as well as to developing more cost-effective technology for cleanup. If the costs of cleanup are commensurate with benefits, cleanups will be quicker, and with fewer transaction costs.

D. Roles of Communities and States in Cleanup Decisions: The minority community is right to feel that it has a significant stake in the hazardous waste program. Although the majority of waste sites are not located close to areas of dense population, a significant number are primarily in poor, and disproportionately minority areas. In addition, the native American community will soon face choices about the location of nuclear waste repositories on its lands.

Citizens in general are applying increasing pressure to be part of decisionmaking processes at sites. This program, and society as a whole, has not yet truly determined how ordinary citizens can be involved in decisions in which they do not have to pay. What we do know is that these issues can no longer be deferred.

Finally, the states will ultimately bear the major chore of cleaning up thousands of sites that do not make the National Priorities List. And, some states have the determination and financial wherewithal to want to deal with NPL sites directly. The current program engenders competition between states and the federal government, and confusion among citizens concerning often conflicting views of federal and state agencies about appropriate cleanup.

E. The Federal Facility Problem: The Reagan-Bush Administration has not addressed the federal facility problem with vigor because it has major budget implications, and because -- on nuclear facilities -- there are no currently available technologies to deal with much of the waste. The closing of many military bases over the next three years will magnify this problem.

and one can expect increasing pressure from the Pentagon and the Department of Energy to reduce cleanup standards.

VI. ADMINISTRATION POLICY

The Administration's fundamental hazardous waste policy is to give lip service to the objectives of the program, pursue an aggressive enough course to protect itself against the kinds of charges that brought down the Gorsuch-Lavelle administration, and bide its time until the costs of the program make it vulnerable to "gutting."

VII. LIKELY QUESTIONS

Q. Governor Clinton, why did you approve an incinerator at the Arkansas Vertac site, when the citizens of the area clearly opposed this remedy?

A. There was no superior technical alternative presented, and, ultimately, I believed it was important to get on with the job of cleaning up. The site, illustrates, however, why we must pay much greater attention to two issues: (1) improving the technology that is available to deal with waste disposal, and (2) creating more effective ways for citizens to participate in decisionmaking without strangling the cleanup program. It is outrageous that the best decision that could be made was incineration. Not only is it expensive, but there are legitimate questions about the ability of these operations to totally destroy waste. In my administration, we will make a major effort to move the obstacles to technology development out of the way, so that safer, more cost effective technologies can be brought to bear.

Q. Do you think the current Superfund program needs major legislative reform?

A. Because the Superfund law and its taxation authority will expire during our first Administration, we will have the obligation to look seriously at any legislative changes that are necessary. The program got off to a horrendous start during the Reagan-Bush years, but it has finally started to make progress. Our first priority must be to ensure that we really are getting our money's worth from this program. While I am concerned about reports of contract abuse, I think we need to examine hard what we can do, either statutorily or administratively, to make sure that our remedies are "right," i.e. that they neither over nor underprotect for the money that is spent. And we clearly need to make major efforts to bring new, more cost-effective waste treatment technologies on line that will deal with waste in a permanent way. If doing this requires legislative reform, we will be in the leadership.

Q. But isn't this program hugely wasteful in the lawyers fees an other transaction costs it generates, and isn't this the result of the unfair liability system in which a single party can be held responsible for an entire cleanup?

A. First, the way to make sure that legal costs are minimized to really energize the mediation, de minimis buyout and mixed funding provisions of Superfund to make sure that every incentive exists for companies to pay their fair share. The Congress has already given the EPA the tools to do this, but we need to press harder to get them used. Secondly, the liability system, while tough, does ensure that we can connect responsibility to someone other than the poor general taxpayer that had nothing to do with the illegal and irresponsible dumping practices of the 1950s, 60s, and 70's, and generate the money to pay for cleanup. Third, we do need to be sure that this system is administered in as fair and equitable way as possible. We need to recognize that many companies caught up in Superfund did nothing wrong themselves. I am convinced that better administration can deal with any real injustices; if I am wrong about that after giving it a try, maybe then we will consider more radical change.

Q. What is your position on whether municipalities should be held liable for the toxic waste that sits in their own landfills?

A. Ideally, we should be able to deal with this problem on a site by site basis, recognizing the tremendous financial pressure municipalities are under. I do not think the Congress really envisioned catching small cities and towns up in this process when the law was passed, so I would be sympathetic to changing the law, if a formula could be found that was based on real information about how much municipalities were really contributing to this problem. Let's not further add to the perceived inequities of Superfund by pulling a numerical cap for municipal liability out of the hat. The current Lautenberg amendment is a step in the right direction, but it needs more work.

Q. Should Federal facilities be held to the same standards as industrial polluters?

A. Absolutely, but we need to make sure that all the standards are based on the best scientific and engineering data we can muster, and that the cleanups make sense in terms of the future use of the land.

For additional information please call Thomas Grumbly on (703) 739-1241.

EPA To Review Superfund Risk Analysis

A controversial directive issued by the Environmental Protection Agency last year now will undergo public scrutiny because of a legal challenge by the Chemical Manufacturers Association and other industry groups. EPA has agreed to reevaluate the directive, which doesn't allow companies involved with Superfund site negotiations to do their own risk analysis.

In June 1990, EPA changed its policy regarding the remedial investigation/feasibility (RI/FS) study portion of the Superfund process. Up to that time, companies involved in negotiation at a site, called the potentially responsible parties, often performed a risk assessment as part of their studies. EPA halted that practice. Now, only the agency performs the risk assessment, and the companies involved undertake other parts of the investigation.

CMA found EPA's move puzzling because the same day the agency announced the policy change, it also released a study concluding that cleanup measures recommended by companies in their risk assessments were as environmentally protective as those made in EPA risk assessments. CMA complained immediately about the change.

In September 1990, CMA filed a lawsuit against EPA claiming that the new policy was essentially an unlawful rulemaking because the agency did not provide advance notice of the change or opportunity for public comment. Joining CMA in the complaint were the U.S. Chamber of Commerce, the National Association of Manufacturers, and the American Iron & Steel Institute. Negotiations among the contesting parties took more than a year, but they have led to a consent decree that calls on EPA to evaluate this policy over the next year and to decide—on the merits of this new evaluation—whether the practice should be continued.

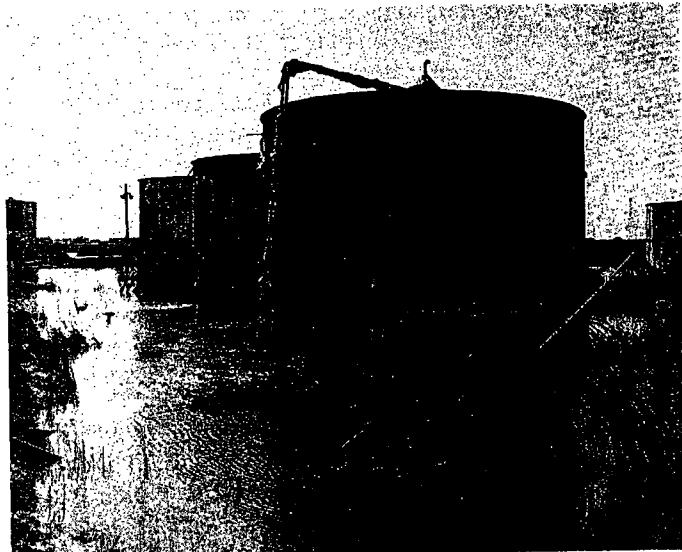
David F. Zoll, CMA vice president and general counsel, says it is appropriate for the companies at Super-

fund sites to do the risk assessments. CMA thinks it makes sense for the potentially responsible parties to perform their own risk assessments, since companies already do most of the RI/FS work. "Barring the [companies] from doing risk assessments adds delay and confusion to the process, and it makes the program less effective and more costly," Zoll says. One of the problems EPA is expected to face is delays in the RI/FS process because the agency lacks enough trained staff to do the risk assessments.

The responsible parties did the risk assessments at Superfund sites, in part, because they were encouraged and authorized to do so by Congress when the Superfund law was passed, CMA contends. However, Congress may also be the reason EPA changed its risk assessment policy. The first time the industry heard of the change was during a Congressional hearing. It may be that EPA, worried about a possible perception of conflict of interest if responsible parties were allowed to do their own risk assessment, announced the change to convince Congress the agency was moving to improve the Superfund process.

Although the evidence is inconclusive about risk assessments in particular, one study has shown that it is taking EPA longer to hit its Superfund milestones. A study prepared this year by the Congressional Budget Office (CBO) found that the RI/FS process, as well as remedial designs and remedial actions at Superfund sites have all been taking longer since EPA Administrator William K. Reilly began reforming the process in late 1989.

Testimony presented in late fall to



Superfund hazardous waste sites can't be risk assessed by responsible firms under current EPA policy

the Subcommittee on Investigations & Oversight of the House Committee on Public Works & Transportation by Jan P. Acton, assistant director of the CBO Natural Resources & Commerce Division, concluded that the average time for the risk assessment portion of an RI/FS has increased from 33.0 months to an average of 47.4 months since 1989. Acton says, though, that risk assessment policy change cannot be isolated as the reason for the increased time.

Basically, the risk assessment policy reflects EPA's move to stricter enforcement of Superfund settlements. But this worries Mort Mullins, CMA's vice president of regulatory affairs. "What really troubles me about this decision is that EPA appeared to be more interested in punishing industry than in cleaning up sites," Mullins says. Indeed this may be what some members of Congress, as well as environmental activist groups, think should happen. But Mullins does not think the present policy is the best one. "Either EPA can have a cleanup program or a punishment program, but it is very hard to have both. The agency should make up its mind," he says.

David Hanson

Drug inhibits key HIV regulatory protein

A benzodiazepine designated Ro 5-3335 has been shown by Hoffmann-La Roche researchers to inhibit replication of the human immunodeficiency virus—the cause of AIDS—by acting as an antagonist of one of the virus's essential regulatory proteins [*Science*, 254, 1799 (1991)]. HIV's genome encodes a protein, designated Tat, that increases expression of the HIV provirus integrated into the genomes of cells infected with the virus. Tat functions by interacting with a sequence, designated TAR, in the proviral DNA. Hoffmann-La Roche scientist Ming-Chu Hsu and collaborators demonstrated that Ro 5-3335, which is 7-chloro-5-(2-pyrryl)-3H-1,4-benzodiazepin-2(H)-one, blocks the interaction of Tat and TAR, leading to inhibition of HIV replication in an infected cell. Although Ro 5-3335 exhibits some toxicity in experimental animals, the compound is a useful model for analogs that might act by the same mechanism. Drugs that block HIV replication by inhibiting Tat could be attractive for use in combination with HIV reverse transcriptase inhibitors such as zidovudine, which interfere with the process by which cells become infected with HIV.

Structures of C_{78} isomers determined

In fullerene-containing soot produced by the vaporization of graphite, two distinct isomers of the higher fullerene C_{78} are formed in a five-to-one ratio and can be separated by high-performance liquid chromatography, according to chemists at the University of California, Los Angeles [*Science*, 254, 1768, (1991)]. Unlike C_{60} and C_{70} , each of which has a single structure, higher fullerenes have open to them a number of isomeric structures that satisfy what has become known as the "isolated pentagon rule." This states that fullerenes, made up of 12 pentagons and some number of hexagons, adopt structures in which no two pentagons share an edge. Five such structures are available to C_{78} , and calculations had suggested that one with D_{3h} symmetry would form preferentially. UCLA chemist François Diederich and coworkers isolated and characterized two C_{78} isomers using ^{13}C NMR spectroscopy and found that, in fact, the major isomer has C_{2v} symmetry—it is a "turtle-shell" fullerene with one flat face—and the minor isomer has a chiral D_3 structure reminiscent of the structure determined at UCLA for C_{76} .

Silicon chip mimics nerve cell

A silicon chip that mimics some of the functions of a real neuron has been developed by Misha Mahowald of California Institute of Technology and Rodney Douglas of the University of Oxford [*Nature*, 354, 515 (1991)]. The device is based on an analog VLSI (very large scale integration) chip—similar to the processors used in personal computers except that it uses an analog (continuously varying) signal instead of a digital (on-off) signal. The device's four active electrical channels are designed to mimic the function of ion channels in the neuron cell membrane. The device reproduces

two major functions of real neurons: It exhibits voltage spikes reminiscent of action potentials and shows adaptive behavior (reduced response upon repeated stimulation). The silicon neuron could represent a step toward mimicking nervous system function more realistically than artificial neural networks do, the researchers say.

Agreement enhances database access

Molecular Design Ltd. (MDL) and the Cambridge Crystallographic Data Centre (CCDC) have agreed to convert molecular data in the Cambridge Structural Database to a format that can be searched with the 3-D module of MDL's MACCS-II program. Researchers will also still be able to use CCDC's 2-D/3-D search, retrieval, and data analysis software to access the database. The Cambridge Structural Database is "the world's most comprehensive compilation of experimental results on 3-D molecular structure," according to CCDC. It contains bibliographic, chemical connectivity, and 3-D coordinate data for nearly 100,000 organic and organometallic structures determined by x-ray and neutron diffraction. Plans are to distribute the MACCS-II-compatible version of the database in the second half of 1992 to system subscribers.

Olefin polymerization catalyst debuts

Discovery of an advanced olefin polymerization catalyst described as "single-site constrained-geometry" has been announced by Dow Chemical. When used to make polyethylene, product crystallinity is low, and the molecular weight range (ratio of weight-average to number-average molecular weight) is a narrow 2.0, compared with 3.8 with conventional catalysts, according to L. Dennis McKeever, vice president for R&D at Dow Plastics. Densities from ultralow to high (0.855 to 0.97 g per mL) are possible. The catalyst is effective in high-pressure, slurry, solution, or gas-phase processes. The catalyst also allows production of ethylene-styrene resin, elastomers, and copolymers of ethylene with α -olefins as high as C_{18} .

Computational chemistry fellowships

Cray Research Inc., in collaboration with the American Chemical Society's Division of Physical Chemistry, has awarded the first in a new series of graduate fellowships in computational chemistry. Recipients of the 1991-92 fellowships are Zhihong Deng, department of chemistry, University of Pennsylvania; Scott M. Le Grand, department of chemistry, Pennsylvania State University; and Randall Q. Snurr, department of chemical engineering, University of California, Berkeley. The awards, which provide a cash stipend of \$5000 per school year, honor innovative developments and applications in theoretical chemistry or related disciplines, with emphasis on large-scale numerical simulations on supercomputer systems. The fellowships are to be awarded annually. For information, phone Robert Eades of Cray Research at (612) 683-3669.

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U.S. House of Representatives
Subcommittee on Oversight and Investigations
of the
Committee on Energy and Commerce
Washington, DC 20515

July 5, 1991

The Honorable William K. Reilly
Administrator
U.S. Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

Dear Mr. Reilly:

For more than a year, the Subcommittee on Oversight and Investigations has been reviewing the adequacy of the Environmental Protection Agency's (EPA) system that awards, manages and oversees in excess of \$1 billion in contracts annually. EPA ranks among the top civilian agencies in contract dollars. In 1989, EPA's twenty-five largest contractors held contracts with a potential value of \$8.6 billion.

Our initial focus has been on deficiencies of the EPA's Office of Inspector General in carrying out its responsibilities to audit EPA contracts and to investigate potential fraud and abuse by EPA contractors. The Subcommittee held a hearing on these matters on December 11, 1990, and enclosed is a copy of the Subcommittee's report on EPA's Office of Inspector General, which was recently adopted unanimously.

The backlog of required audits of EPA contracts is simply staggering. The return to the Federal government on auditing is about 20 to 1 -- for every \$1 spent by the government to audit contractors' claimed costs, the auditors save the taxpayers about \$20. Yet, according to the Subcommittee's report:

- six of the EPA's ten largest contractors received more than \$1 billion from 1983 through 1989, but most of these costs have never been audited;
- there is a substantial backlog in the auditing of EPA contracts overall, including at least 273 unmet requests for incurred cost audits; and

The Honorable William K. Reilly
July 5, 1991
Page 2

- the limited audit work which has been conducted has revealed significant problems with the costs charged by major EPA contractors, ranging from the collapse of timekeeping systems and other internal controls to billing for obviously unallowable costs.

The Subcommittee learned last week that it will take many years to clean up the backlog of contract audits. It is becoming evident that whether we are talking about the Department of Defense, the Department of Health and Human Services, the Environmental Protection Agency, or other government agencies, that Federal agencies are paying far too little attention to the cost-charging practices of their contractors. Our Subcommittee investigations have revealed that Stanford University billed the taxpayers for a 72-foot luxury yacht and that General Dynamics billed the government for the cost of boarding a company executive's dog. Recent press accounts have disclosed that an EPA contractor has billed the taxpayers for potted plants under a Superfund cleanup contract. The taxpayers and the Congress expect that Superfund dollars will be used to clean up sites contaminated by hazardous waste and not to line the pockets of EPA contractors.

Because EPA's Office of Inspector General is the primary watchdog agency charged with uncovering and preventing abuses in EPA programs, it is essential that this Office establish an effective program to audit and investigate EPA contractors. We understand that some actions have been taken since the Subcommittee's December 1990 hearing but much more remains to be done, including prompt implementation of the recommendations of the Subcommittee's report. Moreover, it is clear that the resolution of long-standing deficiencies in the oversight and management of EPA's contractors will require a concerted attack by not only the EPA's Office of Inspector General, but also other involved audit agencies, EPA contracting and program officials, and officials of the Office of Management and Budget.

Given the failures to date by EPA and its Office of Inspector General, we have directed the Subcommittee staff and the General Accounting Office to conduct a detailed review of EPA contractor behavior, with a particular focus on Superfund contracts. This investigation follows our recent discovery that CH₂M Hill, a contractor holding Superfund and other EPA contracts with a potential value of more than \$1 billion, has stonewalled various Inspector General auditor requests for records necessary

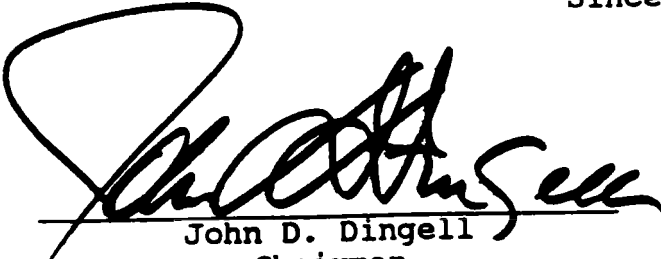
The Honorable William K. Reilly
July 5, 1991
Page 3

to determine the allowability of the contractor's charges to the government. In the face of the company's reported admission of timecard falsification by a project manager and recurring timekeeping problems, CH₂M Hill also has (1) refused auditor requests to maintain timecards in ink and (2) interfered with "floor checks" performed by EPA's auditors intended to assure that contractor employees were actually working on the projects for which the EPA is being charged.

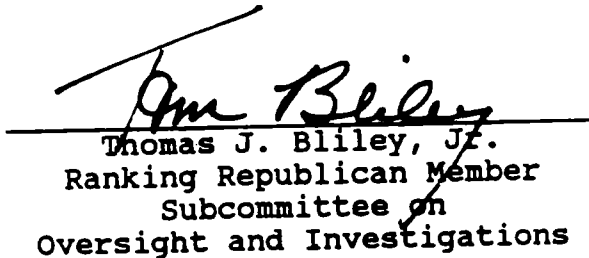
Even more shocking is the fact that CH₂M Hill is refusing access to records necessary to effectively review its overhead charges at the same time it is billing at an overhead rate of approximately 170 percent. (Interestingly, Stanford University's rate was less than half of this.) Certainly, the taxpayers have a right to know whether Superfund cleanup dollars are being squandered on excessive bonuses for corporate executives or other questionable overhead expenses.

The Subcommittee intends to see to it that these EPA contractors receive the same scrutiny which defense contractors and university grant recipients have received before this Subcommittee. We expect to receive the cooperation of your Agency in this effort. Finally, we request that you submit a plan to the Subcommittee by Monday, July 29, 1991, detailing how EPA will address recalcitrant contractors (e.g., by suspending payments), resolve its audit backlog (in coordination with the Office of Inspector General), and provide aggressive oversight of its contractors.

Sincerely,



John D. Dingell
Chairman
Subcommittee on
Oversight and Investigations


Thomas J. Bliley, Jr.
Ranking Republican Member
Subcommittee on
Oversight and Investigations

Enclosure

The Honorable William K. Reilly
July 5, 1991
Page 4

cc: Mr. John C. Martin
Inspector General
U.S. Environmental Protection Agency

Mr. Don R. Clay
Assistant Administrator
for Solid Waste and Emergency Response
U.S. Environmental Protection Agency

Mr. David O'Connor
Director
Procurement and Contracts Management Division
U.S. Environmental Protection Agency

Mr. Lyle Hassebroek
President
CH₂M Hill

Stability / predominantly proller
enough to get program back in ??
& get bonding parameters.

Discrepancy & my res / ~~product~~



WANT THIS IN DoD
MARKUP: WORKING
w/ MADELYN CREEDON
& SENATOR DIXON

July 3, 1991

Ms. Cherie Bonder
Office of the Honorable Albert Gore, Jr.
SR-393 Russell Senate Office Building
Washington, DC 20510

Working but
not needed

Subject: Proposed Risk Sharing Provision for DoD Authorization Bill

Dear Cherie:

Per our discussion of yesterday, this packet contains the following items:

- ✓ A fact sheet briefly describing the issues.
- ✓ Legislative language that would apportion the risk of liability to third parties arising out of hazardous waste cleanup efforts on sites owned by DoD.
- Potential report language to accompany the provision.
- ✓ "Conclusions and Recommendations" of DoD on the issue of risks borne by private sector firms working under contract within the Defense Environmental Restoration Program, issued pursuant to a directive contained in the 1991 DoD authorization conference report, H. Rpt. 101-923 at 593-4.
- ✓ Report by the Society of American Military Engineers (SAME) regarding an Environmental Contracts Forum on that topic.

Risk sharing responds to a critical problem: the public's need for qualified firms to do environmental restoration work that prudent firms are increasingly unwilling to perform. DoD requires competent and experienced private sector remedial action contractors to provide architectural, engineering, scientific and construction management services at DoD hazardous waste sites. Yet many such firms are becoming increasingly reluctant to perform these services due to their exposure to unquantifiable, long-term risk of loss associated with the strict, joint and several liability provisions of federal and many state environmental laws.

Ms. Cherie Bonder
July 3, 1991
Page 2

The enclosed language follows the lead of the SAME report by requiring an "equitable distribution of the risk between the contractor and the government as part of the contract." The model for this approach is the Department of Energy's M&O contractor accountability rule, 56 FR 28099.

The proposal is supported by the Hazardous Waste Action Coalition (HWAC), an association of more than 130 engineering and science firms, including CH2M HILL. HWAC was formed as a coalition within the American Consulting Engineers Council (ACEC) to develop and promote technically sound, timely, and cost-effective approaches to hazardous waste management. HWAC has met with Madelyn Creedon and Ron Kelly and has attempted to incorporate their comments in formulating this provision. Many of us have also briefed personal staff of Senators serving on the Committee.

As you may know, CH2M HILL provides services in engineering, planning, economics, and the environmental sciences. Our Tennessee office is in Oak Ridge. The firm's unusual name is taken from the initials of our founders -- Cornell, Howland, Hayes, and Merrifield - - who formed a partnership in Oregon in 1946. We have a wealth of experience in applying scientific and engineering solutions to complex environmental problems, but must at the same time balance the benefits of such work against the risks it poses to our employee-owners' futures.

Thank you in advance for your consideration of the enclosed. We hope that Senator Gore would be supportive of this effort. If you have any questions or need additional information, please don't hesitate to contact me at 202/393-2426.

Best wishes.

Sincerely,



David W. Conover
Federal Affairs Director



*an association of engineering and science
firms practicing in hazardous waste management*

1015 Fifteenth Street, N.W., Washington, D.C. 20005 202-347-7474 FAX 202-898-0068

**DOD AUTHORIZATION LEGISLATION:
ALLOWABLE COSTS UNDER DEFENSE ENVIRONMENTAL RESTORATION CONTRACTS**

- PROBLEM:** Firms providing environmental restoration and cleanup services to the federal government on-site at DOD facilities face unquantifiable long-term liabilities due to the strict, joint and several liability provisions of federal and state laws. Also contributing to these enormous liabilities are the tremendous costs of site clean up, the developing nature of cleanup technologies, and the potential for third party liabilities associated with toxic torts. Such liabilities are negatively impacting the willingness of cleanup firms to continue to provide environmental restoration services to DOD. Risk sharing mechanisms specifically applicable to DOD facilities are necessary to ensure a supply of experienced cleanup firms willing to work at DOD facilities.
- SOLUTION:** The proposed amendment mandating risk sharing between DOD and environmental restoration firms performing site cleanup activities for DOD should be incorporated into the DOD Authorization Bill. The amendment limits the liability of environmental restoration firms for third party claims to the fee or profit earned during the applicable twelve month period (i.e., the period when the incident resulting in the liability occurred). Cleanup firms would remain liable for their own gross negligence or intentional misconduct, with no cap on liability for these activities. The precedent for such a limit on liability is contained in DOE regulations.
- PRECEDENT:** DOE Final Rule - Acquisition Regulation Concerning Profit Making And Fee Bearing Management and Operating Contractors (56 FR 28099): The liability of DOE Management and Operating (M&O) contractors and their subcontractors, including environmental restoration firms, is limited to the fee or profit earned by the contractor or subcontractor during the applicable award fee evaluation period. This arrangement ensures risk sharing with the DOE facility's contractors, yet recognizes that DOE can not disclaim all liability for facility operations.
- DISCUSSION:** Firms performing environmental restoration and cleanup activities for DOD develop and implement remedies to clean up the environmental damage created by others. However, the standards of liability of federal and state laws hold these firms responsible as if they owned or operated the site. Risk sharing dictates that DOD, as the owner and operator of the facilities where on-site cleanup activities must be performed, should limit the overall liability of environmental cleanup firms to a specific, and reasonably calculable, dollar amount. In accordance with the precedent established in the DOE M&O rule, this liability ceiling should apply regardless of the tier or level of the subcontractor involved in site cleanup activities. Cleanup firms should continue to bear responsibility for their own gross negligence or intentional misconduct. Such an arrangement ensures risk sharing with the facility's contractors, yet recognizes that DOD cannot disclaim all liability for waste at DOD facilities.
- Superfund's Section 119 indemnification, while one form of a risk transfer mechanism, is not impacted by this proposed amendment. Further, Section 119 indemnification may not be applicable to most DOD facilities because the majority of these facilities are not on the NPL list, which appears to be a prerequisite for Section 119 indemnification.



A Coalition of the

American Consulting Engineers Council

June 20, 1991

§2709. Allowable Costs Under Defense Environmental
Restoration Contracts

(a) THIRD PARTY CLAIMS.--(1) Subject to the limitations of this section, in contracts for environmental restoration work at facilities under the jurisdiction of the Secretary, costs of claims based upon liabilities of the contractor to third parties arising out of performance of the contract (including the costs of defending or settling such claims) shall be allowable. To the extent such costs are incurred as a result of negligence on the part of the contractor, the contractor shall not be reimbursed for the portion of its fee or profit earned under the contract, up to the amount necessary to cover the liability, during the twelve-month period in which the event resulting in the liability occurred or, if that period cannot be reasonably identified, the twelve-month period during which the liability is determined.

(2) If the contract has expired, the period in which the event occurred or the liability was determined shall be deemed to be the fee or profit earned for the last twelve-month period that the contract was in effect.

(b) APPLICABILITY.--(1) This section applies to contracts and subcontracts for environmental restoration pursuant to the Defense Environmental Restoration Program or other such programs of the Department of Defense.

(2) This section applies without regard to the type of contract.

(3) This section does not apply to costs for claims resulting from the contractor's gross negligence or willful misconduct by the contractor's principal officials.

(4) All claims by the contractor under this section for reimbursement shall be made within 20 years from the date the event resulting in liability occurred.

(c) EFFECTIVE PERIOD.--The provisions of this section shall apply to contracts entered into before September 30, 1996.

(d) STUDY AND RECOMMENDATION.--^{on or} Prior to expiration of this section, the Secretary shall further study and make comprehensive recommendations with respect to appropriate alternative risk sharing mechanisms for environmental restoration projects. The study and recommendations shall be developed in conjunction with industry and presented in final form to the Congress by October 1, 1995.

(e) DEFINITIONS.--For purposes of this section:

(1) The term "environmental restoration" refers to response actions under section 101(25) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. § 9601(25)), corrective actions under sections 3002(u)(v) and 3008(h) of the Resource Conservation and Recovery Act (42 U.S.C. §§6924(u)(v) and 6927(h)), and other related actions.

(2) In the context of a fixed-price contract, the term "fee or profit" shall be the fee or profit as reasonably determined by the Contracting Officer where cost analysis is performed. Where cost or pricing data is not submitted, fee or profit shall be determined based on a comparison of the contractor's price with commercial or market prices for similar work. If the amount of fee or profit cannot be reasonably determined, it shall be deemed to be an amount not to exceed 15% of the contract price, prorated to the applicable twelve-month period.

Response Action Contractors' Liability Issues
Regarding the Defense Environmental Restoration Program

Conclusions and Recommendations

Conclusions:

The Department of Defense (DoD) faces a major challenge to cleanup its contaminated sites quickly, effectively and without excessive cost to taxpayers. The DoD cleanup and remedial program relies on the architectural and engineering services and the design and construction capabilities of private sector remedial action contractors (RACs). The RAC community expresses reservations about its members' future willingness to undertake this work for the DoD because of perceived uncertain, but believed potentially large, risk to their firms inherent in DoD's remedial action work. In order to better understand the substance and basis of these concerns the Department of Defense has endeavored to work with representatives of the RAC community, other private sector contracting entities, as well as representatives knowledgeable about the practices and concerns regarding the insurance and surety sectors of the nation. The study concludes that contractors have the following deeply held perception of the current liability situation:

- RACs, because of joint strict and several liability under federal and state law, may be found liable when they are not at fault.
- The resulting probability of insolvency through imposition of liability without fault is uncertain and therefore unacceptable.
- RACs are unable to secure adequate insurance due to the insurance industry's reluctance to become involved where the risk is so uncertain and potentially large.
- RACs are also hampered in obtaining performance bonds required by the Miller Act for DoD construction contracts. Surety companies are reluctant to write bonds. The uncertain and potentially large risk for the situation has decreased availability and increased costs which are ultimately reflected in DoD's costs.
- RAC's believe they are assuming risks that properly go to DoD as the generator of hazardous waste and owner of the site.

These perceptions have serious implications for the continued progress of the DoD's cleanup program, as DoD may not be able to sustain rapid progress in its cleanup program without a heavy reliance on knowledgeable qualified contractors.

The Department has also concluded the following as to the current status of response action contracting and the legal liabilities of the Department:

- DoD is currently able to get adequate competition for our remediation contracts.
- Some well-regarded companies are not bidding on DoD contracts citing the risk issues as their reason not to compete.
- DoD is not able to determine, based on this study, what impact the contractor's perceived liability exposure is having on their bid pricing of DoD contracts.
- There is no evidence that quality of work on DoD contracts is being affected.
- The current liability picture particularly discourages contractor participation in innovative remedies as they place potential additional risk on the contractor. A contractor's prime defense to their perceived liability exposure is to use standard, conservative measures wherever possible, thus favoring an excessively conservative approach to remediation.
- RACs express a willingness to be liable for their failure to perform adequately on their remediation contracts.
- DoD as waste generator, facility owner, and overall manager of its remediation effort is and should be ultimately responsible for future problems associated with its remediation efforts, however, it should have a legal remedy against a non-performing contractor.
 - As a waste generator and owner of the contaminated site DoD is in a different liability relationship with its contractors than EPA with its contractors. As such liability shifting rules developed by EPA for dealing with its contractors may not be appropriate for DoD.
- Private firms hiring RACs for private cleanup work engage in risk sharing strategies with RAC contractors which may be adaptable to DoD contracts.
 - Different types of remediation projects have different inherent risks and therefore may call for different risk sharing strategies.
 - Appropriate risk sharing strategies should result in reduced cleanup cost to the Department and the taxpayer, without increasing the ultimate risk to the treasury.
 - Adoption of risk sharing strategies may require regulatory and legislative reform.

Recommendations:

Based on the foregoing conclusions, the Department is concerned remedial action contractors' perceptions may lead in the future to reduction in competition, escalation in costs, lowering of quality, and increased risk to the public. We are also very conscious that any recommendation we adopt for action or inaction, will have economic consequences. Any choice inevitably confers competitive advantage on some contractors and disadvantage on others. We must make sure we understand the nature and implications of the incentives and disincentives our choices imply. We must encourage responsible and professional behavior by our contractors. We must avoid creating incentives for behavior that diverts government resources from the primary goal of cleanup. Ultimately, whatever strategies we adopt should improve the Department's ability to perform effective cleanup in a timely manner at a responsible cost to the taxpayer.

Based on information developed in doing this report, the Department is implementing changes in its contracting strategies and policies within its control to resolve some of these issues. These include better acquisition planning including varying types of contract strategies, reducing amounts of bonds required on construction contracts or use of rolling or phased bonds, allowing irrevocable letters of credit in lieu of bonds, and retaining certain work elements under DoD control (e.g. signing hazardous waste manifests). The environmental and engineering arms of the military departments will continue to examine their current contracting practices with a view to recommending changes in guidance, policy, regulations, and legislation to enhance the effectiveness of our environmental and remedial action contracting. We have tasked them to ensure the scope of their study addresses appropriate and equitable risk sharing between the DoD and its contractors in the cleanup program, and to make specific recommendations for action to be taken. The DoD is now also engaged in a comprehensive review of the Federal Acquisition Regulations so as to ensure adequate treatment of environmental requirements.

Two recommendations merit further consideration. The first would resolve the extent of liability of a surety to a remedial action contract where their only involvement is in providing a bond. This issue was addressed in the last Congress by amending section 119(e) of the Comprehensive Response Compensation and Liability Act to specifically broaden coverage for sureties at National Priorities List sites. Extending this principle to all DoD sites, whether or not on the NPL, would help bring sureties back into writing bonds for DoD cleanup contracts at a reasonable prices. This should broaden competition for contracts, improve timeliness, and reduce overall costs to the Department. This should not work a disservice to innocent third parties, as ultimately it is the Department that is responsible for the remediation. The prime purpose of the surety is to ensure the Department receives the fiscal benefit of the contract.

A more wide-sweeping risk sharing concept evolved from discussions during the preparation of this report. This concept would involve limiting a Response Action Contractor's liability to outside persons. The Department and any other true

potentially responsible parties would be designated as those solely responsible for damages to innocent third parties for damages arising out of a remediation action at a DoD site—logical application of current law as to generators and operators of hazardous waste facilities. The DoD's contracts with its RACs would then provide for recovery by DoD from the RAC if the damages resulted from the RAC's negligence. This concept is similar to the latent damages clause currently used in construction contracts.

The time for preparation of this report was short considering the complexity of the issues. Among the areas that still need substantial further analysis are the total cost implications of various risk sharing strategies as compared with the long term liabilities of the government. We will continue working with the contractor community and other interested parties to explore these and other recommendations and solutions to improve the Department's clean-up program.

for a cleanup in certain states, and therefore may choose not to bid. They indicated that in performing some work, they were staking the survivability of their corporation. When asked, the RACs explained that, in working with the private sector, the RAC shares the risk with the client. This protects the contractor. The point was raised that the owner of a waste site owns the waste, and the RAC is helping to clean it up. Therefore, the site owner must share a good portion of the risk.

The issue of strict liability was raised by the RAC representatives. If anyone has a connection with a hazardous waste site, they are liable. Proper behavior has not excused liability.

When working for the Environmental Protection Agency (EPA) on orphan sites, there is a greater risk to the RAC. The EPA indemnifies the RAC under Section 119 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). This indemnification only covers negligence and not strict liability. The RAC must look at the state laws when deciding to accept a risk.

Another issue raised was that in some instances, a DOD activity required a RAC to sign hazardous waste manifests. This action places liability on the RAC for transporting of wastes. If the RAC had known it would be required to do this, it would not have bid on the job without indemnification. A DOD representative indicated that, generally, the DOD signs the manifest as the generator. The RAC representatives indicated that even if the contractor does not sign the manifest, but arranges for transport, the contractor could be liable, a potentially responsible party (PRP). Even if the contractor doesn't arrange the transport, but is on site, it may be sued. The contractors emphasized that defense costs are a real-time cash flow problem and a real risk even if the contractor is not involved or is innocent.

The problems for the RAC were summarized as follows:

- a. There is an inherent risk associated with doing environmental work. RACs are dealing with anomalies which are inherently difficult to model.
- b. There is an environmental risk of third party liability.
- c. There is no incentive for innovation. Before innovation will be employed by contractors, there must be an agreement between the client and the contractor, and the beneficiary of the innovative practice is required to assume liability. Innovation is prohibitive in a regulatory atmosphere. There is generally no innovation in the U.S.
- d. The architect-engineers (A-Es) are being expected to accept the liabilities of others. Liability insurance is not available in the market. If it is available, it is only for the period of the job.
- e. Requirements vary from state to state. There is a bright spot for the RACs in that there is more flexibility shown when dealing with states than when dealing with the Federal government. Some states may change the specifications on their cleanup projects to permit innovative technology. Many see some states assuming the liability of PRPs. State regulators are a part of the Record of Decision (ROD), and this permits flexibility in dealing with the states.

come to grips on these issues, the DOD's cleanup efforts may not succeed and to him that was unsatisfactory. He indicated that although the forum may not reach closure on these issues, he expected that progress would be made during these two days.

C. AGENDA TOPICS

1. An Assessment of the Risks and Potential Liabilities of Environmental Response Action Contractors, Under Federal and State Law, at Department of Defense Facilities, and the Effects of These Liabilities on Implementation of DOD's Environmental Remediation and Restoration Program.

The industry topic leader discussed, through the use of an example cleanup effort, the risks and potential liabilities that are experienced by a RAC performing work in support of the DOD hazardous waste site cleanup efforts. Some of the problems cited were: site sampling techniques did not cover 100 percent of the area under consideration, and, as a result, there might be ground water leakage paths of which the RAC would be unaware; porosity of the bed rock in an area may preclude total cleanup of toxic chemicals, and these chemicals may leach out after cleanup has been completed; the technology chosen for the cleanup (although agreed to by the parties) may not be effective; today's technology, seen through the eyes of a jury in the future, may be considered to be negligent.

The topic leader indicated that, when bidding on a task, the RAC will examine the risks associated with the proposed effort and make a decision of bid or no-bid accordingly. Insurance available to the RACs is expensive and, because it only covers the current year and will not be available when potential law suits would be expected, is worthless. The contractor must look at the chemicals, the geology, the flow paths of contaminants, and the location of the populace relative to the cleanup site when bidding on a job. There would be a considerable difference of risk between a potential job in the deserts of Utah and one on Long Island. RACs are reluctant to use innovative technology in hazardous waste site cleanup efforts because of the greater risk to the company from a law suit. By experience, the RACs have learned that if water becomes contaminated, property loses value, some damages (personal or property) may occur, and people are going to sue.

In response to a question from a DOD representative, the RAC attendees estimated that \$1M of insurance would cost about \$250K per year. Once the work is completed, the policy is terminated, and there is no further coverage. The point was raised by a contractor that even if a job was performed exactly to specification, the RAC could still be taken to court, and even if the RAC convinced the court that it was neither negligent nor contributed to the condition instigating the suit, the defense costs for the RAC would be substantial.

One contractor indicated that if he had to work for the government without indemnification, he would take efforts to decrease the risk, such as drill additional wells to more fully define groundwater flow. This would unnecessarily raise the cost of doing the work. When asked, a RAC representative indicated that only five percent of the bid covers potential risk (due to competition), but this did little to cover the potential risk costs.

The RAC representatives asserted that they were dealing with an unknown liability and with areas in states with differing laws. As a result, they might not be able to adequately determine the risks

**SAME ENVIRONMENTAL CONTRACTS FORUM
30 - 31 JANUARY 1991
BOLLING AIR FORCE BASE**

A. INTRODUCTION

The executive level Environmental Contracts Forum of the Society of American Military Engineers (SAME) met at Bolling Air Force Base on 30 and 31 January 1991 to discuss the issues of Liability, Indemnification, and Bonding in Environmental Contracting. In attendance at this forum were representatives of the Office of the Deputy Assistant Secretary of Defense (Environment), Army, Navy, Air Force, and Coast Guard and executives representing remedial action contractors (RACs) that perform environmental cleanup services for the Department of Defense and private industry. A list of attendees for this forum is provided as Attachment A to this report.

This forum was co-chaired by Captain James A. Rispoli, CEC, USN, Vice President, Environmental Affairs, Society of American Military Engineers and Mr. Russ Milnes, Principal Deputy to the Deputy Assistant Secretary of Defense, (Environment).

Prior to this forum, invitees were asked to submit discussion papers on any aspect of the topic issues. Suggested discussion topics included: what are the liability concerns; what are the experiences with regard to liability and bonding; how is the risk of performing environmental work assessed; and how do the problems of liability and bonding affect competition. Seven papers were submitted in advance or during the forum. These papers were provided as attachments to the draft proceedings of the forum.

B. OPENING REMARKS

Captain Rispoli opened the forum by outlining the objective of the Environmental Contracts Forum, which is to facilitate an ongoing frank and open discussion of programmatic and contractual issues between industry and the military services. He indicated that this was the third session of this executive forum, and that SAME had been asked by the Office of the Deputy Assistant Secretary of Defense (Environment) to further address the issues of liability, indemnification, and bonding to assist them in obtaining views so that DOD might prepare a report to Congress. To increase the dialogue, CAPT Rispoli indicated that additional contractors had been invited to participate. CAPT Rispoli stated that proceedings of the forum would be issued. These proceedings would not provide any quotes or attribution. He asserted that the forum was not a place for debate, but was a means to discuss the issues so that all in attendance could listen and learn. He asked if there would be any objections in having submitted papers published as a part of the forum proceedings. No objections were raised.

Mr. Milnes addressed the forum stating that the only means of solving environmental cleanup liability problems was through an open forum. He indicated that the Department of Defense (DOD) has pledged to comply with its environmental obligations. The installation restoration effort is important, and as the DOD moves from the study phase, it recognizes that action must be taken to ensure site cleanup progresses smoothly. He emphasized that the DOD wants to finish the cleanup business. Mr. Milnes stated that his office wants to come to grips with the hazardous waste site cleanup contract issue. Performance bonding is an issue; legislative fixes may be possible, but he did not see this as a solution. He explained that if the DOD and the cleanup industry do not



**SAME ENVIRONMENTAL CONTRACTS FORUM
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EXECUTIVE SUMMARY

On 30 - 31 January 1991, the executive level Environmental Contracts Forum of the Society of American Military Engineers (SAME) met at Bolling Air Force Base to discuss the issues of Liability, Indemnification, and Bonding in Environmental Contracting.

During the forum, the following key issues were raised:

- a. There is a risk to the remedial action contractor (RAC) performing environmental work. Part of this risk are the unknowns associated with the work. Another part is the potential for third party liability suits resulting from the performance of such work.
- b. RACs are unable to obtain professional performance liability insurance for hazardous waste site cleanup projects. The insurance industry is reluctant to provide such insurance due to the high risk of liability associated with the performance of such work. Available insurance only covers the period of work performance; not the period during which RACs are most susceptible to third party liability suits.
- c. RACs are unable to obtain surety bonds required for Federal government hazardous waste cleanup projects because the surety bond industry sees a high risk from liability in issuing such bonds. Available bonds are generally for projects of less than \$5M value. Some companies are self-bonding in order to meet governmental requirements.
- d. RACs feel that the Department of Defense (DOD) is responsible for the presence of the hazardous material on the site and therefore, should be responsible for their portion of the risk associated with site cleanup. RACs believe that DOD should indemnify RACs performing work against third party liability to cover the government's portion of the risk.

In response to the concerns raised by RACs, DOD representatives indicated that they would consider the following potential solutions to resolve the issues raised:

- a. Change the laws so that RACs are excluded as a potentially responsible party for liability suits resulting from cleanup actions.
- b. Revise the Federal Acquisition Regulations (FAR) to extend the applicability of indemnification to contractor work done as a part of the Defense Environmental Restoration Program.
- c. Limit the statute of limitations for contractors on environmental cleanup projects and limit the contractor's liability for a project.
- d. Limit the contractor's liability to that resulting from their negligence.
- e. Negotiate the risks of a project with the contractor and determine equitable distribution of the risk between the contractor and the government as a part of the contract.

SOCIETY OF MILITARY ENGINEERS



ENVIRONMENTAL CONTRACTS FORUM

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2. The Availability, Costs, and Limitations of Commercial Insurance to Cover the Risks and Potential Liabilities of DOD's Environmental Contractors

An insurance industry representative topic leader stated that insurance underwriters have problems with insuring projects which have an environmental risk. There are inherent reasons: the long latency period of toxic exposure and the multiple potential causes of bodily or property harm associated with environmental projects. The insurers must establish premiums today for liabilities which will occur ten or more years in the future.

Although liability standards are provided in Section 119 of CERCLA (dealing with negligence), 23 states have laws which are contrary to this section. Contractors may be required to shoulder more liability than they deserve. New, exotic bodily injury theories are being applied. These include: medical surveillance (if an individual is exposed, he or she should be monitored); immunotoxicity (long term exposure can break down the body's immunity making people more susceptible to diseases such as cancers); advance risk of future harm (exposure may increase the possibility of future bodily harm); and mental anguish (the fear of getting a disease as a result of exposure). Once considered remote as reasons for winning a suit, these theories now make environmental work in several states uninsurable.

Recently, the insurance industry has been involved in coverage dispute cases. Policy holders/insurers have asked the courts to look at contracts and determine if an environmental aspect exists. Even though the insurers have thought that a contract has no environmental aspect, courts have frequently decided that it did. Pollution exclusion clauses have not been upheld in court. Since the insurance industry does not have faith in drafting future policies, they are simply not insuring architect-engineers. There is a specialty market for insurance, but there are very few players, and insurance is expensive.

Some A-Es are forming risk retention groups, which is a form of self-insurance. Although this is a potential solution, it does not appear to be working. It is expensive. Many companies do not seem to be ready to insure the practices of their competitors.

The topic leader was asked what type of cap the insurance industry felt would provide adequate coverage for environmental work. The topic leader indicated that he did not have a response to this action. An attendee indicated that the EPA currently has under review a \$50M cap on indemnification to the RACs. The topic leader was asked if there had been any claim against a RAC. The answer was that he did not know of any; there is not a large claims history. This may result from the long latency period for toxic chemical claims. Cleanup efforts have been ongoing for a only few years; only 50 sites have been cleaned up.

The topic leader was asked if this was going to be a new market; were pollution incidents insurable? The response was that as a result of changes to Superfund, specialty coverage may occur. A question as to whether the Federal government would subsidize this type of insurance, brought the response of probably not. Is there a group to step in and develop a market to sell this type of insurance? The answer was, not at this time; one of the problems is that insurance companies are paying on liabilities which they do not believe they insured.

A RAC representative raised the point that there is no guarantee for professional liability insurance. The insurer may chose not to issue or renew the insurance. Insurers will not cover

"prior acts". RACs are paying premiums but are not receiving future coverage. The topic leader indicated that if states had negligence statements similar to Section 119 of CERCLA, then insurance companies might become more interested in providing such insurance. There are presently no magic solutions.

The topic leader was asked the insurance industry's plan of action. The response was that the insurance industry is "slugging out" solutions on a case-by-case basis. The industry has not been able to agree on alternatives to the current situation. A formal definition of "pollution exclusion" is a possibility. A general discussion on possible approaches (solutions) followed. A law similar to Price-Anderson which would be applicable to the toxic waste cleanup industry was mentioned as a potential solution. This solution would create three layers of protection in the event of liability: the insurance layer, the owner/operator layer, and the government layer.

3. Near and Long Term Environmental Restoration Contracting Strategies.

Each of the service representatives made a short presentation on environmental restoration contracting strategies. Described were current efforts, current problems, and actions being taken to clean up identified hazardous waste sites.

4. The Availability, Costs, and Limitations of Corporate Surety Bonds to Cover the Risks and Potential Liabilities of DOD's Environmental Contractors.

The topic leader from the insurance industry indicated that there were considerable problems with the issuance of corporate surety bonds. Contractors must post a surety bond for Federal work under the Miller Act. At this time, there are few bonds available for work on hazardous waste sites.

The topic leader described the problems of issuing bonds for such tasks. Surety bonds are underwritten only to cover the performance of a contractor and the payment of suppliers for construction work. They are written based on the quality of the contractor (ability to do good work, quality of people on site, equipment, how well the contractor has done on similar efforts, and the availability of contractor finances to fulfill the contract requirements). Underwriters normally develop a long-standing relationship with the contractor. Liability from third party suits is not normally considered (this is normally covered by commercial general liability insurance). Recently, however, surety bond issuers have come under attack in the court room because they are the only "deep pocket" remaining in a law suit (RACs are normally people rich, but asset limited).

There has been a lack of indemnification for surety bond issuers for hazardous waste site work. Anyone involved in hazardous waste site work (including the surety bond underwriters who are only covering contractor performance and supply payments) have been found to be liable. If the RAC defaults on such work, the surety principal would be required to hire a completing contractor and, consequently, may be construed to have contracted for the removal of hazardous waste and subjected itself to liability.

Another issue with hazardous waste site bonding is the bond termination date. Normally, a bond is terminated when all work has been satisfactorily accomplished on a project. Due the possibility of long time periods associated with hazardous waste site cleanup action (including the prospect of having to reinitiate work), the bonding company may be required to pay claims long after work has been completed on a project.

Surety bond companies normally underwrite construction efforts. However, many of the contracts for site cleanup are design-build efforts with bonding required for both phases. The topic leader stated, "Today's state of the art technology is tomorrow's malpractice." Surety companies are reluctant to guarantee design technology which is normally covered by professional errors and omissions insurance policies (which, today, is probably not available to the RAC for these risks).

While discussing the availability and cost of surety bonds, the topic leader indicated that the cost of surety bonds has not increased for hazardous waste site cleanup projects. It is about one percent of the construction cost. Initially, hazardous waste site cleanup contracts were thought to be service contracts; then they were required to be construction contracts. About two years ago the surety bond market started drying up. The availability of surety bonds is a major issue. Some available bonds require 100 percent collateral. Some large construction companies are self-bonding. Since the passage of Section 119 to CERCLA, three to four companies have reentered the hazardous waste site bonding market. The market has opened up slightly, but the underwriters are not fighting for business. Only the major providers are coming back into the hazardous waste site cleanup bonding arena, and they are only bonding work on National Priority List (NPL) sites (covered by Section 119 of CERCLA).

The topic leader indicated that the surety bond companies need the same liability protection as the insurers. The more protection that they receive, the more surety companies will reenter the market. Surety companies, as a rule, will not back innovative engineering (too much risk).

A question was raised if any RAC surety bond company had been held to be a PRP? The answer was no, but the industry was concerned because of New Jersey common law interpretations. Some waste site cleanups are being bonded because they are being considered as non-hazardous (due to relatively low risk). This raises the issue of how hazardous is hazardous?

An Army representative indicated that they had received more than four qualified bidders on a recent job. People are apparently getting bonds. There is competition. The stage of not getting responsible contractors bidding has not yet been reached. One of the RAC representatives indicated that the project referred to by the Army may have been a small project. People will still bid a \$5M project. The break point comes for projects greater than \$10M, where there may be insufficient bonding money left.

The topic leader indicated that the surety bond industry is seeking clarification relief that such bonds only cover performance in accordance with the specifications and the payment of bills; bonding does not cover design, third party torts (bodily or property injury), or the performance of designs. A few, new, aggressive companies are issuing bonds for less than \$5M; however, some of these companies may be backing off. Bonds being issued require high collateral. Companies cannot look at the forming of subsidiaries to do bonding to decrease the liability, due to the requirements of remaining on the Department of the Treasury list of acceptable sureties for Federal construction projects.

The topic leader asserted that the surety bond business is a very small portion of the insurance market. In the past, it has rendered a small, but reliable profit. Now it is a big risk. The industry is only issuing bonds on a case-by-case policy and then only to long-term customers.

5. Further Discussion on Industry's Liability Concerns with Regard to DOD Environmental Restoration Work and Potential Solutions to Address These Concerns.

A DOD representative led this topic to generate further discussion on the key issues and to explore potential solutions to these issues. The topic leader indicated that DOD was looking for solutions that would result in good (technical and timely) cleanups of its hazardous waste sites, at a good price, and maintain a good contractor base which earns a fair profit and is a viable community. The RAC representatives indicated that this would be possible if there was equitable risk sharing between the RACs and the DOD.

It was suggested that value-engineering clauses in contracts be utilized. Some contractors indicated that this effort doesn't work very well, due to lack of timeliness in the government's response. This lack of timeliness causes contractors to stop trying. A DOD representative indicated that in situations in which a technology is approved in the ROD, there is reluctance to consider value-engineering proposals because it may mean reopening the ROD. A Navy representative indicated that his service welcomes value-engineering. The services indicated that when they become aware of roadblocks, they would take action to eliminate them.

A question was raised whether the RACs normally revalidated the remedial investigation/feasibility study (RI/FS) when contracted to perform remedial design/remedial action (RD/RA). The RACs agreed that they would revalidate the data obtained by another contractor. The degree of revalidation would depend upon the contractor who performed the RI/FS. Such revalidation could cost up to 20 percent of the RD/RA effort.

The Navy's Comprehensive Long Term Environmental Action, Navy (CLEAN) contract was discussed. The RACs were asked why they bid on these contracts since they did not know the cleanup effort involved. The RACs said that cost-plus (rather than fixed fee) contracting of CLEAN was a plus. They remarked that they would be better able to define the work and get a good price to perform a full scope of each task. As long as the cleanup effort was on the base, the possibility of third party liability was low. The closer to the site boundaries, the greater the risk associated with a project. Under CLEAN, each task is negotiated, and the contractor can evaluate the risk for each task. Only one percent of the projects in a CLEAN contract are anticipated as being a problem.

In a discussion of contracting strategies versus risk, the RAC representatives indicated that third party liability is independent of the contract type. They did not look at fixed price contracts in the environmental area because there are too many unknowns and too much time and effort is spent in contract modifications. They wanted to be able to address, in the contract, the care to be taken in determining the risk of the project.

The RAC representatives were asked, what percentage of contracts are high risk? The response was, that a large percentage of environmental effort requires third party liability and therefore, is a high risk. One company representative indicated that his company will not perform any work without some form of indemnification. Defense costs for liability suits are the big problem. There is no method of predetermining how juries will apportion costs.

The RAC representatives reiterated that they have the ability to negotiate risks for commercial projects. That ability does not currently exist in dealing with the DOD. They also indicated that

the larger the number of contractors involved in a project, the greater the degree of risk to any one contractor. If their work is uninsurable (as it frequently is), the RACs could lose their company as the result of third party liability action. They asserted that they have walked away from jobs when they could not receive indemnification. They stated that the risks they were concerned about were those which they could not control. Any work on an environmental site may end up with a law suit. Only five percent of law suits on environmental projects result in a judgment, but contractors have to pay defense costs to defend good work. The area outside of negligence (strict liability) is of concern. The RAC representative declared that indemnification would not change the quality of their work.

The RAC representatives were asked, if nothing is done with regard to indemnification for DOD work, what is the probability of their doing work? The response was, they would do feasibility studies but would probably not perform any remedial action work without indemnification. They stated, the only companies that the DOD would be able to hire without indemnification would be those with nothing to lose.

A question was raised regarding when indemnification is needed. The answer was, during cleanup and detailed design because these were the riskiest tasks. These efforts were less controllable. During studies, the contractor was further away from being named as a PRP.

One of the contractors summarized his thoughts. He indicated that environmental work was extremely risky. This was due to the application of the concept of strict, joint, and several liability. It was also due to the lack of standards which define negligence; the highly litigious arena involving environmental work; the current state of the art of environmental work; and the long latency periods for hazardous/toxic material exposures (trying to defend oneself 10 to 15 years later is difficult). These risks are currently funded by: insurance (the insurance companies won't participate); fees (not a practical idea because fees are small, risks are great); and the net worth of the service provider (about 20 percent of annual revenue). As a result, this work is becoming unattractive, and, in the future, may be more unattractive. The following recommendations were made:

- a. A uniform standard of liability is needed. State laws must be preempted.
- b. There should be a comparative standard for negligence instead of strict liability (if 70 percent negligent, then 70 percent liable). This was defined by another contractor as comparative responsibility. The government owns the land, put the waste there, and should bear a significant portion of the responsibility.
- c. Liability should be capped to the profit of a job.
- d. Statute of limitations should commence after completion of the work and run for four years.
- e. The DOD should reimburse the RAC for insurance costs or indemnify the RAC if insurance is unavailable.
- f. Risk apportionment should be a part of the contract negotiations.

The discussion continued with the RAC representatives indicating that a negligence standard exists in CERCLA, and they want a similar law modification for state laws and the Resource Conservation and Recovery Act (RCRA). They do not desire strict liability to apply to them. The overriding issue is that the RACs are concerned that they must assume responsibility for what they did not initially cause. The responsibility should be adjudged to the people who put the waste in the land.

The DOD topic leader asked what the DOD could do to help the contractors. There were four areas of potential change: the law, which would be most difficult to change; the regulations (DOD indicated that they would work with the EPA to determine how the regulations might be changed); policy; and the FAR/contract (DOD indicated that they could directly impact these last two areas and achieve the quickest results).

Indemnification of contractors is now addressed in Public Law (P.L.) 85-804 and FAR 52-228.7. Under P.L. 85-504, the contractor must identify the nature of the risk and then the Contracting Officer must raise the issue to the service Secretary for authorization. To support indemnification of contractors for environment risks would make each service's effort unique. The FAR clause is based on radioactive material risks and excludes construction. A change to the FAR appears to be appropriate, but it would have to be based on a change in the law. DOD representatives considered that such a change might be accomplished as a part of the Defense Reauthorization Act.

The following potential solutions were identified for evaluation by DOD in response to the issues raised by the RAC representatives regarding their risks:

- a. Change the laws so that the RACs are excluded as a PRP. This would resolve the Federal issue, but would not resolve the state issues.
- b. Revise FAR 52-228.7 (and possibly FAR 28-311.2) which would extend the applicability of indemnification to contractor work done as a part of the Defense Environmental Restoration Program. This would make the Federal government the defendant and the contractor liable to the government. (This may require a law change to accomplish.)
- c. Limit the statute of limitations for contractors on environmental cleanup projects (after the statute of limitations, the government assumes full liability) and limit the contractor's liability for a project (similar to the limit for oil spills established in the Oil Pollution Act of 1990).
- d. Limit the contractor's liability to that resulting from their negligence.
- e. Negotiate the risks of a project with the contractor and determine an equitable distribution of the risk between the contractor and the government as a part of the contract.
- f. The DOD should specify standards of practice for a project to which the contractor must comply.
- g. A procedure for working out changes as a result of unknown conditions needs to be developed. Cost reimbursable contracting and incentive cost and scheduling were suggested.

The RAC representatives concluded this discussion by stating that contractors are responsible and want to be held responsible for those actions over which they have control. They do not, however, want to be solely responsible for liabilities resulting from a site cleanup.

D. MEETING ASSESSMENT

CAPT Rispoli asked if all people who would make decisions regarding these issues were represented in this forum. Participants indicated that there were no other groups which should be represented as a part of the forum. The forum participants felt, however, that following their review of the proceedings and incorporation of their comments, the proceedings should be provided to select environmental groups for comment.

CAPT Rispoli indicated that the draft proceedings would be circulated to SAME and the Office of the Deputy Assistant Secretary of Defense (Environment) and then be sent with all submitted papers to forum participants for comment prior to finalization. The forum attendees agreed with these procedures.

E. MEETING PROCEEDINGS

The draft proceedings of the meeting were provided to all attendees on 21 February 1991. Comments were received from a US Army Corps of Engineers representative, the NUS Corporation representative, and from the American Insurance Association representatives. Their comments have been incorporated into the proceedings.

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March 28, 1991

Joseph C. Dobes
Director, Safety and Environmental Protection Division
Designers & Planners, Inc.
2611 Jefferson Davis Highway, Suite 3000
Arlington, Virginia 22202

Re: Minutes of the Society of American Military
Engineers January Conference

Dear Mr. Dobes:

Thank you for sending the draft minutes from the January 30-31, 1991 meeting of the Society of American Military Engineers. I was pleased to attend and discuss the issue of surety bonds for hazardous waste cleanup projects. As we discussed on the phone recently, I have only a few comments on the draft minutes, and you took care of the specific items while we spoke.

However, I also have a general comment which I wanted you to have in writing for the record. As you may remember, I was unable to stay for the entire program, and thus, missed the creation of the recommendations and potential solutions contained in the minutes. All of the recommendations and potential solutions developed by the attendees of the conference are excellent ideas. However, I was concerned that surety was not specifically included in some of the comments.

For example, recommendation "e" states that "The DOD should reimburse the RAC for insurance costs or indemnify the RAC if insurance is unavailable." This is an instance where the RAC's surety should specifically be included in the recommendation. Just such a provision is part of the Superfund amendment passed last year, and has been essential to the increase we have seen in the availability of surety bonds for those contracts covered by that amendment. The ideas contained in the recommendations should apply equally to the RAC and its surety.

The potential solutions also refer only to the contractor, while applying the solutions to the surety as well will be necessary to increase the sureties' ability to underwrite

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PRESIDENT

bonds for these types of projects. Thus, it is my recommendation that the potential solutions be amended to read as follows (underlined portion is the proposed amendment):

- a. Change the laws so that the RACs and their sureties are excluded as a PRP. This would resolve the Federal issue, but would not resolve the state issues.
- b. Revise FAR 52-228.7 (and possibly FAR 28-311.2) which would extend the applicability of indemnification to contractor and surety work done as a part of the Defense Environmental Restoration Program. This would make the Federal government the defendant and the contractor or surety liable to the government. (This may require a law change to accomplish.)
- c. Limit the statute of limitations for contractors and their sureties on environmental cleanup projects (after the statute of limitations, the government assumes full liability) and limit the contractor's and surety's liability for a project (similar to the limit for oil spills established in the Oil Pollution Act of 1990).
- d. Limit the contractor's and surety's liability to that resulting from their negligence.
- e. Negotiate the risks of a project with the contractor and surety who takes over for a contractor and determine an equitable distribution of the risk between the contractor or surety and the government as a part of the contract.
- f. The DOD should specify standards of practice for a project to which the contractor or surety must comply.
- g. A procedure for working out changes as a result of unknown conditions needs to be developed. Cost reimbursable contracting and incentive cost and scheduling were suggested.

Mr. Joseph C. Dobes (cont'd)
March 28, 1991
Page 3

These minor changes in the recommendations and potential solutions would express the necessity of protecting the surety of a response action contractor to the same extent as the contractor. Without this equity, it is most likely that bonds will continue to be difficult to obtain for all hazardous waste cleanup projects not covered by the Superfund amendment implemented last year.

Thank you for allowing us to submit these follow-up comments. Please let me know if there is anything else which I can do to assist you in putting together the final version of the minutes.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Lynn M. Schubert', with a stylized, flowing script.

Lynn M. Schubert
Senior Counsel

LMS/lms/jdltr.sam

cc: Captain James A. Rispoli
Ms. Susan Sarason
Craig A. Berrington, Esquire
Ms. Martha R. Hamby
James L. Kimble, Esquire

November 5, 1991

Dear Senate Staff Member:

A few weeks ago, the attached list of companies and trade associations sponsored a briefing for Senate staff on municipal liability at Superfund sites (Attachment A). With the possibility that a floor amendment will be offered to the Senate banking bill on this subject, we thought it would be helpful to summarize the reasons we think you should oppose any proposals addressing municipal liability under Superfund.

The companies and trade associations which sponsored the briefings represent a broad cross section of the American business community. We share two beliefs: first, the current Superfund liability and fundraising system is not working, and second, enacting S. 1557 would make a bad system even worse.

Whatever Superfund's theoretical virtues, after a decade of experience the reality is that site by site fundraising inevitably leads to complex and contentious disputes between and amongst government agencies and private parties that delay cleanups and divert massive sums of money to legal costs and other non-cleanup activities.

In the last decade, the federal government has committed about \$10 billion to Superfund, and the private sector has spent billions more. Over the years, Congress and the Bush Administration have made major changes in the program to improve the results. Yet, out of the more than 1,200 Superfund sites identified since 1980, only 63 have been completely cleaned up. And things are not getting any better. EPA recently announced that it will begin only one-fourth of the 200 final cleanup actions Congress directed it to undertake in 1990-91. This disappointing track record has nothing to do with lawsuits against municipalities.

We sympathize with the concerns of municipalities. But it is important to understand that the liability system is delicately balanced and piecemeal changes to appease one group have profound consequences for those left in the system. Shielding municipalities from private party lawsuits seeking their contribution to cleaning up sites where they contributed hazardous substances is a major and fundamental change in Superfund's liability regime. Equally important, it would do nothing positive to clean up sites, and may adversely affect the funding and speed of current and future Superfund cleanups.

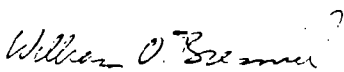
We believe it may be appropriate to address the concerns of municipalities, but only as part of a broader review of the entire Superfund liability and fundraising system. We hope that the Senate Superfund Subcommittee will undertake such a review early in 1992, rather than considering politically appealing special interest exemptions.

We have attached a more detailed discussion of our concerns about S. 1557 (Attachment B) and responses to some of the arguments made during the briefing by the bill's authors (Attachment C). In brief, our major arguments against the bill are:

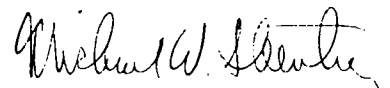
- Municipal solid waste contains hazardous substances. In fact, the definition of "person" in the Superfund law explicitly includes municipalities. Thus, there is no legitimate basis for treating municipalities differently than others.
- Congress explicitly gave private parties the right to seek contributions from those not targeted for cleanup contributions by EPA. S. 1557 eliminates this essential element of Superfund that was designed to mitigate the fundamentally unfair nature of the law's strict, joint and several liability system.
- Shielding municipalities from liability could drive up the cost of many cleanups, encouraging more litigation, negotiation, and delay.
- Superfund already has a procedure to remove cities and others from the Superfund liability process when appropriate.
- Many cities instructed industrial companies to dispose of wastes at municipal landfills. To say years later that cities have no responsibility is unfair.
- S. 1557 creates the real and unfair possibility that politically popular constituents will be let off the hook while those who are less popular but face identical or similar circumstances are forced to pay even more than their fair share to clean up Superfund sites.
- The municipal liability proposal would represent a far reaching change in Superfund's delicately balanced liability system. Yet, the Senate Superfund Subcommittee has held but a single hearing on the issue, and it heard mainly from the bill's supporters. Neither the Subcommittee nor the full Environment and Public Works Committee has voted on the legislation. We believe Superfund liability is far too important to be tinkered with through rifle shot floor amendments.

Thank you again for your time.

Sincerely,


William O. Bresnick


Leslie Cheek, III


Michael W. Steinberg

Attachments

Adolph Coors Company
American International Group, Inc.
American Iron and Steel Institute
American Paper Institute
ARCO
Bethlehem Steel Corporation
Chemical Manufacturers Association
CIBA-GEIGY Corporation
Crum & Forster Insurance Companies
Fireman's Fund Insurance Companies
Hartford Insurance Group
Hoechst Celanese
Institute of Scrap Recycling Industries
National Association of Manufacturers
National Food Processors Association
National Paint and Coatings Association
Oryx Energy Company
Society of Independent Gasoline Marketers of America
Texaco Inc.
UNOCAL

DISCUSSION OF S. 1557

FACT: Municipal solid waste contains hazardous substances. In fact, the definition of "person" in the Superfund law explicitly includes municipalities.

- Superfund liability is, and has always been, determined by whether your waste contains hazardous substances, not by the identity of the generator of that waste. And municipal solid waste contains hazardous substances, such as pesticides, nail polish remover, and used oil. In fact, the definition of "person" in the Superfund law explicitly includes municipalities. Any effort to claim otherwise is historical revisionism to fit a new political goal. The law did not create "good" waste generators and "bad" waste generators. If you sent hazardous substances to a site, you are regarded as a potentially responsible party (PRP).

Under Superfund's strict, joint and several liability system, any party which contributed hazardous substances to a site can be held liable for the entire cleanup. It doesn't matter how much hazardous substances you sent; it doesn't matter if the waste you sent was diluted; it doesn't matter if the level of hazardous substances was only a few parts per billion; it doesn't matter if the level of hazardous substances was below the levels that occur naturally in the soil or water at the site; and it doesn't even matter if the waste you sent did not cause the pollution requiring the cleanup.

Cities are in the same boat as the rest of us. We don't blame them for wanting to jump out and swim to shore. But Congress shouldn't start picking and choosing which passengers should be given a safe port and which should remain on the rocky seas.

FACT: Municipal solid waste does, in fact, contain many of the same hazardous substances found in industrial waste and poses similar health risks.

- The recent municipal landfill standards promulgated by EPA require landfills to have composite liners to control migration of hazardous substances from municipal solid waste into groundwater, as well as leak detection systems, leachate collection systems, and groundwater monitoring systems. In issuing them, EPA said that there is basically no difference between the types of hazardous substances that come out of ordinary municipal solid waste and that which comes out of industrial waste.

FACT: Congress explicitly gave private parties the right to seek contributions from those not targeted for cleanup contributions by EPA. S. 1557 eliminates this essential element of the Superfund "compromise."

- Congress created the strict, joint and several liability system to give EPA a major club to force companies to finance cleanups. In doing so, it understood that strict, joint and several liability would often result in "deep pocket" businesses being tagged for cleanup, regardless of how much waste they sent, what it contained, and whether it created any environmental problems. At the same time, recognizing that this system could allow those with fewer (but still ample) resources to avoid liability entirely, Congress explicitly gave private parties the right to seek contributions from those not targeted by EPA.

Many of us still believe Superfund is unfair and fundamentally flawed. But as long as the current system is maintained, we strongly believe that the right of private contribution actions against other PRPs is the only way to ensure that it is possible to fairly distribute cleanup costs among all those who contributed hazardous substances, not just the "deep pockets" pursued by EPA.

FACT: Superfund already has a procedure to remove cities and others from the Superfund liability process when appropriate.

- To the extent that municipalities have legitimate concerns, Superfund already has a procedure to handle them. Under the law, EPA can offer to "buy out" so-called de minimis, or small hazardous waste contributors, at any given site. Parties that sign de minimis settlements cannot be sued for additional contributions by larger waste contributors. Municipalities are entitled to the same consideration for de minimis status as any other waste contributor at a site.

FACT: Shielding municipalities from liability could drive up the cost of many cleanups, encouraging more litigation, negotiation, and delay.

- With the real possibility that the cleanup costs at municipal sites will balloon, and with fewer parties available to share the cost, the stakes for those remaining at the table will be much greater. As a result, the incentive to negotiate and litigate over allocating liability will increase, not diminish. The result will be more lawyers, more lawsuits, more wasteful diversionary spending on non-cleanup activities, and more delays in cleanups.

FACT: The likelihood that municipalities and their taxpayers will be required to make major monetary contributions to cleanup is vastly overstated.

- First, courts are charged with taking into account a variety of equitable factors in determining how much various parties should ultimately pay. Thus, if there are special circumstances involving a municipal PRP, the courts will have the discretion to address them. In addition, at some sites, municipalities

have demonstrated that they can contribute substantially to the cleanup at little or no actual cost to them or their taxpayers. For example, a city could make publicly-owned treatment plants available for leachate treatment rather than constructing a new leachate treatment plant on site, in effect making a substantial "in-kind" contribution to the cleanup.

FACT: If your state is a trash importer, chances are that enactment of S. 1557 will result in cities that own or operate landfills which are or may become Superfund sites (as many will by EPA's own estimates) paying more to cleanup municipal landfill sites.

- The interstate shipment of waste is a national problem. This bill allows cities that have exported their trash to shift their cleanup liability to owner/operator cities that accepted their waste. In this way, the bill redistributes Superfund liability from trash exporting states to trash importing states.

FACT: Many cities instructed industrial companies to dispose of wastes at municipal landfills.

- Many cities instructed industrial companies to dispose of wastes at municipal landfills because revenues from industrial disposal helped subsidize the cost of collecting municipal garbage. Moreover, many industries disposed of their wastes in municipal landfills at the specific behest of state and federal officials who regarded co-disposal as environmentally safe. Under these circumstances, to impose complete liability on industrial generators, while relieving the cities of any liability, is grossly unfair.

RESPONSES TO ARGUMENTS MADE IN SUPPORT OF S. 1557

The authors of S. 1557 assert that the bill will help get sites cleaned up faster and bring greater rationality and efficiency to Superfund.

The requirement under Superfund that EPA and private parties identify, negotiate and litigate between and amongst one another to raise cleanup funds and fairly allocate liability is, in fact, a major cause of delay in the program. And it certainly wastes enormous resources. But the suggestion that litigation by other PRPs against cities is a major cause of delay in Superfund is unsubstantiated.

For example, at the Laurel Park site in Connecticut, the site was proposed for the NPL in 1981. Cities were not named as PRPs until 1988. Yet, it was only last May that EPA reached agreement with a group of PRPs to perform the remedial design and remedial action. Similarly, at the Operating Industries, Inc. (OII) site in California, progress toward cleanup proceeded independent of efforts by PRPs to bring municipalities to the negotiating table. In fact, it was the existence of the right of contribution against cities that convinced many in the PRP group to settle with EPA and start the cleanup without municipal participation. Had S. 1557 been law, that decision would have gone the other way and cleanup would have been delayed. In fact, the consent decree on cleaning up the first unit of the site was signed before municipalities were sued.

Shielding municipalities from contribution suits will not do one thing to accelerate cleanups. In many respects, it is likely to further delay them by raising the stakes for those left at the table and forcing them to be even more penny wise than they are today. The result is likely to be more disputes and litigation and more delay, not less.

The authors of S. 1557 assert that cities should not be treated like chemical companies and other industrial concerns because they came by their liability exercising a contract with citizens to collect trash while chemical companies produce their waste as part of their basic business and in pursuit of profits. This distinction, they claim, justifies treating cities more favorably.

Superfund has many defects. But one of the few things it did right was to conclude that the law should not play favorites when determining who should pay for cleanups. That is why it made the presence of hazardous substances in the waste the touchstone of liability, not the identity of the person who generated or transported it. This legislation violates that core principle by arbitrarily concluding that one PRP is "better" than another PRP. Once that process begins, the present framework on which the law is based will unravel.

Some of us believe Superfund should be fundamentally revamped. But we do not think it ought to occur bit by bit and we certainly don't think it should occur only for those with political appeal.

The authors of S. 1557 assert that this is not a special interest carve out. They claim that Congress did not intend to cover municipalities who transported garbage.

The effort to distinguish garbage from hazardous substances is facile, but misleading. In fact, many things we toss in our garbage every day contain substances that are considered hazardous by EPA and thus give rise to Superfund liability. Nail polish remover, used oil, lawn pesticides, paints, telephone cords and hundreds of other ordinary, common products that find their way into garbage contain hazardous substances. Under Superfund, their presence in waste establishes liability.

The authors of S. 1557 assert that municipalities did not cause Superfund problems.

The effort to make municipalities hazardous waste innocents strains credulity.

Many cities instructed industrial companies to dispose of wastes at municipal landfills because revenues from industrial disposal helped subsidize the cost of collecting municipal garbage. In addition, many industries disposed of their wastes in municipal landfills at the specific behest of state and federal officials who regarded co-disposal as environmentally safe. Finally, the hazardousness of municipal solid waste depends not just on its composition, but how it was managed. Many of the municipal landfill sites in Superfund operated when regulatory controls were lax or nonexistent. As a result, many sites were inappropriately sited, poorly managed, and inadequately closed. Thus, even if municipal solid waste contains fewer hazardous substances than industrial waste, historic mismanagement has still created serious environmental problems which would exist even if no co-disposal of industrial waste had ever occurred.

Perhaps more importantly, though, this argument is irrelevant. Many industrial companies could fairly contend that the waste they sent to a site, by itself, would not have created a Superfund site. Yet, they would remain liable. The bottom line is that Superfund has never made a distinction between persons whose wastes created the problem and persons whose wastes did not. The only criteria is whether your wastes contained hazardous substances.

The authors of S. 1557 assert that even if municipal solid waste contains some hazardous substances, the actual amounts are usually so small that cities shouldn't be held liable.

This point goes to how much you should pay, not whether you should pay. In fact, hundreds of small, medium, and large companies at hundreds of

other sites can make exactly the same argument. But they would be left in the system and cities would be taken out. If municipalities that sent waste containing less than half a percent of hazardous substances are out, why shouldn't companies whose industrial wastes contained similarly low concentrations of hazardous substances be out also?

In addition, it is important to understand that when multiplied by high volumes of waste, even the presence of less than one percent of hazardous substances in waste can translate into a large amount of toxic wastes.

Equally important, it must be noted that the remedies selected to clean up municipal landfills are not simply driven by how much hazardous substances are present.

For example, methane, a greenhouse gas, results from the degradation of food and yard wastes in landfills. It is highly flammable and poses a fire and explosion threat. The presence of methane gas, which is almost entirely attributable to municipal solid waste, can substantially increase the cost of a Superfund landfill cleanup since it may require construction of a methane collection system.

Similarly, the volume of waste can affect the cost of cleanup. Municipal landfill cleanups often involve placing a costly cap over the waste. The cost of the cap is directly related to the volume of waste contributed, not the amount of hazardous substances contained therein. Often, it is the municipalities who contributed the largest volume of waste at a landfill.

The authors of S. 1557 assert that the bill does not let cities off the hook, but merely exempts them from suits filed by anyone other than EPA.

The bill is cleverly drafted to escape being called a flat out municipal bailout. But if it walks like a duck.... Consider this: in the entire history of Superfund, EPA has never, not once, sought to force a municipal generator to contribute to a Superfund cleanup. The reason has nothing to do with their potential liability; instead, it has everything to do with political sensitivity. EPA knows that if it pursues cities as PRPs, these entities would howl in protest. So it left the job to private parties. A bill that permits EPA and no one else to pursue municipalities is, in effect, a municipal bailout. The fact is EPA won't do it. And cities will be off the hook.

The authors of S. 1557 assert that companies suing municipalities are abusing the legal system to create political pressure for Congress to reform Superfund.

This is specious. Congress explicitly gave PRPs the right to seek contributions from any person whom they believed to be liable, including municipalities. To suggest now that private parties who exercise this right are somehow abusing the system puts us in an Alice in Wonderland world: "We gave you the right to do this, but if you do it, we will take it away."

The authors of S. 1557 assert that the Lautenberg bill is simply an effort to enshrine current EPA policy into law.

This is misleading. EPA's policy has been that the agency itself would not name municipalities as PRPs. But it specifically avoided taking the next step of barring others from seeking contribution from municipalities through private lawsuits. The Lautenberg bill goes far beyond EPA's policy by completely shielding municipalities from any private contribution actions.

The authors of S. 1557 assert that many others, such as small businesses, are helped by S. 1557, not just municipalities.

This is correct. And it is a politically creative way to shift the entire cleanup burden to medium and large businesses. But good political tactics do not always result in good, workable laws. This bill, by picking and choosing which parties should finance cleanup, by making liability a function of who you are and how much political support you have, not whether your waste contained hazardous substances, undoes a basic element of Superfund. In so doing, it introduces even more inequity into the program, and does so at the expense of one class of companies who sometimes have less liability and culpability than those who would be let off the hook.

The authors of S. 1557 assert that the Lautenberg bill will prevent PRPs from suing individual municipal officials, such as Mayors.

This argument is entirely misleading. Individual mayors and other local officials have not been sued under current law. Rather, suits are filed against municipalities, not the individuals who run them. No local official faces personal liability today.

1 **TITLE X—ASSET CONSERVATION**
2 **AND DEPOSIT INSURANCE PRO-**
3 **TECTION**

4 **SEC. 1001. SHORT TITLE.**

5 This title may be cited as the “Asset Conservation
6 and Deposit Insurance Protection Act of 1991”.

7 **SEC. 1002. AMENDMENT TO THE FEDERAL DEPOSIT INSURANCE**
8 **ACT.**

9 (a) **IN GENERAL.**—The Federal Deposit Insurance Act
10 (12 U.S.C. 1811 et seq.) is amended by adding at the end
11 the following new section:

12 **“SEC. 40. ASSET CONSERVATION.**

13 **“(a) LIABILITY LIMITATIONS.—**

14 **“(1) INSURED DEPOSITORY INSTITUTIONS.**—The li-
15 **ability of an insured depository institution under any**
16 **Federal law imposing strict liability for the release or**
17 **threatened release of a hazardous substance at or**
18 **from property—**

19 **“(A) acquired through foreclosure;**

20 **“(B) held in a fiduciary capacity;**

21 **“(C) held by a lessor pursuant to the terms**
22 **of an extension of credit; or**

23 **“(D) subject to financial control or finan-**
24 **cial oversight pursuant to the terms of an exten-**
25 **sion of credit,**

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16 July 91

1 shall be limited to the actual benefit conferred on
2 such institution by a removal, remedial, or other re-
3 sponse action undertaken by another party.

4 “(2) MORTGAGE LENDERS.—The liability of a
5 mortgage lender under Federal law imposing strict li-
6 ability for the release or threatened release of a haz-
7 ardous substance at or from property—

8 “(A) acquired through foreclosure; or

9 “(B) subject to financial control or finan-
10 cial oversight pursuant to the terms of an exten-
11 sion of credit,

12 shall be limited to the actual benefit conferred on
13 such lender by a removal, remedial, or other re-
14 sponse action undertaken by another party.

15 “(3) SAFE HARBORS.—Notwithstanding para-
16 graphs (1) and (2), an insured depository institution
17 or mortgage lender shall not be liable under any
18 Federal law described in paragraph (1) or (2) based
19 solely on the fact that the institution or lender—

20 “(A) holds a security interest only as a de-
21 pository institution or mortgage lender, or aban-
22 dons its security interest in the collateral before
23 foreclosure;

1 “(B) has the unexercised capacity to influ-
2 ence operations at or on property in which it
3 has a security interest;

4 “(C) includes in the terms of its extension
5 of credit covenants, warranties, or other terms
6 and conditions that relate to the borrower's
7 compliance with environmental laws;

8 “(D) monitors or enforces the terms and
9 conditions of the extension of credit;

10 “(E) monitors or undertakes one or more
11 inspections of the property;

12 “(F) requires the borrower to cleanup the
13 property prior to or during the term of the ex-
14 tension of credit;

15 “(G) provides financial or other advice or
16 counseling in an effort to prevent default or
17 diminution in the value of the property;

18 “(H) restructures, renegotiates, or other-
19 wise agrees to alter the terms and conditions of
20 the extension of credit;

21 “(I) refuses to restructure, renegotiate, or
22 renew an extension of credit;

23 “(J) acquires the property through foreclo-
24 sure; or

1 “(K) exercises whatever other remedies at
2 law or in equity may be available under appli-
3 cable law for the borrower’s breach of any term
4 or condition of the extension of credit.

5 “(b) ACTUAL BENEFIT.—For the purpose of this sec-
6 tion, the actual benefit conferred on an institution or lender
7 by a removal, remedial, or other response action shall be
8 equal to the net gain, if any, realized by such institution or
9 lender due to such action. In no event may the actual bene-
10 fit exceed the full fair market value of the property follow-
11 ing such removal, remedial, or other response action.

12 “(c) EXCLUSION.—The limitations on liability provid-
13 ed under subsection (a) shall not apply to—

14 “(1) any person that has caused the release of a
15 hazardous substance that forms the basis for liability
16 described in subsection (a);

17 “(2) any person that, following the acquisition
18 of property through foreclosure or the termination of
19 a lease agreement, failed to exercise due care to pro-
20 tect the public health and safety with respect to iden-
21 tified releases of hazardous substances that form the
22 basis for liability described in subsection (a); or

23 “(3) any person that actively directs or con-
24 ducts operations that result in the release of a haz-

1 ardous substance that forms the basis for liability de-
2 scribed in subsection (a).

3 “(d) GOVERNMENTAL ENTITIES.—

4 “(1) BANKING AND LENDING AGENCIES.—A Fed-
5 eral banking or lending agency shall not be liable
6 under any law imposing strict liability for the release
7 or threatened release of a hazardous substance at or
8 from property (including any right or interest there-
9 in) acquired—

10 “(A) in connection with the exercise of re-
11 ceivership or conservatorship authority, or the
12 liquidation or winding up of the affairs of an in-
13 sured depository institution, including any of its
14 subsidiaries;

15 “(B) in connection with the provision of
16 loans, discounts, advances, guarantees, insur-
17 ance or other financial assistance; or

18 “(C) in connection with property received
19 in any civil or criminal proceeding, or adminis-
20 trative enforcement action, whether by settle-
21 ment or order.

22 “(2) LIMITATION.—The immunity provided by
23 paragraph (1) shall not apply to—

1 “(A) any entity that has caused the release
2 of a hazardous substance that forms the basis
3 for liability described in paragraph (1); or

4 “(B) any entity that, following the acqui-
5 sition of property through foreclosure, failed to
6 exercise due care to protect the public health
7 and safety with respect to identified releases of
8 hazardous substances that form the basis for li-
9 ability described in paragraph (1).

10 “(3) SUBSEQUENT PURCHASER.—The immunity
11 provided by paragraph (1) shall extend to the first
12 subsequent purchaser of property described in such
13 paragraph from a Federal banking or lending agency,
14 unless such purchaser—

15 “(A) would otherwise be liable or poten-
16 tially liable for all or part of the costs of the re-
17 moval, remedial, or other response action due to
18 a prior relationship with the property;

19 “(B) is or was affiliated with or related to
20 a party described in subparagraph (A); or

21 “(C) fails to exercise due care to protect
22 the public health and safety with respect to
23 identified releases of hazardous substances that
24 give rise to a removal, remedial, or other re-
25 sponse action.

1 “(4) LIMITED LIABILITY FOR EMERGENCY RE-
2 SPONSE ACTIONS.—

3 “(A) IN GENERAL.—Except as provided in
4 subparagraph (B), a Federal banking or lending
5 agency shall not be liable for costs or damages
6 in connection with actions taken in response to
7 an emergency created by the release or threat-
8 ened release of a hazardous substance at or
9 from a property described in paragraph (1).

10 “(B) GROSS NEGLIGENCE STANDARD.—This
11 paragraph does not preclude liability for costs
12 or damages resulting from the gross negligence
13 or intentional misconduct by a Federal banking
14 or lending agency in responding to an emergen-
15 cy created by the release or threatened release
16 of a hazardous substance in connection with a
17 property described in paragraph (1).

18 “(C) DEFINITION.—For the purpose of this
19 paragraph, the term ‘gross negligence’ means
20 reckless, willful, or wanton misconduct.

21 “(e) LIEN EXEMPTION.—Any property transferred pur-
22 suant to subsection (d) or held by a Federal banking or
23 lending agency shall not be subject to any lien for costs or
24 damages associated with the release or threatened release

1 of a hazardous substance known to exist at the time of the
2 transfer.

3 “(f) EXEMPTION FROM COVENANTS TO REMEDIATE.—

4 A Federal banking or lending agency shall be exempt from
5 any law requiring such agency to grant covenants warrant-
6 ing that a removal, remedial, or other response action has
7 been, or will in the future be, taken with respect to proper-
8 ty acquired in the manner described in subsection (d)(1).

9 “(g) ENVIRONMENTAL ASSESSMENTS.—

10 “(1) DEPOSITORY INSTITUTIONS.—The appropri-
11 ate Federal financial institutions regulatory agencies
12 shall, after consulting with the Administrator of the
13 Environmental Protection Agency and the Secretary
14 of Housing and Urban Development, promulgate reg-
15 ulations that require insured depository institutions to
16 develop and implement adequate procedures to
17 evaluate actual and potential environmental risks that
18 may arise from or at property prior to making an ex-
19 tension of credit secured by such property. The regu-
20 lations may provide for different types of environ-
21 mental assessments in order to account for different
22 levels of risk that may be posed by different classes
23 of collateral.

24 “(2) MORTGAGE LENDERS.—The Secretary of
25 Housing and Urban Development shall, after consul-

1 tation with the Administrator of the Environmental
2 Protection Agency and the appropriate Federal finan-
3 cial institutions regulatory agencies, promulgate reg-
4 ulations to assure that mortgage lenders develop and
5 implement procedures to evaluate actual and poten-
6 tial environmental risks that may arise from or at
7 property prior to making an extension of credit se-
8 cured by such property. The regulations may provide
9 for different types of environmental assessments in
10 order to take into account the level of risk that may
11 be posed by particular classes of collateral.

12 “(3) FINAL REGULATIONS.—Final regulations re-
13 quired to be promulgated pursuant to paragraph (1)
14 shall be issued within 180 days after the date of en-
15 actment of this section.

16 “(h) DEFINITIONS.—For the purposes of this section:

17 “(1) The term ‘property acquired through fore-
18 closure’ or ‘acquires property through foreclosure’
19 means property acquired, or the act of acquiring
20 property, from a nonaffiliated party by an insured
21 depository institution or mortgage lender—

22 “(A) through purchase at sales under judg-
23 ment or decree, power of sales, or from a trust-
24 ee, deed in lieu of foreclosure, or similar con-
25 veyance, or through repossession, if such prop-

1 erty was security for an extension of credit pre-
2 viously contracted;

3 “(B) through conveyance pursuant to an
4 extension of credit previously contracted; or

5 “(C) through any other formal or informal
6 manner by which the insured depository institu-
7 tion or mortgage lender temporarily acquires,
8 for subsequent disposition, possession of collat-
9 eral in order to protect its security interest.

10 Property is not acquired through foreclosure if the
11 insured depository institution or mortgage lender
12 does not seek to sell or otherwise divest such proper-
13 ty at the earliest practical time, taking into account
14 market conditions and regulatory requirements.

15 “(2) The term ‘mortgage lender’ means—

16 “(A) a company (other than an insured de-
17 pository institution) that—

18 “(i) is regularly engaged in the busi-
19 ness of making extensions of credit se-
20 cured, in whole or in part, by real property
21 to nonaffiliated parties, and

22 “(ii) complies with the environmental
23 assessment requirements imposed under
24 subsection (g), after final regulations under
25 that subsection become effective;

1 “(B) the Federal National Mortgage Asso-
2 ciation, the Federal Home Loan Mortgage Cor-
3 poration, and the Federal Agricultural Mortgage
4 Corporation, if such Association or Corporation
5 requires institutions from which it purchases
6 mortgages (or other obligations) to comply with
7 the requirements of subsection (g), after final
8 regulations under that subsection become effec-
9 tive; and

10 “(C) any person regularly engaged in the
11 business of insuring or guaranteeing against a
12 default in the payment of an extension of credit
13 to nonaffiliated parties, secured in whole or in
14 part by real property, and extended by a mort-
15 gage lender (as such term is defined in this
16 paragraph).

17 “(3) The term ‘fiduciary capacity’ means acting
18 for the benefit of a nonaffiliated person as a trustee,
19 executor, administrator, custodian, guardian of es-
20 tates, receiver, conservator, committee of estates of
21 lunatics, or any similar capacity.

22 “(4) The term ‘extension of credit’ includes
23 lease transactions that are functionally equivalent to
24 a secured loan and that comply with regulations

1 issued by the appropriate Federal banking agency or
2 State banking authority.

3 “(5) The term ‘insured depository institution’
4 has the same meaning as in section 3(c), and shall
5 also include—

6 “(A) a federally insured credit union;

7 “(B) a bank or association chartered under
8 the Farm Credit Act of 1971; and

9 “(C) a leasing company that is an affiliate
10 of an insured depository institution (as such
11 term is defined in this paragraph).

12 “(6) The term ‘Federal banking or lending
13 agency’ means the Federal Deposit Insurance Corpo-
14 ration, the Resolution Trust Corporation, the Board
15 of Governors of the Federal Reserve System, a Fed-
16 eral Reserve Bank, a Federal Home Loan Bank, Fed-
17 eral Banking Commission, the National Credit Union
18 Administration Board, the Farm Credit Administra-
19 tion, the Farm Credit System Insurance Corporation,
20 the Farm Credit System Assistance Board, the Farm-
21 ers Home Administration, the Rural Electrification
22 Administration, and the Small Business Administra-
23 tion, in any of their capacities, and their agents.

24 “(7) The term ‘appropriate Federal financial in-
25 stitutions regulatory agency’ has the same meaning

1 given such term in section 8(e), except that it does
2 not include the Secretary of the Treasury or the
3 Oversight Board.

4 “(8) The term ‘release’ has the meaning given
5 such term in section 101(22) of Public Law 96-510,
6 and also includes the use, storage, disposal, treat-
7 ment, generation, or transportation of a hazardous
8 substance.

9 “(9) The term ‘hazardous substance’ includes
10 any substance or material that is subject to regulation
11 or response under Federal or State environmental
12 laws or regulations.

13 “(10) The term ‘security interest’ includes
14 rights under a mortgage, deed of trust, assignment,
15 judgment lien, pledge, or any other right accruing to
16 a creditor under the terms of an extension of credit
17 to secure the repayment of money, the performance
18 of a duty or some other obligation.

19 “(i) SAVINGS CLAUSE.—Nothing in this section shall
20 affect the rights or immunities or other defenses that are
21 available under other applicable law to any party subject to
22 the provisions of this section. Nothing in this section shall
23 be construed to create any liability for any party.”.

24 (b) EFFECTIVE DATE.—The amendment made by sub-
25 section (a) shall become effective upon the date of enact-

1 ment of this title, except that it shall not affect any admin-
2 istrative or judicial claims that have been formally filed as
3 of such date.

STATEMENT OF CONCERN REGARDING
TITLE X OF THE SENATE BANKING REFORM BILL

I wish to express serious concern over "The Asset Conservation and Deposit Insurance Protection" title, Title X, of the Senate Banking Reform bill. This provision should be removed from the Senate's banking reform package.

Title X would exempt banks from most liability under environmental laws with a strict liability standard. This includes Superfund, the Clean Water Act, the Resource Conservation and Recovery Act, the Clean Air Act and the Safe Drinking Water Act--there may be others.

What concerns me the most about this legislation is that the banking community has provided no real proof that a problem exists. In testimony before the Senate Superfund, Ocean and Water Protection Subcommittee, representatives from the EPA testified that they had found the following:

Of the 18,392 notice letters it has sent to potentially responsible parties (PRPs) at Superfund sites, none have ever been sent to the FDIC or the RTC.

In the almost twelve year history of the Superfund program, only eight lenders have ever been identified as PRPs.

The banks claim that this fear of liability, whether real or not, might cause lenders to turn down loans. However, in a recent article in American Banker, a loan syndication official at Citibank stated that "I've never had anybody give environmental issues as a turndown for a loan." This official went on to say, "I've never seen a call report listing environmental concerns as a parameter."

On the other hand, banks can have tremendous impacts on the environmental behavior of their borrowers. In the words of Richard Rosenberg, Chairman of the BankAmerica Corporation, the bank's customers "have enormous impacts on the environment, and we can promote change by how our resources are allocated."

In fact, the current liability standards encourage banks to make careful loans. When one considers the state of the banking community today, the last thing we want to do is remove incentives for banks to make careful loans.

Title X does not belong in the Senate Banking Reform bill. The liability of lenders for environmental problems should be considered within the context of the reauthorization of the particular environmental laws affected.

General statement:

I would like to express my very significant concerns regarding Title X of this proposed legislation. It is clear to me that the Banking Committee did not fully consider the ramifications of preempting all federal environmental laws that might conceivably create liability for careless banks. Furthermore, this body should hesitate before approving legislation that would preempt stricter state laws as Title X would for all claims against a long list of federal lenders.

America's banks have just not made the case that the current credit crunch has been caused by the threat of potential (and sometimes deserved) environmental liability. Indeed, many bankers privately express that they would prefer EPA's proposed lender liability rule to the confusing Title X. Title X would replace the current incentive banks have to help identify contaminated properties with unspecified, and probably unenforced, regulations.

Instead of recklessly cutting a big loophole for banks in most of America's environmental laws and spawning years of litigation, the Senate should listen to the environmental and industrial communities which urge us to defer this issue to a comprehensive review of the Superfund law, which is slated for the next Congress.

Addl language re EPW jurisdiction:

It is entirely inappropriate that this environmental legislation proceed disguised as banking reform. It is plain for all to see that this is really an attempt to rewrite the Superfund statute, something the Banking Committee has neither the right nor the expertise to do. In fact, many in the banking community are upset because of this subterfuge; they worry (with good cause) that Title X will create more uncertainty than exists now and will create years of litigation because it does not clearly set out how it modifies a long list of federal and state environmental laws.

ENVIRONMENTAL COMMUNITY OPPOSES LENDER LIABILITY BAIL-OUT

November 5, 1991

Dear Senator:

Re: Floor Vote on S. 543, the Banking Reform Bill

We write to express the adamant opposition of the environmental community to the proposed "Title X" of the Banking Reform Bill. America's banks seek approval to turn a blind eye towards environmental contamination problems that threaten human health and the environment -- leaving the bill for the overburdened American taxpayer. We urge you to respect the environment and oppose this giveaway to the banks.

Title X would:

- Exempt banks from most liability from all of America's strict liability environmental laws, including, for example, Superfund, the Clean Water Act, RCRA, and the Safe Drinking Water Act, among others;
- Preempt stricter state laws that would apply to a long list of federal lenders;
- Create new uncertainties and spawn years of litigation regarding banks liabilities for environmental contamination.

The Banks Cry Wolf

What is most outrageous about this proposed legislation is that the banking community has provided no real proof that a true problem exists. When challenged by the Senate Superfund, Ocean, and Water Protection Subcommittee to present evidence that innocent lenders are experiencing liability for environmental contamination, lenders responded with self-serving, incomplete anecdotes. Only EPA could present comprehensive statistics, and it found that:

- Of the 18,392 notice letters it has sent to potentially responsible parties (PRPs) at Superfund sites, none have ever been sent to the FDIC or the RTC;
- EPA's search of its records reveals only six National Priorities List (NPL) Superfund sites where federal entities have been involved;
- In the almost twelve year history of the Superfund program, only eight lenders have ever been identified as PRPs.

In other words, according to EPA, only .04% of all the Potentially Responsible Parties ever identified have been lenders and the FDIC and RTC have never been so identified.

In response to this type of argument, bankers assert that their emperor does have clothes and that the (unfounded) fear of environmental liability has single-handedly caused our current credit crunch. This ignores the fact that the current economic downturn has many complex causes and the unfounded fear of environmental liability is but one. Exempting lenders from all America's environmental laws will not change this situation or turn on the tap of new credit.

Banks Aren't Always Innocent

Further, lenders' assertions that they are always innocent bystanders at the scene of environmental liability are simply not true. In Chairman Riegle's state, the Attorney General of Michigan has charged that the Manufacturers National Bank of Detroit is responsible for environmental contamination that may take over \$30 million to clean up. The bank was represented on the board of directors of Auto Specialties Manufacturing Co. from 1964 to 1986 and exerted control over the company's decisions. These decisions have led to significant contamination problems at several sites in southwestern Michigan.

And Manufacturers National is not alone. EPA's response to the Superfund Subcommittee's questionnaire contains several examples of lenders that became embroiled in the management of polluting enterprises. If a chemical company or a manufacturing company made these bad decisions they would clearly be liable for cleanup costs; why should a lender that made similarly dangerous decisions get off the hook?

In fact, getting off the hook is the theme of Title X. For example:

- To qualify for a limitation of liability, under Title X, lenders will no longer have to show they used due diligence to detect any contamination problems. Instead, they would automatically qualify for a limitation on their liability (from all Federal strict liability environmental laws including the Superfund statute, RCRA, the Clean Water Act, the Clean Air Act, the Oil Pollution Act of 1990).
- Title X would require Federal agencies to produce due diligence regulations, but appears to suggest that these regulations be applied prospectively only, which may completely excuse past negligence.
- Title X also lacks any enforcement mechanism whatsoever for these regulations.

Huge New Loophole

And not only would this misguided provision let lenders get away with having created or ignored contamination problems in the past, it would also establish a whole category of contaminated sites where no cleanup need ever take place. The first person a Federal lender sells a property to will be exempt from all environmental laws including all state laws until the end of time. Moreover, these first purchasers may be able to pass on this immunity to others by leasing them the property and/or selling them stock in a holding company.

All these first purchasers would ever have to do is exercise "due care" (whatever that means) if they decide to look for contamination and manage to find it. This loophole could allow the RTC and FDIC

Lender Liability
November 5, 1991

to become a dumping ground for environmentally contaminated properties, an absolutely outrageous result.

Significant Opposition to Title X

It is instructive to know that even the banking community does not enthusiastically support this bail-out. EPA's proposed rule has satisfied most banker's concerns and they privately worry that Title X will generate years of litigation as parties seek to parse its contradictory provisions and to apply its confusing mandate to a vast array of Federal and State environmental laws.

Moreover, many in the private sector worry that Title X will provide a vehicle for premature legislation limiting the liability of municipalities under Superfund. It makes no sense to propose sweeping changes to our environmental laws as an add-on to banking reform legislation. It would be much more appropriate to consider these issues in the context of a comprehensive re-evaluation of the Superfund program.

For these and many other reasons, we urge you to consider the damage these provisions will cause to the environment and the laws that protect it, and to oppose Title X of the Banking Reform legislation.

Sincerely,

Phil Clapp
Clean Water Action

Joe Schwartz
Environmental Action

Bill Roberts
Environmental Defense Fund

Rick Hind
Greenpeace

Marchant Wentworth
Izaak Walton League of America

Doug Wolf
Natural Resources
Defense Council

Sherry Ettleson
Public Citizen's Congress Watch

A. Blakeman Early
Sierra Club

Carolyn Hartmann
US Public Interest Research Group

The Greening of BankAmerica

2/21/91
By JED HOROWITZ

BankAmerica has gone green.

The first evidence came in January, when the San Francisco-based giant circulated a set of environmental principles to its employees and installed a senior vice president to head an office of environmental policies and programs.

Then, in April, chairman Richard Rosenberg announced that Bank of America will donate up to \$6 million in Latin American debt to three conservation organizations working to preserve rain forests in Mexico, Central America, and South America.

In the latest green twist, BankAmerica Corp. is leading an effort to raise \$400 million

for a new not-for-profit entity that would clean up catastrophic oil spills. The outfit, Marine Spill Response Corp., is indirectly owned by a coalition of the country's largest oil



**The bank's customers
"have enormous
impacts on the
environment, and we
can promote change
by how our resources
are allocated."**

**Richard Rosenberg
Chairman,
BankAmerica Corp.**

companies. A meeting to persuade about a dozen other banks to join the credit was held in New York last week.

"At BofA you are seeing a

See **GREENING** page 8

The Greening of BankAmerica: A Policy Blossoms

Continued from page 1

response to consumer demands about what is right, blending with the personal beliefs of the people that have become the leaders of the institution," said Peter A. Seligmann, chairman and chief executive of Conservation International, one of the beneficiaries of the bank's debt-for-nature swap.

BankAmerica's environmental efforts are driven by a savvy mix of good intentions and good business. Its top executives have a true commitment to the cause, according to people close to management, but also want to score with the bank's green-leaning customers in California.

BankAmerica also may see opportunity in funding one of the fastest growing business sectors in the nation. The cost of cleansing the nation's air, water, and waste over the next 50 years is estimated to be between \$500 billion and \$1 trillion, in today's dollars. That could mean an enormous opportunity for banks willing to lend to companies that range from waste recyclers to manufacturers of catalytic converters.

Citicorp Upgrading 'Sensitivity'

BankAmerica is not the only financial company pushing the green front.

Citicorp has hired consultant Cynthia Stone to, in her words, "increase sensitivity to environmental issues at all levels of the bank and across businesses."

Working through the company's corporate affairs office, Ms. Stone is developing an employee communications effort to be unveiled in a few months. Until now, the major effort has been

"Any credit decision has a number of factors going into it, and environment isn't always the overriding one. We are still figuring it out, but we do have a say in the credit decision."

Richard Morrison
Senior vice president, head of environmental policy at BankAmerica Corp.

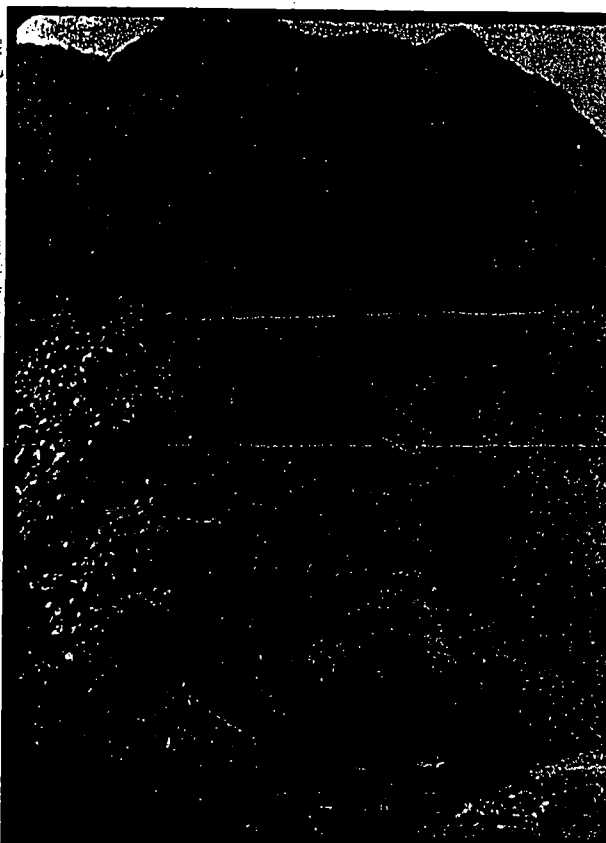


to include organizations such as the National Audubon Society as part of the \$25 million in grants and contributions Citicorp makes annually.

Practical Results Elusive

BankAmerica, at least initially, has not sought much publicity for its more ambitious efforts. That may be because it has not yet determined how to implement the most controversial tenet of its environmental principles: a promise to curb loans to polluters or other ecologically irresponsible corporations.

"That is real easy to say, but



ECOLOGICALLY CORRECT: BankAmerica has donated \$6 million of its Latin American debt to help save rain forests in Mexico and Central and South America.

it's a whole lot harder to apply it to our customers," admitted Richard Morrison, the senior vice president who coordinates BankAmerica's environmental policy efforts.

"Any credit decision has a number of factors going into it,

as travelers checks and foreign currency services. "We are not in a position to tell them what to do."

Few lenders at BankAmerica or other institutions have yet to see the lending policy in action. "I've never had anybody give environmental issues as a turn-down for a loan," said a loan syndication official at Citibank. "I've never seen a call report listing environmental concerns as a parameter."

Mr. Morrison said that one of the biggest problems in monitoring compliance with the new policy is the fact that "thousands of loan officers" are talking to customers every day.

"If these people understand the policy, they will turn off a bad guy real early in the process, and nobody would ever see it," he said.

That problem will only be exaggerated when BankAmerica completes its planned merger with Security Pacific Corp. Bank officials will not comment on any aspect of the merger, though Mr. Morrison said the environmental policy is meant to apply to all bank employees worldwide.

Effort Carries High Price Tag

When it comes to other parts of the program, however, there is little doubt that the bank is spending time and money.

In his introduction to the bank's environmental principles, Mr. Rosenberg wrote that the company's "day-to-day business operations have a limited direct impact on the environment, unlike an industrial company."

"But we realize that our resources are channeled to companies that have enormous impacts on the environment, and that we can promote change by how those resources are allocated."

BankAmerica's Environmental Principles

BankAmerica will:

1. Follow responsible environmental practices in all its operations.
2. Make the environmental responsibility displayed by customers and suppliers a factor in all relevant business decisions.
3. Solicit advice and technical expertise in the development and management of its environmental programs and practices.
4. Make a special effort to identify businesses and organizations that are attempting to find solutions to environmental problems and provide appropriate support.
5. Provide employees and retirees with information regarding environmental issues to help them make informed decisions.
6. Expand its recycling, energy, and waste management programs.
7. Recognize and reward employees for actions that support these principles.
8. Periodically assess its performance in identifying and addressing environmental issues.
9. Improve the understanding of the full social impact of government and business actions that affect the environment and the economy.

Source: BankAmerica

Those are fighting words, when coupled with an internal newsletter defining the green policy as encompassing "everything from recycling paper to rejecting commercial loan customers who display a chronic disregard for the environment."

Roster of Initiatives

The environmental principles were developed over a five-month period last year by SRI International, a consultant in Menlo Park, Calif. that worked with more than a dozen senior executives at BankAmerica. Since then, the bank has taken a number of initiatives, both practical and informational:

- It has hired GreenCross, a certification group that reviews the origin of products and supplies purchased by the bank company. The bank will not buy furniture made of tropical hardwoods from rain forests, and GreenCross is double-checking the certification of certain suppliers that are suspect.

- It is working with other Bay Area companies on purchases of recycled paper products, in order to lower costs and encourage production by suppliers.

- It has instituted recycling programs at all branches - including recycling oil and transmission filters from company cars - and expects to have some 450 administrative buildings and offshore branches involved in the program next year. The bank even has its large plastic mail sacks melted down and resurfaced into new plastic bags by an Oregon recycler.

- It has centralized control over heating, water use, and air conditioning in some 2,000 of its buildings, and developed an environmental checklist of 65

items to assess the impact of any new building or design project.

- It has contributed \$500,000 toward the founding of an Environmental Analysis Center on atmospheric pollution at the California Institute of Technology. The bank's philanthropic division also has budgeted \$100,000 this year to give to environmental causes, and is encouraging branches to focus on local environmental projects in a \$50,000 program.

- The bank devotes a column to environmental issues as part of a four-page monthly newsletter sent to checking account customers. It also has started a

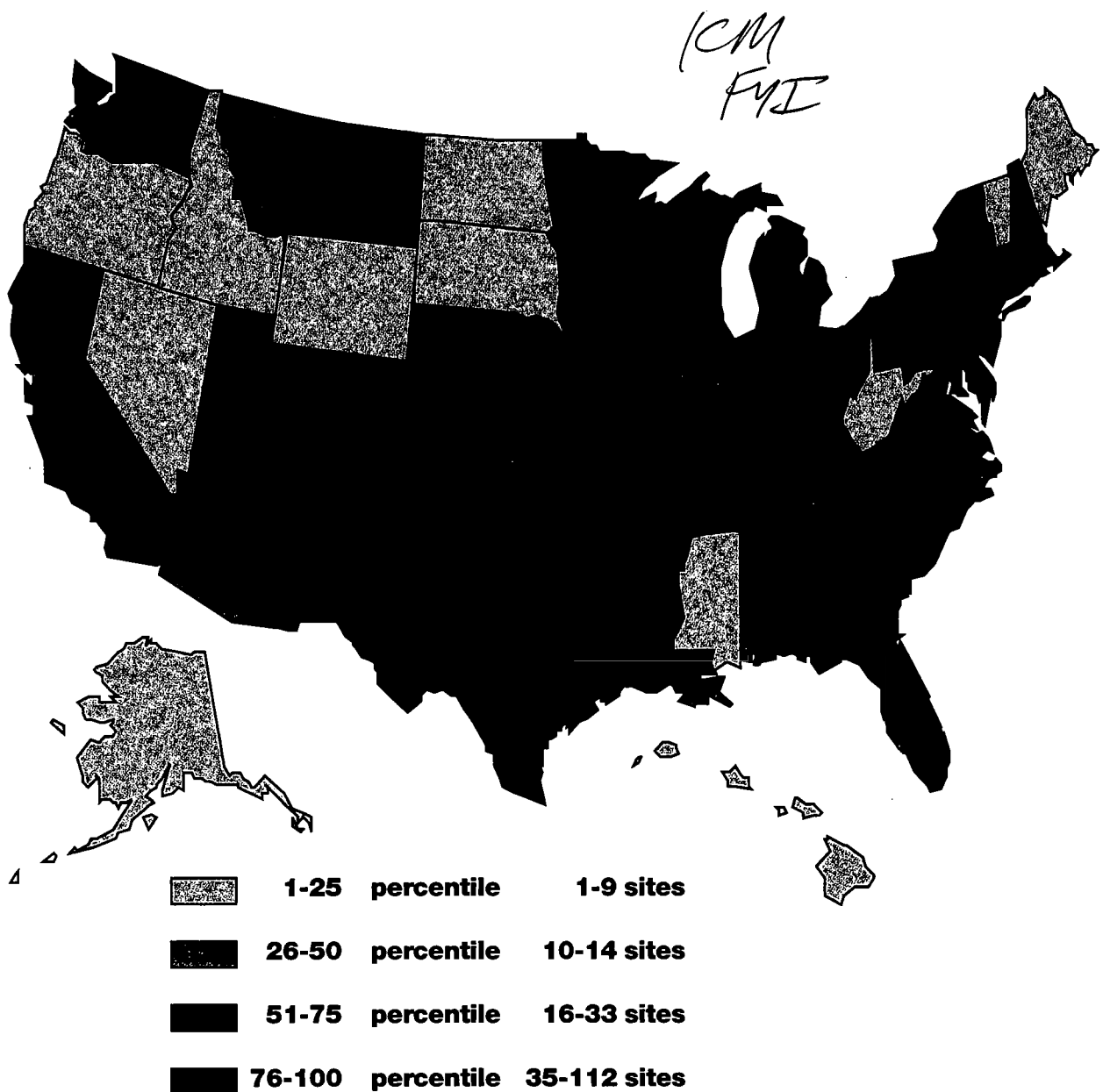
BankAmerica has not sought much publicity for its ecological efforts.

Green Ideas in Action campaign that offers money to employees who come up with useful environmental tips.

Though Mr. Morrison's staff consists only of a vice president and a secretary, bank sources said pressure to adhere to the new green code is coming from Lewis Coleman, the vice chairman for wholesale banking and an ardent conservationist; Peter MacPherson, an executive vice president in charge of Third World debt, who is working gratis with Conservation International; and Thomas Peterson, a vice chairman in charge of retail banking.

"There are a lot of banks that have done things, such as starting recycling programs," Mr. Morrison said. "But no one has the comprehensive full-court press that we started. It's not like other parts of banking where, if you don't do it, there are 20 other banks that can."

Culdo Rahr/Conservation International



Superfund:

Money Squandered in the Name of Public Health

by Andrea Golaine

Superfund sites are found in rural, suburban and urban areas across the United States. (The number of sites in different states is shown in the map above.) The sites vary greatly in size, contamination level, and type of chemicals present. Billions have been spent under the guise of Superfund to clean up such sites. Yet scientific reviews confirm that compared with other environmental problems cancer and non-cancer risks from Superfund sites are low risk.



Dear Readers:

With this Fall 1991 issue of *Priorities*, we begin our third year of publication of a magazine dedicated to the promotion of long life and good health. We hope you like our "new look" and our intensified effort to bring you a variety of articles focusing on nutrition, food safety, and environmental and lifestyle issues as they relate to your health.

Priorities is experiencing an exciting "growth spurt" now, with an increase in advertising revenues and opportunities for newsstand sales. We welcome your assistance in accelerating our expansion.

—Consider giving friends, colleagues and relatives subscriptions to *Priorities* as holiday gifts

—Call Howard Maurer now to reserve advertising space in our Winter Issue, due out in January, 1992.

As always we welcome your letters, comments, criticism and praise.

Sincerely,

A large, elegant, handwritten signature in black ink, reading 'Elizabeth M. Whelan'.

Elizabeth M. Whelan

President ACSH

Publisher, *Priorities: For Long Life and Good Health*

Love Canal's ghosts, now over a decade old, are such stubborn souls. They are not, however, the ghosts of chemical contamination past. Indeed, the most compelling environmental studies to date proved that *Love Canal is the disaster that wasn't*. Former New York Governor Hugh Carey agrees: "Love Canal is the story of people trying to create an issue where there wasn't one." The ghosts, then, filling the streets and shrouding the image of Love Canal, are the spirits of fanatical environmentalists, self-serving politicians and citizen alarmists.

A Brief History

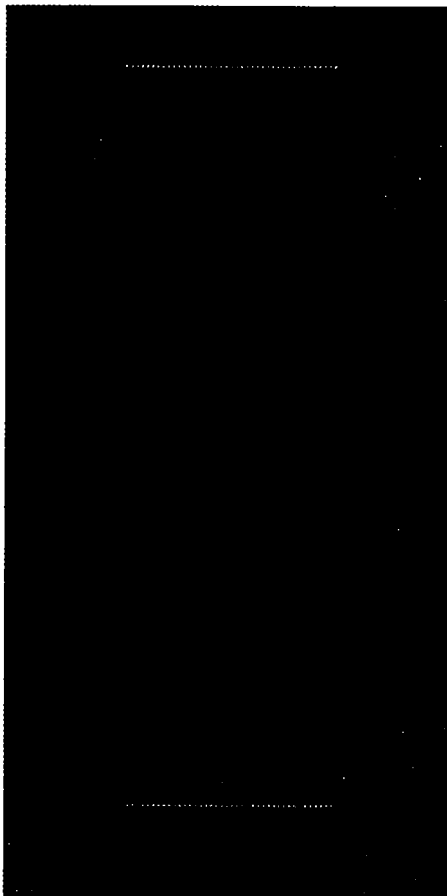
Love Canal is the only remnant of entrepreneur William T. Love's 1894 dream to make a fortune by harnessing the energy of Niagara Falls to create electrical power for an industrial complex. Until 1942, Love's ten acre canal was nothing more than a swimming hole. Then Hooker Electrochemical Company (now Occidental Chemical Corporation) began to dump industrial waste there. Hooker's extensive evaluation had found the clay-lined canal to be an ideal repository for hazardous wastes. Over the next decade, Hooker dumped nearly 22,000 tons of industrial waste. The army and various federal agencies also took advantage of this naturally insulated chemical dump.

The 1950s postwar baby boom significantly changed Love Canal from an ideal chemical waste repository into a potentially dangerous site. The rapidly swelling population spawned a need for more housing and schools. Hooker was pressured to sell the Love Canal and surrounding land to the Niagara Falls school board. Hooker ultimately donated the land to the school board for \$1, but did so with the explicitly clear warning that the land should not under any circumstances be excavated, for fear of disturbing the clay lining and causing chemicals to leak.

Nevertheless, the city excavated the canal to construct storm sewers and roads in 1957 and 1958. When children playing there received minor skin irritations from leaking chemicals, Hooker again warned the school board to cover the area and stop excavation. The second warning also fell on deaf ears.

The problem initiated by the 1950s ex-

cavation finally erupted in the 1970s. After several wet years, there were increasing complaints of chemical odors and leaks. The Niagara County Health Department ordered the site fenced off and remediation was begun: The cause was evident, the so-



lution straightforward. The perimeter of the canal was trenched, and the water table in the surrounding soils was lowered with drain tiles and wells. Love Canal was turned into a national media event in 1978 by vocal residents, a news-hungry press, and opportunistic politicians.

Initially, twenty families at risk (those with children under two and pregnant women in the first two rings of homes around the canal) were to have been relocated. Then, says Governor Carey, politics and junk science surfaced and reigned forever." The psychic trauma of the situation was undoubtedly real. But several factions took advantage of a frightened, hysterical population. Washington politicians pointed a finger at us, saying Love Canal was the ultimate symbol of (state) government neglect. They then used Love Canal to pass Superfund. The federal government released the results of hastily prepared and

improperly conducted studies claiming that oozing chemicals were harming human health."* In addition, Governor Carey describes the activist citizens calling one press conference after another, recounting unproven, dramatically shocking scenes. "The media added their own hype and Love Canal became the object of pity and horror," continues Carey, "and the condition accelerated. The media never told the story of all that was being done to remedy the situation, however, because they were intent on creating the unrivaled drama. *Inaccuracy was allowed to prevail because so many people and factions sought their own personal gain from Love Canal.*" (Emphasis added.)

Ultimately there was mass evacuation and the Love Canal Emergency Declaration Area (EDA) bloated to 350 acres and over 1,100 homes. Love Canal became a ghost town.

Ghostbusting

The original canal area was first covered by a 22-acre clay cap; a second 40-acre clay cap reinforced by a thick plastic membrane was added later. This oversized shield is buffered by 30 surrounding acres, yielding a 70-acre containment facility isolated from the public. The remainder of the EDA consists of seven neighborhoods.

Nearly 250 homes closest to the canal were bought by the state and demolished immediately. The Love Canal Area Revitalization Agency (LCARA) was created by New York state law in 1980 to purchase and manage homes near the canal, and act in the public's interest. Over the years, LCARA purchased 500 additional homes, many of which were destroyed after falling into disrepair.

Attempts to reinhabit Love Canal began in 1982, when EPA's two-year, \$8.5 million study concluded that, outside of the canal contaminated area, (1) chemical concentrations were no higher than in comparison cities, and (2) no environmental standards were violated. Despite validation by the National Bureau of Standards, the U.S. Department of Health and Human Services, and independent studies, the report was plagued by controversy and distrust (generated largely by its hasty, disorganized release) and was ultimately rejected. Another study was ordered.

A Technical Review Committee of independent scientists from across the country was assembled to design and supervise the new comprehensive environmental testing. The committee worked carefully to avoid errors or objections that might cause rejection. All meetings were held publicly and the community was invited to help select comparison areas. In September of 1988, five years and millions of dollars later, *this second study reported exactly the same conclusions as the first*. These findings were used to formulate State Health Commissioner Dr. David Axelrod's "Decision of Habitability".

The Habitability study found that four of seven neighborhoods were habitable as is. Three areas had slightly higher levels of contamination and were deemed nonhabitable. About 150 residents in 69 homes had never left two of these three areas, however, and were still not advised to leave because the areas simply do not pose a threat to health. The federal government, in point of fact, has refused to assist in their cleanup because the *contamination levels are insignificant*.

The Love Canal Area Master Plan changed the three areas deemed nonhabitable into an industrial-commercial classification. Area one will be developed into a scenic approach to the city of Niagara Falls. The two areas with remaining residents present an interesting dilemma. The low levels of contamination would be fairly easy to clean up, but very costly (exceeding the cost of the homes). Marketing of abandoned homes would have to wait until remediation was completed, during which time they would continue to deteriorate. Finally, it would be nearly impossible to overcome the label of "nonhabitable," despite the fact that levels pose no health threat. The commercial-industrial classification, then, was basically made by default.

LCARA entered the real estate market with the first of its refurbished 230 homes in July 1990. As of July, 1991, 26 were under contract or sold. Sale prices, averaging \$50,000, are approximately 20% below comparable markets, lowered by the Love Canal stigma compounded by an abandoned and rundown neighborhood.

The Ghost Still Roams

Why, despite a fastidious remediation, clean health reports, and compelling efforts

to reinhabit the area, does Love Canal remain a ghost town?

Love Canal's image is ever more tarnished by the media. Consider, for example, the recent Hollywood version of Love Canal, in which a young boy dies from leukemia. The viewer logically concludes that leaking chemicals caused his illness, and wonders how many others died from chemical poisoning.

Beyond the severely tarnished image, Love Canal has had to leap formidable legal and financial hurdles.

Opposition to reinhabiting Love Canal neighborhoods has remained strong, vocal, and litigious. Opponents, led by Lois Gibbs (president of the original Love Canal Homeowners Association) and bolstered by the powerful National Resource Defense Council (NRDC) asked for an injunction against LCARA to prevent them from selling homes until they prepared an acceptable Environmental Impact Statement (EIS). New York State's Attorney General granted the injunction in 1985 and held it until 1990 when an acceptable EIS was presented by LCARA. Gibbs and the NRDC then filed a lawsuit against LCARA for failure to do an adequate EIS, claiming that health risks were not assessed. They lost in the first round, but are now appealing the case. NRDC, on behalf of all opponents, is also filing a suit against the EPA, claiming they, too, failed to adequately assess human health risks.

Against tremendous odds, though, buyers are appearing for the homes. But the final impasse is at the bank: lenders refusing to hold mortgages on Love Canal homes, fearful of being held liable for future cleanup of the secured property. "Although Congress has enacted (a) provision to protect lenders from this liability," writes Alvin L. Arnold in *Real Estate Environmental Law Report*, "courts as well as the EPA have interpreted the provision to create liability for two classes of lenders: (1) those who become owners after foreclosing on property that secures a loan; and (2) those who participate in the management of the property securing the loan." A ray of hope: U.S. Congressman John LaFalce (from the Niagara Falls area) has recently introduced a bill that would protect lending institutions

from such tremendous liability.

For now, unfortunately, home sales are dependent on the potential buyer paying cash or LCARA holding the mortgages.

A Legal Nightmare

The story of Love Canal is incomplete without a review of who is suing whom. According to New York State Assistant Attorney General Michael Bryce, Occidental has been found liable twice, once for dumping (under Superfund) and once for creating a public nuisance. But, also under Superfund, Occidental filed a counter claim against the city of Niagara Falls, the State of New York, and the federal government for their parts in creating the problem. The judge split the case, and phase I, which is only trying to establish liability, was in court from October, 1990 through the end of June, 1991. A judgment is expected after October, 1991. Phase II will decide the financial degree of liability; the state and federal governments are currently suing Occidental for \$150-160 million in remediation costs, and, if Occidental is found liable, are expected to sue for damages as well as remediation.

Love Canal is an icon of the environmental movement. It is the story of half truths and political motivations. Unfortunately, it's also a never ending story, a festering wound, unable to heal itself because of the unrivaled momentum of the environmental movement.

Without a doubt, no one wants another Love Canal; we must strive to manage the benefits of technology safely and appropriately. We must also acknowledge that the heavily industrialized areas of this country are no longer pristine. That doesn't mean we should simply write them off, as the environmentalists are trying to do with Love Canal.

** Although there was chemical leakage into the Love Canal community, there is no conclusive case of human illness or death during the 1960s, 1970s, 1980s or 1990s, related to exposure to the chemicals in Hooker's waste-disposal site.*

KRISTINE NAPIER, M.P.H., R.D., IS A CLEVELAND-BASED FREELANCE MEDICAL AND SCIENCE WRITER.

After fading from the nightly news over the past year, AIDS is once again the focus of media attention. Unfortunately, the reason for the renewed interest, the controversy over allowing health care workers infected with the AIDS virus to practice, is diverting attention away from behaviors which truly place an individual at substantial risk for AIDS.

The virus which causes AIDS, human immunodeficiency virus (HIV), is transmitted through sexual contact, piercing of the skin by HIV-contaminated instruments, transfusion of contaminated blood products, and the transplantation of contaminated tissue. An infected mother can transmit the virus to her child before, during, or shortly after birth. There is no evidence that HIV is transmitted by casual contact.

Reducing your risk for AIDS involves taking the following precautions, adapted from the ACSH booklet, *Answers About AIDS*:

- ▼ The only sure way to protect yourself from contracting AIDS through sexual contact is to abstain from sex outside a mutually faithful relationship with a partner whom you know is not infected with the AIDS virus.
- ▼ Do not use intravenous drugs. If you are an IV drug user, get professional help to terminate your drug habit. If you are unable to get off drugs, do not share needles or syringes. Be aware that some street sellers are re-sealing previously used needles and selling them as new. If, knowing the risks, you decide to use a needle or syringe that may not be sterile, clean it with bleach before use.
- ▼ Avoid sexual contact with anyone who has symptoms of AIDS, you think may be at risk for AIDS, or who engages in these high risk behaviors: intravenous drug use, male homosexual activity, bisexual activity.
- ▼ Avoid having multiple and/or anonymous sexual partners.
- ▼ Avoid having sex with anyone who has multiple and/or anonymous sexual partners. Don't have sexual contact with a sexual partner of someone who has AIDS.
- ▼ Avoid contact with your partner's blood, semen, feces, or urine.
- ▼ Do not have sexual contact with prostitutes.
- ▼ If you do have sex with someone whose HIV status is unknown to you, avoid exchange of body fluids and receptive anal intercourse. Always use a latex condom during each sexual act, from start to finish to help prevent contact with the AIDS virus. Use of a spermicidal agent may provide additional protection. Using a condom and spermicide consistently will reduce, but by no means eliminate, the risk of becoming infected with the AIDS virus.
- ▼ Exercise caution regarding procedures such as acupuncture, tattooing, ear piercing, etc., in which needles or other unsterile instruments may be used repeatedly to pierce the skin and/or mucus membranes. Such procedures are safe if proper sterilization methods are employed or disposable needles used. Ask what precautions are being taken before undergoing such procedures.
- ▼ Do not share any implements that could become contaminated with blood such as toothbrushes or razors with anyone who has, or might have AIDS.

Appearance, occupation and social status are not reliable indicators of whether a person is infected with the AIDS virus. All types of people from all walks of life can be infected, so you should assume that a prospective partner is infected unless proven otherwise.

Old Diseases Pose

by Michal Astor-Billian
and Jean Carey

Measles. Rubella. Whooping cough. Before the advent of vaccines the simple mention of these diseases struck fear into the hearts of parents everywhere. As we approach the twenty-first century, armed with the means to control, prevent, and eliminate them, why are these diseases, all for which effective vaccines are available, threatening the public health again?

The most important reason is the failure to take advantage of modern technology to immunize children according to medically approved vaccine schedules. An estimated 20 million children in the United States have not been completely immunized against childhood diseases.

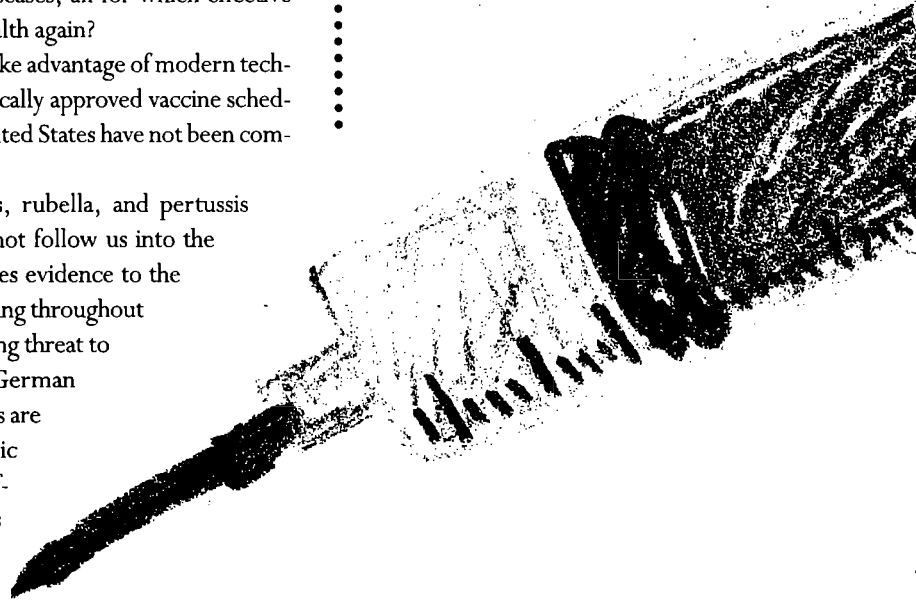
Mistakenly, many people feel that measles, rubella, and pertussis (whooping cough) are ancient history and cannot follow us into the next century. A review of recent events provides evidence to the contrary. Incidence of pertussis has been increasing throughout the nation since the early 1980s. Another growing threat to the public health is rubella, also known as German measles. In New York City, health care providers are fervently working to stem a measles epidemic among preschoolers and infants. Public health officials are concerned that the current measles epidemic is a foreboding sign. Efforts to control infectious childhood diseases must be stepped up.

The dramatic reduction in infectious disease deaths and disabilities achieved by the development and introduction of safe, effective vaccines has lulled many people into a false sense of security. Others, ignorant of the real and permanent consequences of some childhood diseases feel that the risk of contracting the disease is less than the risk involved in receiving the vaccination. These are common and dangerous misconceptions. For the vast majority of children, the risks associated with the vaccination are minute compared to the risks associated with contracting the disease. The consequences of contracting measles, rubella or whooping cough are serious, and include deafness, blindness, mental retardation, heart defects, sterility, miscarriage, paralysis, and death. Two of the combined vaccines which are most worrisome to the general public are the MMR (measles, mumps, rubella), and DPT (diphtheria, pertussis, tetanus).

Measles, rubella, and pertussis are acute, highly communicable diseases transmitted through the air by droplets exhaled in coughing and sneezing from infected persons. They can also be spread by direct contact with the nasal or throat secretions of an infected person or through freshly contaminated articles such as tissues or bed linen.

Measles

Measles is caused by infection with a virus known as *Morbillivirus*. The presenting symptoms are, in order of appearance, cough, runny nose, other respiratory symptoms, and fever two to three days before the onset of a red and blotchy skin rash that begins on the face and spreads to the arms and trunk,



Immunization Schedule

4-6 years	X	X†
15 months	X*	X†
6 months	X	
4 months	X	
2 months	X	

**DTP MMR
Vaccine**

X* Many experts recommend this dose of vaccine at 18 months.

X† Some experts recommend that this dose of MMR vaccine be given at entry to middle or junior high school.

X† In some areas this dose of MMR vaccine may be given at 12 months.

Is this
the right
one?

m.m.

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102D CONGRESS
1ST SESSION

S. 1557

To improve the implementation and enforcement of the Federal cleanup program.

IN THE SENATE OF THE UNITED STATES

JULY 25 (legislative day, JULY 8), 1991

Mr. LAUTENBERG (for himself and Mr. WIRTH) introduced the following bill; which was read twice and referred to the Committee on Environment and Public Works

A BILL

To improve the implementation and enforcement of the Federal cleanup program.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the "Toxic Cleanup Equity
5 and Acceleration Act of 1991".

6 **SEC. 2. ADDITIONAL DEFINITIONS.**

7 Section 101 of the Comprehensive Environmental Re-
8 sponse, Compensation, and Liability Act of 1980 is
9 amended by adding the following new paragraphs at the
10 end thereof:

November 1, 1991

The Honorable Albert Gore Jr.
393 Senate Russell Office Building
Washington, DC 20510

1991 NOV -1 PM 4:16
Katie
FYI

Dear Senator Gore:

Legislation was recently introduced in the Senate (S. 1557) which would effectively relieve certain municipalities and other generators and transporters of wastes similar to "municipal solid waste" from liability under the Superfund law. We urge you to oppose this legislation.

Instead of spending time responding to individual pleas for relief, the undersigned urge Congress to expeditiously review the entire Superfund liability system. The fact is that the Superfund liability system is broken. Whatever Superfund's original theoretical appeal, it does not work in practice. It is not cleaning up sites rapidly and it results in enormous adversarial warfare, confusion, and huge legal fees.

Municipalities seeking relief through S. 1557 may have brought to your attention concerns which Congress should consider. Nevertheless, most everyone caught in the Superfund liability dragnet can make virtually identical arguments about the enormous legal costs and liability they face, irrespective of how much or what pollution they contributed to a given site.

In evaluating the bill, it is important to understand a simple fact: Superfund liability is based on whether your waste contains hazardous substances. Municipal solid waste contains hazardous substances. On that basis alone, effectively exempting municipalities represents a fundamental and far-reaching departure from the original intent of the law.

Sponsors of S. 1557 claim that the legislation does not provide an exemption from liability but allows the Environmental Protection Agency (EPA) -- and no one else -- to continue to seek cleanup contributions from municipalities and others covered under the bill. While technically correct, in fact, EPA does not now seek cleanup contributions from local governments. Under S. 1557, the agency would have no reason or incentive to change this policy since it can use the strict, joint and several liability scheme to force other "deep pocket" generators to finance the cleanups.

We understand and sympathize with the municipalities. But effectively relieving some potentially responsible parties (PRPs) of Superfund liability will do nothing to eliminate the systemic problems in the program. It will not accelerate cleanups, nor reduce the resources now wasted on non-cleanup activities. Indeed, it may well further slow the cleanup process and increase litigation.

November 1, 1991

Page Two

We all want an effective, efficient cleanup program; but piecemeal protectionism for any one group of PRPs will not further that goal. We urge Congress to undertake a comprehensive review of the liability system as a first step in addressing the real problems with Superfund.

Adolph Coors Company
Alcan Aluminum Corporation
Aluminum Association
American Furniture Manufacturers Association
American International Group, Inc.
American Iron and Steel Institute
American Paper Institute
ARCO
Associated Builders and Contractors
Associated General Contractors of America
Bethlehem Steel Corporation
Can Manufacturers Institute
Chemical Manufacturers Association
CIBA-GEIGY Corporation
Crum & Forster Insurance Companies
Fireman's Fund Insurance Companies
Hoechst-Celanese Corporation
Kaiser Aluminum & Chemical Corporation
National Association of Manufacturers
National Association of Metal Finishers
National Food Processors Association
National Paint and Coatings Association
Oryx Energy Company
Society of Independent Gasoline Marketers of America
Society of the Plastics Industry
Texaco Inc.
UNOCAL Corporation



National Association
of Manufacturers

H. RICHARD SEIBERT, JR.
Vice President
Resources and Environment

FYI

September 13, 1991

The Honorable Albert Gore, Jr.
United States Senate
393 RSOB
Washington, DC 20510

Dear Senator Gore:

Recently, Senator Lautenberg introduced S. 1557, a bill designed to change the nation's ten year old Superfund law. The bill changes the basis of liability under the law to exempt cities which sent municipal waste or garbage to landfills which later became Superfund sites. The introduction of this bill follows the EPA announcement of an effort to correct the problems which the cities face through a proposed settlement process. This EPA effort would not require any new legislation. Therefore, NAM asks you to not co-sponsor or support S. 1557. However, we do seek your support in reforming the Superfund law.

In 1980 Congress passed the Superfund law in an attempt to clean up the nation's hazardous waste sites. Now after ten years and hundreds of millions of dollars only about 60 sites have been cleaned up. The Superfund program has been an unmitigated disaster in term of actually cleaning up hazardous waste sites efficiently and quickly.

While there are approximately 1,200 sites on the National Superfund list today, EPA expects to increase the number to 2,000 over the next few years. About 30% of all the sites are landfills.

Some Senators have stated that their interest in S. 1557 stems from their desire to assist cities which have been identified as potentially responsible parties (PRPs) in Superfund sites across the nation. NAM understands that there might be some immediate political appeal to exempting cities which sent waste to landfills which are now Superfund sites. However, this legislation fails to address several serious problems:

- The nations' Superfund law is designed to bring in all parties (industrial, municipal small business, non-profit, etc..) which sent wastes to sites which ultimately became Superfund sites. The fact that cities have been named as "parties" or potentially liable is no accident. EPA sues industry for the total cleanup cost and then industry must sue smaller companies, nonprofit organizations, and cities to be compensated for the some portion of the cleanup costs. This is the unfortunate result of the law's *joint, strict, and several liability* standard.

1331 Pennsylvania Avenue, NW
Suite 1500 - North Lobby
Washington, DC 20004-1703
(202) 637-3157
FAX: (202) 637-3182

September 13, 1991
Page Two

In NAM's view, the statute's liability standard is so fundamentally flawed that it threatens to make anyone who sent waste to a landfill which becomes a Superfund site liable. Churches, hospitals, nonprofit organizations, Mom and Pop restaurants, shoe repair shops, autobody repair shops and small manufacturers. Even the banks fear being brought into the liability mess. Clearly the taxpayers will ultimately pay for the cleanup of garbage at Superfund sites through higher taxes, garbage tipping fees, or through higher prices in goods.

- The Lautenberg bill disregards the fact that municipal garbage contains hazardous substances which are covered by the Superfund law and subject to liability. These hazardous constituents come from residues of household products like motor oil, paint, and cleansers.
- The bill exempts cities from financial or management responsibilities from the immediate health and safety threat of methane gas. Methane gas results from the degradation from food and yard wastes in landfills. Methane, a greenhouse gas, is highly flammable and poses significant fire and explosion threats at landfills and for their neighbors. Often the mere presence of methane in a landfill can account for 40-50% of the total costs of cleanup at Superfund sites.
- S. 1557 ignores the fact that cities generate millions of tons of garbage and as a result are responsible for thousands of tons of hazardous substances. It is the volume of the municipal garbage in a landfill which drives up the costs of cleanup and complicates the litigation.
- S. 1557 implies that municipalities and industry did something wrong by disposing of municipal garbage and industrial wastes in the same landfill. In fact, the states and U.S. EPA directed the "co-disposal" of industrial and municipal garbage in landfills for almost two decades as environmentally safe. Many city authorities instructed industrial companies to dispose of wastes at landfills because the cities needed the industrial and commercial revenues from industrial waste disposal to subsidize the municipal garbage costs. In other situations the cities used municipal waste as a *sponge* to absorb the industrial wastes at the landfill because it was thought to be environmentally beneficial.
- The Lautenberg bill removes financial liability for cities which sent wastes to landfills which they do not own or operate. Yet the bill ignores the cities which owned or operated landfills.

Congress specifically requires that garbage and solid wastes are the responsibility of state and local governments in the 1976 Resource Conservation and Recovery Act (RCRA). The Lautenberg bill would encourage municipalities to export their garbage wastes on barges, highways, and rail cars so that cities won't risk being pulled into Superfund liability in the future. Is this really the message that Congress wants to send to local communities trying to safely manage garbage programs?

September 13, 1991
Page Three

NAM believes that Congress is to be complimented for admitting that their Superfund law is in a shambles. We agree with the Members of the Senate who call for an overhaul of the statute. We stand ready to restore some sense of good management and reason to the cleanup of the nation's 1,200-2,000 hazardous waste sites by supporting a program which does the following:

NAM's Superfund Reform Principles:

- Base cleanup on sensible cleanup standards. Recognize that the presence of wastes in Superfund sites from municipal garbage, metal fabricators, hospitals, food processors, or an autobody repair shop require direct different types of cleanup. Not all Superfund sites are scientifically the same and shouldn't get the same cleanup standards.
- Risk assessments or scientific tools should be used in deciding on how to clean up and what to clean up. Remediation should be based on real risk.
- We need to find a Superfund cleanup system that eliminates the ridiculously expensive legal or contractor transaction costs. These transaction costs can often exceed the costs of the Superfund cleanup and delay the cleanup process for years while all the parties sue one another. This is a waste of time and money and only serves to make the lawyers and consultants rich.

NAM urges you to not support S.1557. Instead we ask you to join our effort to overhaul the flawed Superfund program. In the meantime, we encourage all cities and companies to work with the EPA on their proposed model settlement program to get all parties (cities, hospitals, and industry) into an early cleanup program and to avoid these expensive and tedious legal battles.

If you have questions on how this might affect your state, your cities, and industry, please contact Ms. Theresa Pugh, director, environmental quality, at (202) 637-3175.

Sincerely,

A handwritten signature in black ink, appearing to read "Rich Seibert". The signature is fluid and cursive, with a large initial "R" and a stylized "S".

H. Richard Seibert, Jr.
Vice President
Resources and Environment
National Association of Manufacturers

THE CAPITOL GROUP, INC.

MEMORANDUM

TO: Katie McGinty
Legislative Assistant
Office of Senator Gore

FROM: Marna Wollman

DATE: October 11, 1991

SUBJECT: Superfund Briefing

I am sorry that you were unable to attend yesterday's briefing. Per your request, I have enclosed the materials that were dispersed. Someone will be calling to follow-up with you within the next few days. If you have any questions before then, please feel free to call me at 202/638-1400.

Thank you.

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Superfund ISSUES FORUM

What Is Superfund?

"The Environmental Protection Agency's 'Superfund,' established a decade ago as the ultimate solution to the nation's toxic waste crisis, is mired in billions of dollars in administrative costs and attorneys' fees that threaten to make the program the most expensive public policy fiasco in U.S. history."

— "Superfund Costs
May Top S&L Bailout,"
The San Francisco Chronicle
May 29, 1991

In 1980, faced with the Love Canal in New York, "Valley of the Drums" in Kentucky, the "Kepone Disaster" in Virginia, and the specter of other pollution emergencies, Congress passed The Comprehensive Environment Response, Compensation, and Liability Act (CERCLA), commonly known as Superfund. Congress designed this five-year program to clean up the most dangerous hazardous waste sites nationwide and to respond to emergencies.

Congress empowered the U.S. Environmental Protection Agency (EPA) to raise funds for cleanups from any party connected with hazardous substances at a particular site, past and current owners and operators, generators and transporters. To make it easier for EPA to force these private parties — called potentially responsible parties (PRPs) — to pay for cleanup, Congress decided that any PRP could be held liable for all cleanup costs at a site under the "deep pocket" doctrine of strict, joint and several liability. Recognizing that at some "orphaned" sites no PRPs could be identified, and that emergency situations would require immediate action, Congress created a dedicated trust fund of \$1.6 billion funded by a variety of business taxes.

In 1986, Superfund was authorized for five more years by the Superfund Amendments and Reauthorization Act (SARA). SARA added \$8.5 billion to the trust fund and set specific cleanup goals and standards for EPA. In 1990, during the closing hours of the 101st Congress, Superfund's taxes were continued for five more years as a last-minute addition to the budget agreement.

How are Superfund Sites Identified?

EPA ranks sites for cleanup by the National Priorities List (NPL). There are approximately 1200 final and proposed sites on the NPL as of May 1991. These sites are spread across the U.S., with the majority of

states having ten or more, and five states having more than 50. However, the scope of the problem is much larger. While EPA's database currently contains approximately 11,000 potential sites throughout the U.S., the U.S. General Accounting Office, in a December 1987 report, estimated that the actual number of sites in the U.S. to be reviewed could range from 135,000 to 425,000.

Many Superfund sites were created by waste from manufacturing, transportation spills and accidents, or industrial wastewater. But hundreds of others are simply municipal sanitary landfills that have been used for all of a community's wastes, including both industrial and household waste containing hazardous substances.

What is a "Cleanup"?

Two types of action, or cleanups, can be taken to control Superfund sites:

■ **Removal Actions** are immediate cleanups in response to imminent threats to the public health and environment of the surrounding community. An example would be removing and disposing of a site's leaking barrels. Removal actions can be performed by EPA using the trust fund, or by private parties connected to the site, and are generally limited by SARA to one year and/or \$2 million.

■ **Remedial Responses** are intended to provide more permanent solutions at sites, and can be taken by EPA only if the site is on the NPL. They can take much longer to complete and are more expensive than removal actions. In the best of circumstances, remedial construction takes many years to complete. EPA reports that the average Remedial Response costs — not including legal fees and other costs — are currently \$26 million per site,

Superfund ISSUES FORUM

Superfund Liability:

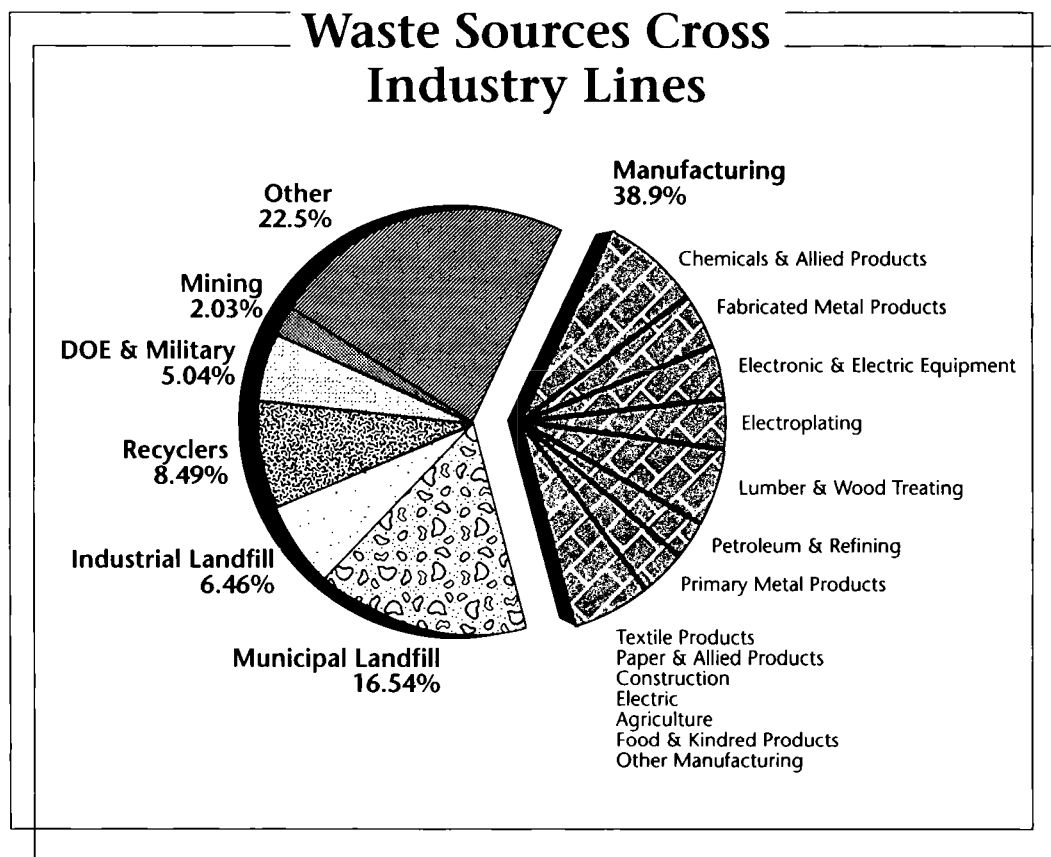
Who are the PRPs?

"In essence, anyone who has ever generated, transported, disposed of or arranged for the disposal of hazardous substances, and anyone who has ever owned or operated a site that is put on the National Priorities List, can be entirely responsible for cleanup costs as a PRP under Superfund."

Superfund was created by Congress in 1980 to clean up the nation's most dangerous waste sites. At each Superfund site, the

Superfund site. Commenting on the liability system, a Member of Congress noted, "Superfund will ultimately make PRPs of us all."

PRP Profile: Waste Sources Cross Industry Lines



Source: U.S. Environmental Protection Agency
Superfund: Focusing on the Nation at Large, September 1990

U.S. Environmental Protection Agency (EPA) attempts to identify potentially responsible parties (PRPs). The statute gives EPA authority to identify and compel PRPs to pay for cleanup under Superfund's expansive liability system. Some parties have likened Superfund's liability system to a huge net, wide enough to entrap virtually anyone who ever had anything to do with a

Wastes at NPL Sites Come from Many Sources

As the pie chart shows, many different kinds of entities have been named PRPs, especially in the manufacturing sector. But Superfund's liability net is so far-

reaching, no one is immune. In addition to large corporations and their subsidiaries, the following entities have been named PRPs at one or more Superfund sites across the country:

- municipal and county governments
- hospitals and nursing homes
- dentists
- schools and universities
- churches
- civic clubs
- nonprofit organizations
- recyclers
- small independent businesses
- individuals

How Does EPA Define a "PRP"?

According to EPA, "A potentially responsible party is any individual or company that might have contributed to or caused the contamination problems at a Superfund site. Examples include owners, operators, and waste transporters or producers. Many PRPs did not break a law when they disposed of their hazardous wastes. Thus, when EPA compels a PRP to clean up a site, it is usually imposing retroactive civil liability, rather than criminal liability. Nonetheless, the PRP can be legally ordered to pay for or conduct the cleanup of its wastes.

EPA begins the search for PRPs as soon as a site is discovered and makes a more concentrated effort to find them after a site is added to the NPL [National Priorities List]. Once a PRP is located and notified of its potential liability, EPA or the State begins the negotiation process. The negotiations can lead directly to a satisfactory settlement, or — if negotiations fail — to a legal order that compels cooperation under the threat of severe financial penalty."

PRPs and the Superfund Liability System

In essence, anyone who has ever generated, transported, disposed of or arranged for the disposal of hazardous substances, and anyone who has ever owned or operated a site that is put on the NPL, can be entirely responsible for cleanup costs as a PRP under Superfund. Under the Superfund liability system, EPA has been given authority to use powerful legal tools in its quest to find and compel as many parties as possible to pay for cleanup. Under this system, PRPs are exposed to:

- **Joint and several liability:** parties found responsible at a site can be sued together or separately for *all* cleanup costs — meaning one party with 'deep pockets' can be held responsible for the entire cost of cleanup, regardless of the extent of its involvement.
- **Retroactive liability:** parties can be held liable for cleanup today that arises from waste disposed of years, even decades, ago — even if the disposal of such material was perfectly legal at the time.
- **Strict liability:** no negligence or fault must be shown in order to establish liability.
- **No causation requirement:** EPA need not prove that the waste disposed of by a PRP created the need for cleanup at the site.

Given these provisions, it can be almost impossible for PRPs to escape Superfund's liability net. And refusing to pay for cleanup can be extremely costly. EPA has the authority to proceed with cleanup at any given site using Superfund monies, and then sue PRPs who refused to pay for triple the cost. ■

This publication was produced by American International Group, Inc., Crum & Forster Insurance Companies, and Fireman's Fund Insurance Companies to further the debate on Superfund.

We think it is time for Congress to fully understand the problems caused by Superfund's liability system. A decade has passed since Superfund's enactment. Billions of dollars have been spent. Relatively few sites have been completely cleaned up. And the eventual scope of the nation's hazardous waste problem, its costs and the number of parties involved threatens to grow to overwhelming proportions.

Piecemeal solutions, such as special exemptions from liability for certain groups, will not fix the basic flaws and inequities in the system. Instead Congress must address the concerns of everyone affected by Superfund liability. This includes not only PRPs, such as businesses and local governments, but also the taxpayers and consumers they serve.

We cannot afford to wait for solutions until Superfund's taxes expire in 1995. Congress must launch a comprehensive review of Superfund liability this year to help determine alternatives that will allow Superfund to meet its goals more cost effectively and efficiently in the future.

For further information, please contact:

*Jan M. Edelstein
Special Assistant to the Chairman
American International Group, Inc.
1455 Pennsylvania Avenue, NW
Suite 900
Washington, D.C. 20004
202/783-2440.*

June 1991

Superfund ISSUES FORUM

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Why Congress Should Not Exempt Generators and Transporters of "Municipal Solid Waste" from Superfund Contribution Claims

Congress is currently considering legislation, sponsored by Senator Lautenberg and Representative Torricelli, that would exempt generators and transporters of "municipal solid waste" from Superfund contribution claims. The following points outline major concerns with this legislation.

The legislation assumes that municipal solid waste is benign. It is not. In fact, the New Jersey Public Interest Research Group recently testified that studies have shown that a single household can contribute up to 100 pounds of toxic wastes per year to the waste stream.

If Congress exempts municipal governments from Superfund contribution claims, the business community will be saddled with the entire responsibility for cleaning up municipal landfills.

The cost of cleaning up municipal landfills will likely dwarf the cost of remediating private sites. The cost of cleanup is driven not only by the toxicity of substances present in the ground and water, but also by the volume of all waste — hazardous and non-hazardous — disposed at the site.

The proposal exempts from contribution claims only those local governments hauling trash to third-party sites. Governments which own or operate their own disposal sites remain fully liable. What is the logical basis for this distinction?

Prior to acting on municipal liability relief proposals, Congress must fill in numerous data gaps regarding the nature of municipal waste, potential municipal liability at present and future NPL sites, and the scale of municipal cleanup costs. As of now, only one hearing has been held, and none of these issues were addressed.

There has been insufficient attention paid to how bills that effectively exempt certain PRPs from Superfund liability will affect Superfund cleanups, RCRA, and other related issues. Prior to acting on such bills, Congress should examine such questions as:

- Whether a municipal exemption will affect the incentives for municipalities to handle waste properly under RCRA;
- Whether a municipal exemption is consistent with various RCRA issues, such as proposed regulations requiring double liners for MSW landfills;
- Whether a municipal exemption will sharply increase the overall cost of Superfund cleanups, perhaps to the detriment of individual companies and other environmental programs;
- Whether a municipal exemption will affect the relationship between trash importing and trash exporting states.

General Talking Points in Support of Comprehensive Superfund Liability Reform

Lenders and municipalities have legitimate Superfund liability concerns which Congress should consider.

But many others involved in Superfund's liability system have grievances similar to, and no less legitimate than, those of municipalities and lenders.

In fact, the Superfund liability system is broken; whatever its theoretical appeal, it does not work in practice; it is not cleaning up sites rapidly; it results in enormous adversarial warfare, confusion, and huge legal fees.

Business wants an effective cleanup program; this is not a debate between "good guys" and "bad guys" or between those who champion Superfund and those who want to destroy it. The only issue is how to devise an effective, efficient cleanup program; piecemeal carve-outs are not the way to accomplish that goal.

Bills that effectively exempt certain classes of PRPs, whatever their political appeal, will do nothing to correct the basic and fundamental defects in the current liability system; they will not accelerate the cleanup process nor will they reduce wasteful non-cleanup spending. In fact, the effect might be entirely the opposite.

Instead of spending time responding to individual pleas for relief, Congress should expeditiously revamp the entire Superfund liability system. A comprehensive reform initiative is the only way to address the real problems eating away at this bedrock hazardous waste cleanup statute.



The Honorable Frank R. Lautenberg
717 SHOB
Washington, DC 20510-3002

August 14, 1991

Dear Senator Lautenberg,

Now that an increasing number of municipal governments are facing the hard lessons of life at a Superfund site (open-ended liability for even relatively minimal contributions to a problem hazardous waste site with no associated wrongdoing on their part), some are lobbying for special relief. As an association representing many small and middle-sized companies who have been embroiled in numerous Superfund sites, where the complex legalities resemble Franz Kafka's The Trial (in that the accused is never certain about the nature of the charge, its status, or resolution), we can empathize with the municipalities' prayer for special relief. But we believe that S.1557, Municipal Superfund Liability, is arbitrary and would be counterproductive.

Superfund's liability scheme was designed purposely to cast as wide a net as possible by imposing strict, joint and several liability on "any person" who caused or contributed to a problem. The premise was that the "polluter must pay," and indeed, municipalities played a substantial role in contributing to the pollution problem. Just as the vast majority of industrial PRP's are tagged and drawn through arduous, costly Superfund enforcement actions despite their adherence to the waste disposal practices common at the time, so now are more municipalities facing the legal consequences of strict, joint and several liability.

A special fix for municipalities might be acceptable if it would indeed help "fix" the situation. For several very basic and important reasons, it would only compound a very bad situation if Congress were to act as suggested by the American Communities for Cleanup Equity, who support S.1557. In order to support this view, consider the current situation:

Frequently, companies are now being held responsible for disposal actions taken decades ago. At the time the wastes were disposed of, these companies were complying with the law and were not acting irresponsibly. For the most part, no one, not even the federal government, or the state and local governments, knew any better at the time. As a matter of fact, no government or local enforcement agency required any better disposal practice at the time. In many cases, such as the Lowry Landfill in Denver, the local government owned the disposal facility and administered the site. In some cases, such as the Stringfellow site in California, the State government actually mandated how and where the waste disposal was to take place, and charged for the disposal at the time - and yet the generators of the waste (because they are "industry") are now the sole targets of retroactive liability.

There are even cases where the State regulated the facility and EPA used it to dispose of wastes that EPA removed from unpermitted dump sites, where EPA contends that the generators at the State-regulated site are retroactively liable for clean-up of both the wastes they are alleged to have generated that may be in the regulated site and the wastes that EPA put there!

Unrestrained retroactive liability is clearly contrary to our country's fundamental sense of justice; it may in fact be judged to be unconstitutional in this context, when and if some besieged party is allowed to appeal a case on point to the Supreme Court. The theory of retroactive liability makes some sense when one thinks in terms of "making the polluters pay," but unchecked by any consideration of culpability, the theory leads to unintended, extravagantly unfair consequences.

But whether retroactive liability is unconstitutional or unfair, the important practical effect is to penalize some companies disproportionately, after the fact, for actions which were not illegal or even necessarily ill-advised at the time they were committed.

It is apparent that states and municipalities often shared a near symbiotic relationship with their industry counterparts at numerous waste sites now on the National Priority List. There is then no rational legal basis for relieving municipalities from the same kind of accountability company PRPs face. Consider the plight of the tiny Gilbert Spruance Company (an NPCA member) which employs around fifty persons (many residents of New Jersey). As its president Robert Cox wrote Mr. Seth Mones, Committee Counsel, on October 12, 1989:

"As you may remember, when we had our meeting in September, we discussed the difficulties we've experienced in the Superfund situation generally, and GEMS specifically.

As a memory refresher, at GEMS, our volumetric contribution was approximately .025%, and we were tiered with TEXACO, as a number for clean up in the amount of \$150,000. We stand abandoned by our insurance company, PMA, and we choose to fight what we felt was an injustice.

The latest from GEMS, copies enclosed, as an invoice from the liaison counsel at GEMS tiered at a total of \$19,100. You will note that we paid \$5,000 on 03/14/88, refused to pay any more since it was this liaison counsel recommendation that we (Sпруance) pay \$150,000 as our share of clean up.

...we had refused to participate in any more ongoing activities at GEMS, since a cash flow hit of \$150,000 would put us in danger. We're certainly not going to pay \$19,100 to a liaison counsel who also charged us with \$150,000 as our share of clean up.

You've asked me to keep you informed of Superfund developments affecting our company, and here is another good example of a smaller company being 'whip sawed' by the process. I said to you in our meetings, Spruance is like 'Rhode Island at the First Constitutional Convention', asking for someone to listen and make the Superfund process equitable and fair, so a smaller company like Spruance can stay in business. We still feel like Rhode Island, we're being heard some, but the process remains something to be fixed and addressed, if we're to stay in business."

We feel that this special bail-out for municipal governments would be a gross injustice to Gilbert Spruance and perhaps thousands of other business entities equally undeserving of unfair protracted liability actions under Superfund.

There are two other likely undesirable practical results of a special carve-out for municipalities which we are certain the bill does not intend:

- 1) Conceivably, municipalities might be less inclined to adhere fully to the prohibitions and guidelines of the current Resource Recovery and Conservation Act (RCRA) and the anticipated new mandates of a reauthorized RCRA. For example, a coalition of environmental groups - including the Sierra Club and the Environmental Defense Fund - has called for a national ban on new incinerators and on using ash in roadways or construction and has sought federal classification of municipal garbage ash as hazardous waste. Bills containing those provisions are expected to be introduced in Congress as it begins reauthorizing RCRA.

Rhetorical claims that municipal governments, because they represent the public, not industry per se, cannot "cause or contribute" to toxic waste problems, is absurd. In fact, using the municipal garbage ash as an example, environmental groups contend that water leaching through landfills dissolves heavy metals in the ash such as lead, cadmium, and mercury which can eventually enter ground-water supplies. The action of a carve-out is therefore arbitrary and without a sufficient basis. In fact, everyone involved in the Superfund morass (who acted in good faith and in accordance with common waste disposal practices) deserves to be treated to the same reform, or no one does;

- 2) It is also possible, based on the current language in S.1557, that trash exporting states such as New Jersey would attempt to extinguish all possibility of liability by sending to "owners and operators" of waste facilities in other states such as Ohio or Kentucky. If so, it would not be long before so-called receiving states attempted to erect barriers to this scenario which would further complicate one of our nation's most perplexing public policy issues.

We urge you to reconsider the merits of S.1557 and focus instead on the underlying problem of a liability "cornerstone" of Superfund which has thwarted its successful execution since its inception.

We are not pointing our fingers at municipalities as wrongdoers, nor do we enjoy the kind of leverage or desire to engage in a shifting of our actual responsibility for cleanups to other parties. Thus, our motive here is apparent - the municipalities are singing our song that Superfund needs equitable reform. We urge Congress to do so for all parties similarly situated (municipalities, small companies, large industry) rather than in an arbitrary, piecemeal fashion with negative externalities as contemplated by S.1557.

Thank you for considering our views on S.1557.

Sincerely,

Thomas J. Graves, Esq.
Director
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August 14, 1991

Leslie Cheek
Senior Vice President
Federal Affairs

Crum & Forster Corporation



THIS LETTER WAS SENT TO MEMBERS OF THE SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS (S. 1557) AND HOUSE SUBCOMMITTEE ON TRANSPORTATION AND HAZARDOUS MATERIALS (H.R. 3026)

Dear _____:

Re: S. 1557, Superfund Municipal Liability Exemption

On behalf of liability insurers routinely sued for coverage of Superfund cleanup obligations by both businesses and local governments, I am writing to recommend your opposition to the captioned bill, which would exempt generators and transporters of "municipal solid waste" from Superfund contribution claims.

We urge opposition to the bill not out of a lack of sympathy for cash-strapped local governments and small businesses asked to shoulder part of the cost of cleaning up municipal landfills contaminated with hazardous wastes, but rather out of concern that its enactment would provide incomplete relief even for its intended beneficiaries, undermine Superfund's regulatory benefits, and postpone comprehensive reform of Superfund's retroactive liability regime.

First, S. 1557 would exempt from Superfund contribution claims only those local governments whose garbage is transported to disposal sites owned or operated by third parties, not those whose trash is dumped at their own landfills. More than half (138) of the 236 "municipal landfills" on the Superfund National Priorities List (NPL) are owned or operated by local governments. S. 1557 would afford no relief to these governments.

Correcting this inequity would entail the creation of a larger inequity: the exemption of an entire class of site owners from any Superfund liability. How would Congress be able to defend Superfund's "polluter pays" principle if it were to spare governmental site owners from liability while preserving it for private site owners?

Second, we believe the enactment of S. 1557 would undermine Superfund's salutary influence on waste disposal practices. Applied prospectively, Superfund's liability regime furnishes a strong incentive to careful waste management. How would it serve Superfund's regulatory goal to exempt legions of "potentially responsible parties" (PRPs) from liability not only for their past mistakes, but also for any future waste disposal conduct?

If municipalities and non-industrial businesses were to be forever exempt from the polluting consequences of indiscriminate landfilling of gargantuan amounts of household trash, what would be substituted for the incentive Superfund liability provides for waste minimization, recycling, and the like?

Finally, we are convinced that simply shifting the huge costs of cleaning up municipal landfills to a smaller population of PRPs would merely postpone what the economics of Superfund make inevitable: the complete abandonment of retroactive Superfund liability and the substitution of a broad-based business tax for the cleanup of all old waste disposal sites.

The costs of cleaning up municipal sites are likely to dwarf the expense of remediating private disposal facilities. Most numerous among the types of facilities now coming onto the NPL are the so-called "nonhazardous" waste facilities regulated under subtitle D of the Resource Conservation and Recovery Act (RCRA). Here is what the General Accounting Office (GAO) said about these facilities in late 1987:

...Altogether, there are reported to be 261,930 nonhazardous waste facilities in the United States, both active and closed. These do not have to have EPA permits to operate, however, and only half of the 227,127 operating facilities are subject to any state permitting requirements....Many of these facilities existed before hazardous waste disposal was regulated, and any of them could be receiving hazardous wastes from companies or households that generate unregulated small quantities. EPA and the states have already found serious contamination problems at some of these types of facilities, including 184 subtitle D landfills on the NPL.

For these reasons, EPA and state officials suspect that hazardous wastes may be present, in some amount, at virtually all of the estimated 261,930 subtitle D facilities. Of these, 70,419 facilities, by their nature, have a high likelihood of being hazardous waste sites. As of 1984, 35,622 facilities, according to data provided to EPA by the states, received hazardous wastes from small quantity generators, i.e., those facilities that generated 1,000 kilograms of hazardous wastes or less a month. Another 32,941 were establishments (locations that include one or more facilities) that were reported closed as of 1984, and therefore, because of their age, were most likely accepting hazardous wastes before

the disposal of hazardous waste was regulated. In addition, 1,856 are facilities that EPA classifies as open dumps because they pose a reasonable probability of adverse effects on health or the environment.

Another GAO report issued at the same time matter-of-factly noted a nearly 16-fold disparity between the 27,000 sites then on the list from which NPL sites are selected and the 425,000 sites that "GAO now estimates, largely on the basis of EPA data...may need to be evaluated" for inclusion on that list.

Assuming that only one out of every 16 of the 261,930 "nonhazardous waste facilities" in the United States will eventually find its way onto the Superfund NPL, the program will be charged with cleaning up some 16,370 municipal landfills. Even if recent EPA estimates of the average site cleanup cost -- \$26 million -- were to remain constant, the cleanup bill for these sites could amount to more than \$425 billion.

To the extent that the proportion of municipally-owned sites to third-party sites used by municipalities remained constant at roughly 50-50 on future NPL listings, municipalities could be required to shoulder more than \$200 billion in cleanup costs even if S. 1557 in its current form were enacted. Clearly, local governments could not carry this burden.

If S. 1557 were enacted, another \$200 billion in cleanup costs would have to be allocated among the population of site users that generated wastes other than "municipal solid waste." To the extent that many of America's largest industrial enterprises did not use these local sites, the entire burden would fall on the smaller local businesses that did. Clearly, these firms could not shoulder this burden.

If neither local governments nor local businesses could afford the cleanup of these sites, and "deep-pocket" PRPs contributed no wastes to these sites, who then would pay for their cleanup?

The logical answer to this question is the Fund -- Superfund itself. But this answer raises other questions: Wouldn't the fund have to be several times larger than it now is to account for the shares that would otherwise have been paid by (presumably) exempt municipal and small business PRPs and by "deep-pocket" enterprises? And if the fund is to be enlarged, how could Congress justify imposing additional taxes on producers of oil and chemical feedstocks to finance the cleanup of (mostly) household garbage?

If, as we think is the case, Congress wants the business community to be the conduit through which funds for municipal waste cleanup flow, Congress ought to establish an efficient and predictable way for business to raise the needed revenue. Superfund's retroactive liability regime is both the least efficient and the least predictable means Congress could have chosen for this purpose. Congress ought to recognize that fact by scrapping the system as it applies to old sites and substituting a public works program funded by a broad-based business tax.

Ending the retroactive application of Superfund in this manner would have a number of beneficial effects. First, it would preserve the prospective incentives the statute has created for careful waste disposal. Second, it would end, for municipalities and everyone else, the unfairness inherent in applying new liability rules to conduct that cannot be undone. Third, it would release both government and private resources now absorbed in enforcement-related and insurance coverage litigation to site cleanup. Fourth, it would speed up cleanup by ending arguments over remedy and cost allocation. Finally, it would relieve our customers and your constituents -- corporate and municipal alike -- and our industry, too, of potentially crippling and unmeasurable future liabilities.

Piecemeal exemptions like those proposed in S. 1557 are not the right answer to the problems Superfund liability has created. Only comprehensive reform will make Superfund do what it is supposed to do -- clean up waste disposal sites quickly and efficiently.

Sincerely yours,

Leslie Cheek, III
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Sincerely yours,

Leslie Cheek, III
Senior Vice President-Federal Affairs

LC/kor



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TALKING POINTS ON MUNICIPAL LIABILITY

Coors is a PRP (Potentially Responsible Party) at Denver's Lowry Landfill CERCLA site. We are actively contributing considerable resources toward the complex process required under CERCLA to ultimately remediate this site. Our experiences have caused us to look closely at the applicability and workability of the CERCLA statute on huge municipal landfill sites like Lowry.

We have a number of concerns:

1. The role of municipalities in the cleanup of municipal landfill sites. Municipalities are liable for cleanup costs under CERCLA. The basis for the liability is the fact that municipal solid waste and sewage sludge that certain municipalities took to the Lowry Landfill from 1965-80 -- and, indeed, the municipal solid waste and sewage sludge that municipalities all across our country take daily to landfills -- contains hazardous substances. Although the concentrations of hazardous substance in municipal waste is low, the cumulative total is enormous. We believe municipalities should be major contributors to cleanup costs and remain very concerned that EPA has not chosen to pursue municipalities as PRP's except in rare circumstances, thus, leaving responsibility for cost recovery from municipalities to other PRP's. To add insult to injury, Senator Frank Lautenberg has recently introduced S.1557 which would exempt municipalities from CERCLA liability.
2. Given that 230 of the 1,207 currently-listed Superfund sites are municipal landfills -- and the prospects are that many more municipal landfills will join this group -- we firmly believe as a matter of national policy that huge landfill sites like Lowry deserve to be dealt with differently in order to better ensure their remediation in a timely and cost-effective manner.
3. The CERCLA statute, in our view, never envisioned huge 450-acre Lowry-sized municipal sites. Municipalities in good faith operated these landfills in accordance with the rules and regulations that were in place at the

time. Enforcement agencies oversaw those landfills. Businesses and other entities sent materials to those landfills under full permit of these government authorities. Cities across the country similarly managed their landfills, and we now have a national problem of huge and increasing proportions. The mandate of CERCLA is to pursue all ends until the sites are cleaned up -- using joint-and-severally liable approach among others, to the point of bankrupting cities, companies and states and bankrupting the insurance companies that insured the businesses who sent materials in good faith to what are now the Superfund sites.

4. If we are ever going to achieve a reasoned and fair cleanup process for huge municipal sites, we believe as a matter of national policy that there needs to be a different way to approach the problem of landfills. It is to this end we and others are exploring a number of alternatives. One idea that has been discussed at great length is replacing the current litigation based liability system for old sites on the NPL with a broad based taxing mechanism or public works program.

The attached material outlines the story of one municipal solid waste Superfund Site -- Lowry Landfill in Denver, Colorado. We believe the data and experience which is described clearly supports the assertion that municipalities should not be relieved of their fair share of the cleanup of these municipal sites.

The problems associated with implementing the CERCLA statute is a major challenge for not only Coors but for public policymakers at all levels. We do not have all the answers, but we hope we can work with Congress to develop a more reasonable approach to achieving remediation of these sites.

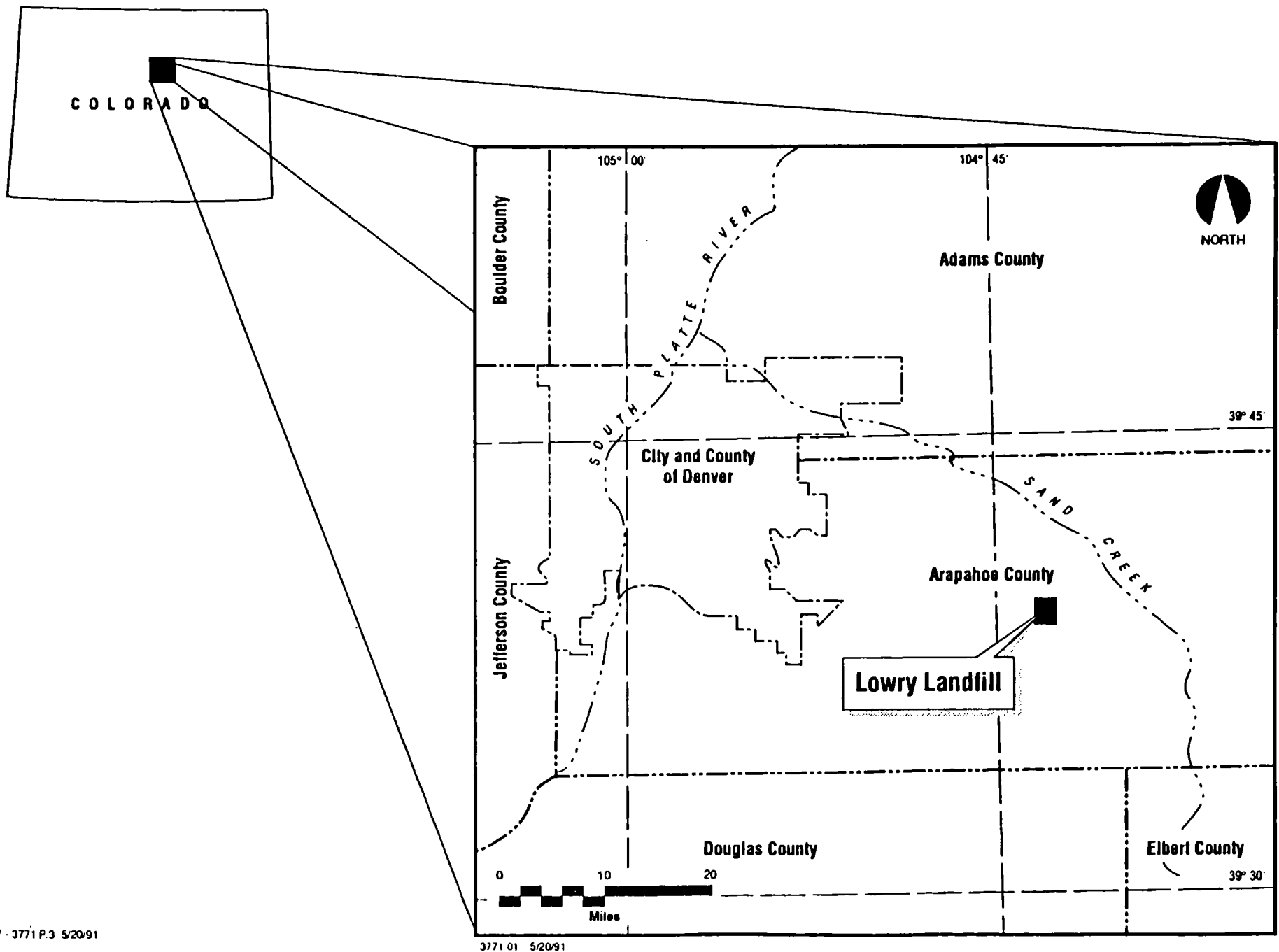
For further information, please call Richard Crawford, Coors, Federal Government Affairs Department, 202-737-4444.

Municipal Landfill Superfund Site

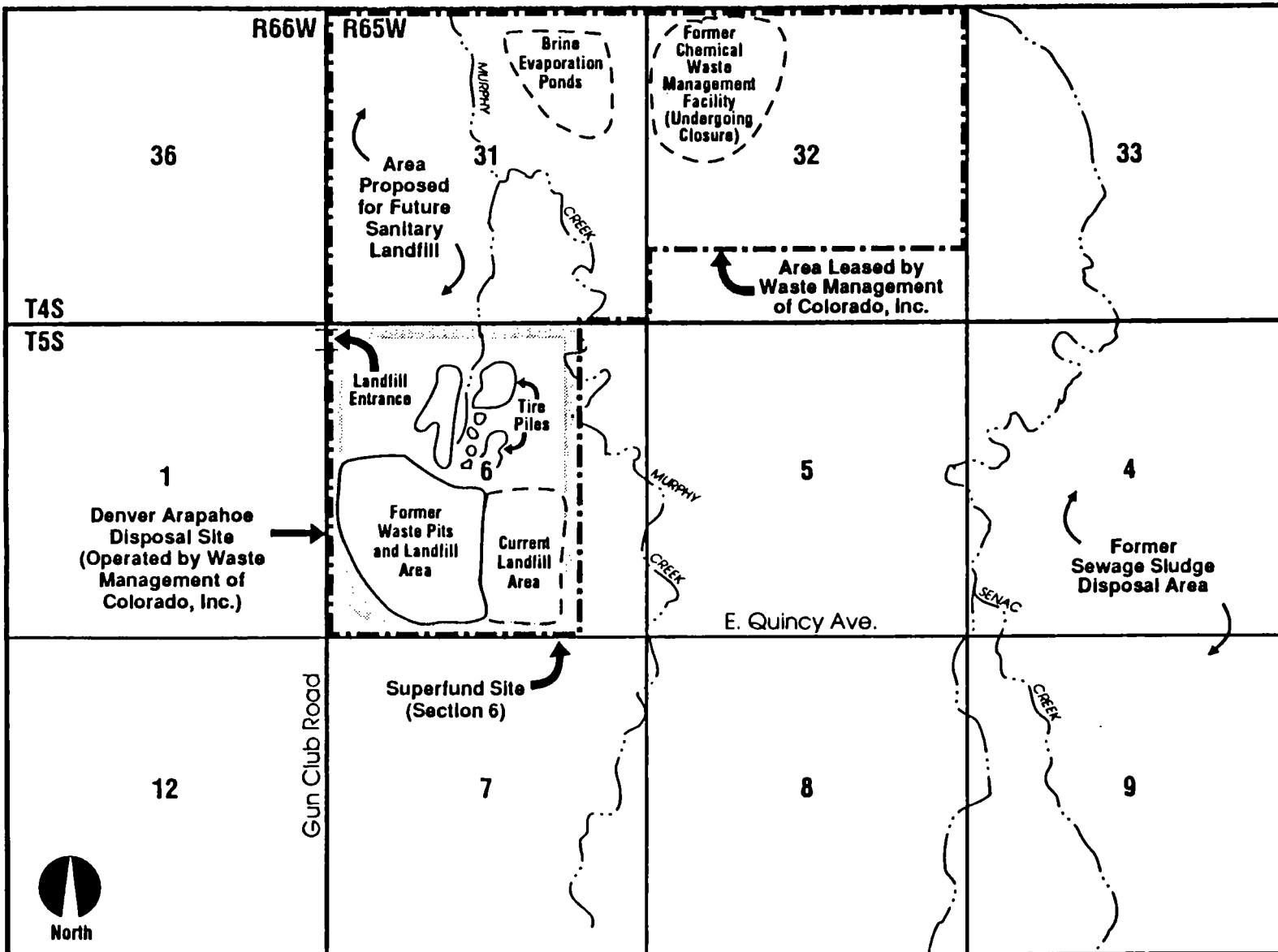
Discussion

May 1991

Lowry Landfill Superfund Site Location



Lowry Landfill Superfund Site Location



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Miles

History of Lowry

- 1988** In May, EPA releases its Preliminary Identification of Remedial Alternatives (PIRA), which contains a range of overall cleanup costs of \$151.0 million to \$4.5 billion.
- 1988** In June, EPA “notices” 28 PRPs to negotiate terms by which they might conduct studies of the first OU.
- 1988** In September, the Lowry Coalition (seven corporations, three municipalities) is chartered by EPA to study OU #1 (Shallow Groundwater). Coors, a voluntary charter member, chairs the Coalition.
- 1989** In July, EPA releases its Preliminary Endangerment Assessment ... which indicates no immediate threat to citizen health from Lowry.
- 1989** In December, EPA agrees to have Lowry Coalition add OU #6 (Deep Groundwater) to its studies.
- 1989** In October, CCD, Chem Waste Management and Waste Management of Colorado are chartered by EPA to study OU #2 (Landfill Solids) and OU #3 (Landfill Gases).
- 1990** Other OU(s) remain not chartered.
- 1990** Lowry Coalition works with EPA and other parties to develop a de minimis settlement for selected PRPs.
- 1990** In December, EPA released revised Lowry PRP list (including new volumes and PRPs).
- 1991** In May, EPA released another revised list of PRPs and waste volumes

Overview

- **Lowry Landfill ... EPA places it on Superfund list in 1984**
- **In May 1988, EPA scopes likely solutions:**
 - Containment: \$151 million to \$324 million
 - Minimum *in situ* treatment: \$160 million to \$324 million
 - Moderate treatment: \$246 million to \$527 million
 - Incineration: \$2.1 billion to \$4.5 billion
- **In 1993, EPA will select:**
 - Scope/technologies for remediation
 - Institutional controls
- **In 1994, EPA likely to direct PRPs to perform/coordinate remediation**

Who Does Congress Say Should Bear Cleanup Costs?

- **Past owners and operators of the site**
- **Current owners and operators of the site**
- **Generators who arranged for the disposal of hazardous substances at the site**
- **Transporters who selected the site for disposal of hazardous substances**

What Are Hazardous Substances?

- **Substances listed in 40 CFR**

Examples: most industrial wastewater treatment sludges, pesticides, air conditioning refrigerants, wood preservatives, dry cleaning solvents, PCBs, friable asbestos, radionuclides, ethylene dichloride in paint and spot removers, trichloroethylene in household pesticides and floor polishes, benzene contained in gasoline and most petroleum products

- **Substances not listed in 40 CFR, but exhibiting one or more of the hazardous waste characteristics identified in 40 CFR 261, Subpart C:**

- **Ignitability** Examples: used oils, radiator fluids, paint wastes and thinners, methane generated in landfills from organic solid wastes
- **Corrosivity** Examples: household cleaners, discarded batteries, hydrogen sulfide generated in landfills from organic solid wastes
- **Reactivity** Examples: swimming pool chemicals, sulfides formed in landfills from organic wastes
- **Toxicity** Examples: photo processing wastes, some paint wastes and thinners, grease and rust solvents, used oils, fuel additives, discarded batteries, gasoline, fly ash

What Hazardous Substances Has EPA Excluded from Superfund Liability?

- **Petroleum**
Superfund excludes crude oil and any fraction of petroleum not listed as a hazardous substance under CERCLA/SARA
- **Materials that are not hazardous**
Examples: domestic sewage, special nuclear or by-product material defined by the Atomic Energy Act of 1954 (as amended)
- **Solid wastes that are not hazardous**
Examples: household wastes, agricultural crop and animal wastes, fly ash waste, hazardous waste samples used in laboratory testing

Does Municipal Solid Waste Contain Hazardous Substances?

- **Government entities contacted**
 - Cities of Denver, Seattle, Phoenix, Austin, Kansas City
 - EPA Office of Solid Waste and Emergency Response
- **230 of the 1,207 Superfund sites are municipal landfills**
- **Types of hazardous substances found in MSW [Meta Systems, Inc., *Municipal Solid Waste Landfilling: A Review of Environmental Effects*, November 16, 1988 and U.S. EPA, *Characterization of MWC Ashes in Leachates from MSW Landfills and Co-Disposal Sites*, October 1987]**
 - Latex paint
 - Oil-based paints
 - Solvents (flammable)
 - Pesticides (garden, household)
 - Waste oil
 - Automobile batteries
 - Household batteries

YES!

Does Municipal Sewage Sludge Contain Hazardous Substances?

- **Government studies**
 - **Study performed by Lowry municipalities admits small amounts of hazardous substances** [GeoTrans report, July 10, 1990]
 - **BLM banned land application of sewage sludge for fear of future CERCLA liabilities** [*Environment Reporter*, April 27, 1990, pages 2004 and 2005]. **Under pressure from EPA, BLM later reversed its ban** [*Environment Reporter*, October 26, 1990, page 1211]
- **Hazardous substances in Lowry municipal sewage sludge are typically heavy metals (e.g., cadmium, chromium, lead, manganese, mercury, nickel, zinc)** [GeoTrans report, July 10, 1990]

YES!

What Total Volumes Do We Believe Were Contributed To Lowry? (1965 – 1980)

- **Industrial generators $\approx$ 128 million gallons**
[Source: EPA, May 1991 volumetric list]
- **Municipal sewage sludge $\approx$ 17 million gallons**
[Source: EPA, May 1991 volumetric list]
- **Municipal solid waste $\approx$ 2.2 billion gallons**
[Source: Applied Hydrology Associates, 1990]

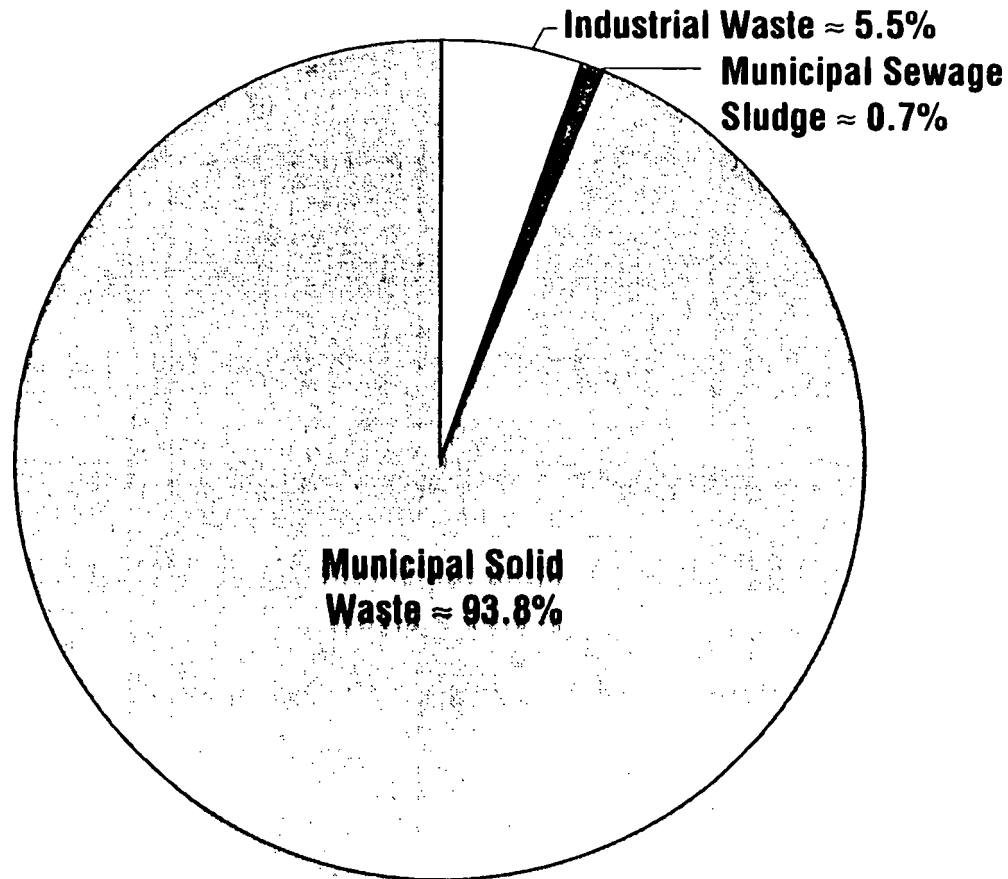
On the other hand...

How “Concentrated” Were Materials Disposed Of At Lowry?

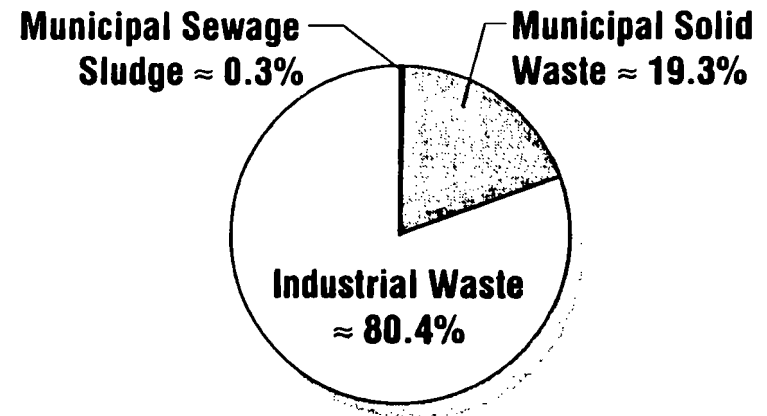
- **Industrial Waste $\approx$ 25.07% Hazardous Substances** [Kellogg Corporation, 1991]
- **Municipal Sewage Sludge $\approx$ 0.7% Hazardous Substances** [Kellogg Corporation, 1991]
- **Municipal Solid Waste $\approx$ 0.35 – 0.40% Hazardous Substances** [EPA 1987 Study. *Characterization of Household Waste from Marin County, California and New Orleans, Louisiana*]

Sources of Volume and Hazardous Waste at Lowry

Relative Total Volume
(Basis: 2.34 Billion Gallons)



Relative Volume of Hazardous Substances
(Basis: 39.9 Million Gallons)



Point: This makes the City and County of Denver the second largest contributor of hazardous substances.

Sources: EPA/OSWER and 104(e) submittals

Notes:

- Industrial waste ≈ 25.07% hazardous substances [Kellogg Corporation, 1991]
- Municipal sewage sludge ≈ 0.7% hazardous substances [Kellogg Corporation, 1991]
- Municipal solid waste ≈ 0.35 – 0.40% hazardous substances [EPA 1987 Study. Characterization of Household Waste from Marin County, California and New Orleans Louisiana]

What Does Interim Municipal Settlement Policy Say About Who Should Bear Cleanup Costs?

"... the general policy is to exclude... municipal wastes from the Superfund settlement process, unless the Region obtains site-specific information that the MSW or sewage sludge contains a hazardous substance from a commercial, institutional or industrial process or activity. ..."

"... The only exception to this general policy is that EPA may consider bringing generators/transporters of municipal solid waste that contains a hazardous substance derived only from households into the settlement process as potentially responsible parties if the total privately generated commercial, institutional, and industrial waste at the site is insignificant compared to the municipal solid waste. EPA expects this exception to be sparingly applied."

Source: The Federal Register/Volume 54, No. 237/Tuesday, December 12, 1989/ Notices

What Does EPA Region VIII Say About Household Waste Generators/Transporters at Lowry Landfill?

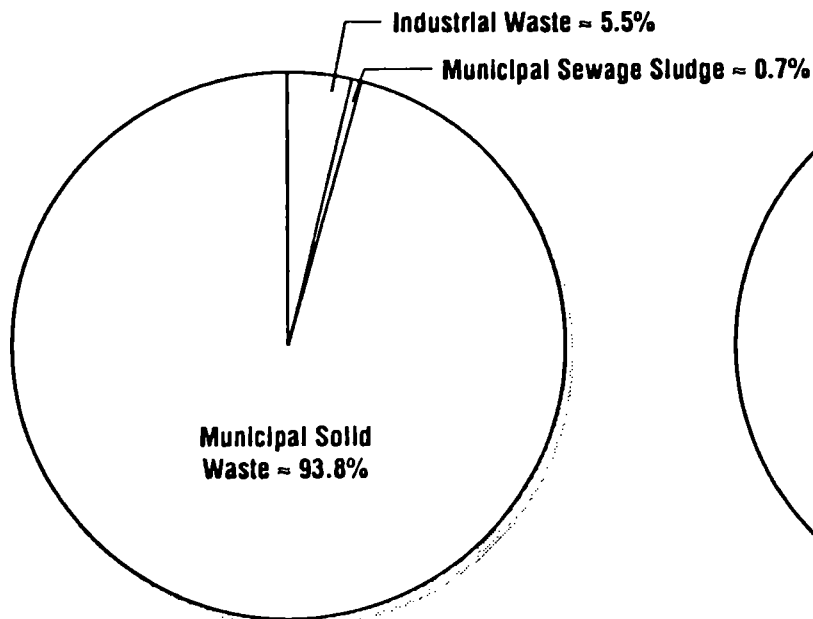
“EPA generally will not pursue generators/transporters of household wastes for costs of site cleanup except in truly unusual circumstances, which are not present at Lowry.”

*Source: EPA TES 11 Team, Protocols for Identifying and Determining Volumetric Contribution for Lowry Landfill
(Section 6) Potentially Responsible Parties, September 5, 1990*

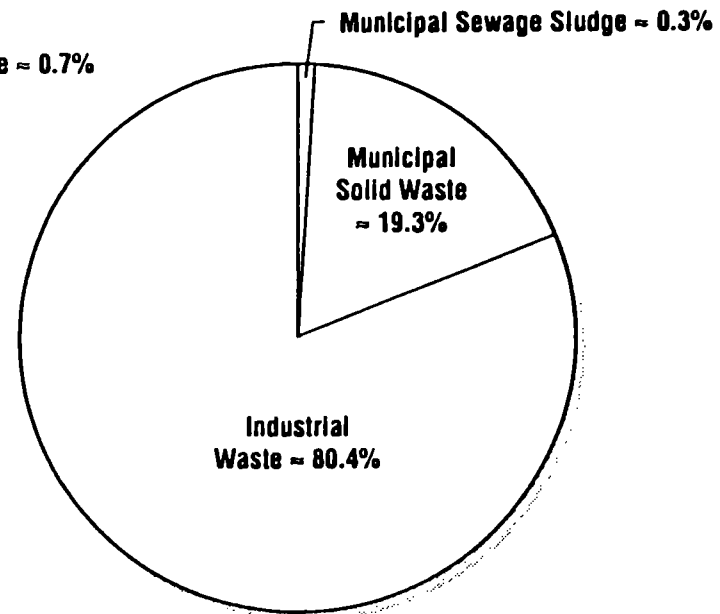
HERE'S THE BEEF!

- **Municipalities contributed about 20% of the hazardous substances at the Lowry Landfill (and are the second largest contributor)**
- **But, the Interim Municipal Settlement Policy allows EPA Regions to ignore municipalities as potential bill payers for site cleanup costs**

Relative Total Volume
(Basis: 2.34 Billion Gallons)

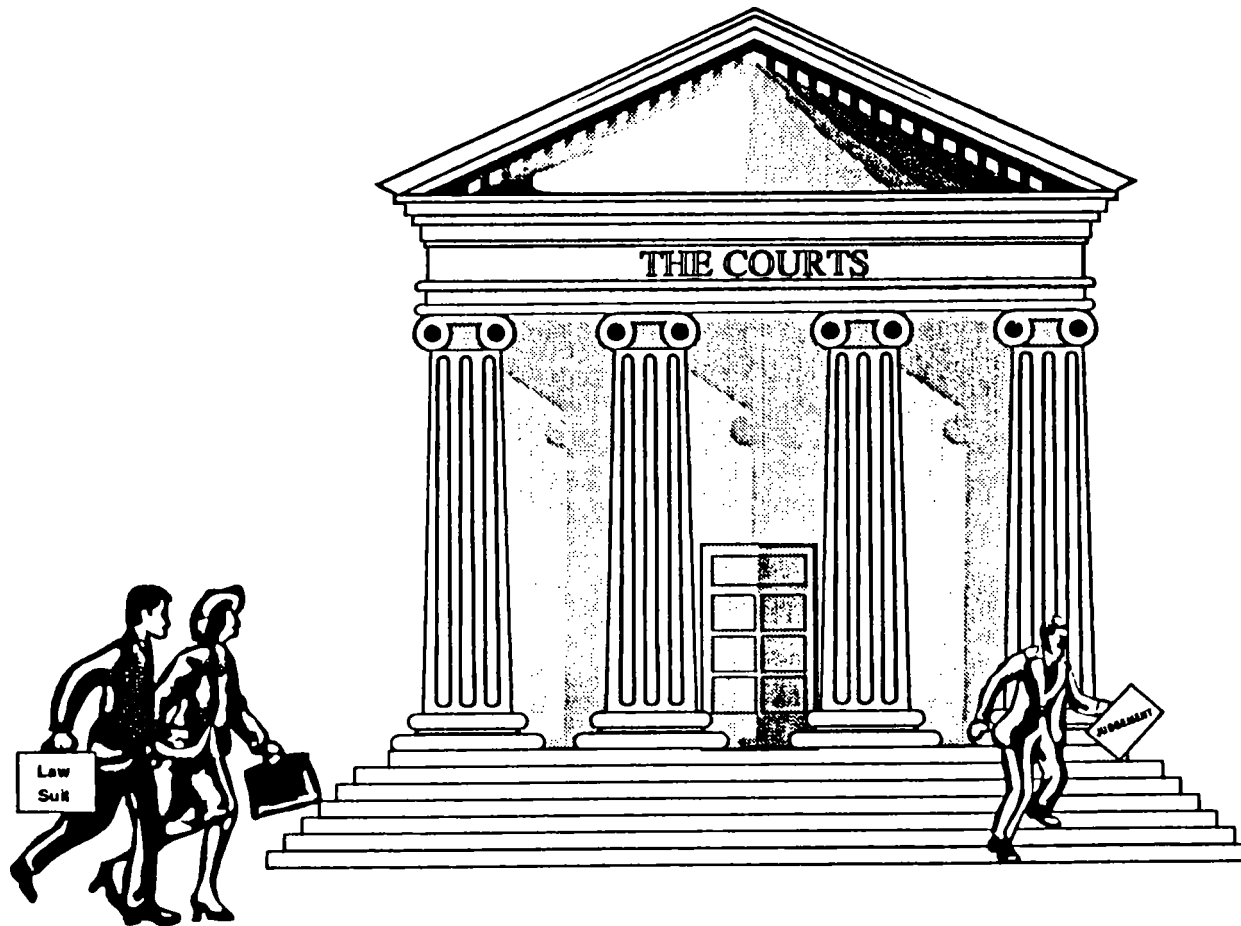


Relative Volume of Hazardous Substances
(Basis: 39.9 Million Gallons)



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Therefore...



...industrial PRPs are encouraged, by these circumstances, to pursue municipalities to the courtroom to obtain their fair share of cleanup costs.

We Believe ...

- **Municipalities should be required — by Congress and /or EPA — to pay their fair share as generators/transporters, before the fact, along with industrial generators.**

OR...

- **Municipalities and industry should work cooperatively so that, for example...**

...Municipal landfills, a problem of national scope, can be removed from CERCLA jurisdiction and remediated as part of a separately-administered program.

Relative Total Volume

	Approximate Volume	Relative Percentage
Municipal Solid Waste	2.200 billion gallons	93.8%
Municipal Sewage Sludge	0.017 billion gallons	0.7%
Industrial Generators	0.128 billion gallons	5.5%
Total	2.345 billion gallons	100.0%

Relative Volume of Hazardous Substances

	Total Volume	Hazardous Component			Volume of Hazardous Substances	Relative Percent
Municipal Solid Waste	2.200 billion gallons	x	0.35%	=	7,700,000	19.3%
Municipal Sewage Sludge	0.017 billion gallons	x	0.70%	=	119,000	0.3%
Industrial Waste	0.128 billion gallons	x	25.07%	=	32,089,600	80.4%
Total					39,908,600	100.0%

Relative Volume of Hazardous Substances

	Total Volume ¹		%Hazardous Substances ²		Volume of Hazardous Substances
City of Lakewood	2,838,684	x	0.20%	=	5,677
Littleton - Englewood	5,590,928	x	0.70%	=	39,136
Metro Wastewater	8,039,250	x	0.88%	=	70,745
Total	16,468,862				115,558

$$\text{Weighted Average} = \frac{115,558 \text{ gallons}}{16,468,862 \text{ gallons}} = 0.7\%$$

¹ Source EPA 5/91 PRP list

² Source 104(e) response