



**STATEMENT OF
CONGRESSMAN RICK BOUCHER
OF VIRGINIA**

Introduction of the Superfund Liability Reform Act

November 22, 1993

Mr. Speaker, last December, at his economic conference in Little Rock, then President-elect Clinton said he was "appalled by the paralysis" of the Superfund program and "by the fact that the money's being blown."

The President was right. The Superfund program is in deep trouble. In a recent editorial, the Washington Post said, "Of all the environmental laws that Congress has written in the past two decades, Superfund is the most deeply flawed and troubling. It was created to do a necessary job -- to clean up hazardous waste dumps. But it is generating intolerable injustices and needs to be fixed." Superfund, the Post concluded, "has become notorious for inequity and inefficiency, giving a bad name to a good cause."

The principal source of the inequity of the Superfund program and the primary cause of the program's failure is its liability system. It is a harsh, punitive and unfair system that has set off a chain reaction of lawsuits, leading to the meltdown of the entire cleanup program.

Mr. Speaker, today I am introducing the Superfund Liability Reform Act, legislation which will break the cycle of wasteful litigation and will help refocus the Superfund program on its intended purpose. I am pleased to be joined by the gentleman from Michigan, Mr. Upton in offering this measure.

The Congress is now working closely with the administration to fashion comprehensive reform of the Superfund program. There are many complex matters to discuss in the context of Superfund reform. We are introducing the Superfund Liability Reform Act today to stimulate discussion with regard to the liability provisions in the hope that this proposal will serve as the foundation for a new and more equitable liability structure as we draft comprehensive Superfund reform next year. We fully expect that constructive refinements in the proposed structure will be made as these discussions progress.

The National Advisory Council on Environmental Policy and Technology (NACEPT), which has been meeting for many months under the auspices of the Environmental Protection Agency, has carefully examined the many problems of the Superfund program and has reached general consensus on the means to address many of those problems. The legislation we are introducing today embodies the framework of recommendations coming from the NACEPT discussions regarding Superfund liability reform.

NACEPT identified certain essential aspects of reform of Superfund's liability system, including the need to expedite the determination of liability of parties at each Superfund site, the need to allocate shares of liability fairly among those parties and need for a neutral and impartial third party to make the liability determinations. The EPA, the environmental community and a wide array of stakeholders at Superfund sites, all of whom were represented in the NACEPT process, agreed on those principles. The bill I am submitting today creates a new system of liability which encompasses those principles and reflects the consensus of the group.

The bill reforms the current system of joint and several liability by allocating shares of liability to ensure that liable parties will pay only their fair share of cleanup costs. Liable parties that accept their assigned shares are released from further liability for cleanup costs. This feature will help minimize, and hopefully eliminate the time-consuming and expensive cycle of litigation which exists today.

The assignment of shares of liability for each site would be determined by a three-member panel of specially-trained administrative law judges. To make its determination, each allocation panel would consider the so-called "Gore Factors," principles developed by Vice President Gore in 1980 during the original Superfund reauthorization when the Vice President was a Member of the House of Representatives. The Gore Factors include the degree to which a party's contribution of hazardous substances to a site can be distinguished, the amount of hazardous substances contributed by a party, the degree of toxicity of those substances, the degree and nature of a party's involvement at the site and whether a party cooperated with federal, state or local officials in preventing harm to public health or to the environment. The Gore Factors, which passed the House of Representatives in 1980 but were not incorporated into the Superfund statute as enacted, provide very sensible criteria for determining each party's share of liability for cleanup costs.

The allocation of shares of liability would be a final, binding allocation of all recoverable response costs at a site and would be subject only to limited judicial review. Any challenge to the binding allocation of responsibility would be filed in U.S. District Court. Unless the court finds the allocation decision to be arbitrary and capricious, or that the challenging party is not liable as a matter of law, the unsuccessful challenger would pay all attorneys' fees incurred in defending the challenge and would be held liable for the costs of the orphan share at the site. This strong disincentive to appeal the decision of an allocation panel would limit unnecessary judicial review, expediting the final determination of liability and greatly reducing transaction costs for liable parties.

Although liable parties would no longer be jointly and severally liable for all cleanup costs at a Superfund site, this legislation retains a critical aspect of joint and several liability for the EPA to use as an enforcement tool. Under the bill, the EPA would still retain its authority to impose liability on a party to perform the entire cleanup at a hazardous waste site, but that party would retain the right to collect from other liable parties their respective assigned shares of the cleanup costs.

Liabile parties which are insolvent, defunct or unknown are called "orphan parties," and the legislation provides for the orphan shares to be paid by the Hazardous Substance Superfund. The EPA will have a strong incentive to bring as many parties as possible into the allocation proceeding for each site in order to reduce the size of the orphan share. In addition, for each site the EPA will designate a "guardian of the Fund" who will ensure that all liable parties pay their maximum fair share and protect the Superfund from covering too large of an orphan share.

The legislation places a moratorium on cost-recovery litigation at all National Priority List sites pending the allocation of shares of liability at each site. No cost recovery action, no governmental enforcement action and no contribution action could be filed with respect to any National Priority List site until 90 days after a binding allocation decision is issued.

There would also be simple and swift enforcement of the binding allocation decisions. Liable parties would be obligated to pay promptly and manage the cleanup efforts, or face substantial civil and criminal sanctions.

A recent study by the Rand Corporation found that one-third of all the money spent by potentially responsible parties at Superfund sites went toward legal fees and other costs not related to the cleanup of the sites. The study revealed that 60 percent of the money was spent on these transaction costs in some cases. Lloyd S. Dixon, one of the authors of the report, said the finding "raises doubts whether Superfund's liability approach as currently designed is an efficient way to clean up the nation's hazardous waste sites."

After studying this matter in depth and for some time, I am convinced the current Superfund liability system is inefficient, wasteful and in need of wholesale reform. The legislation I am introducing today will lead to more efficient cleanups of hazardous waste sites and will discourage excessive litigation and the evasion of responsibility.

The Superfund Liability Reform Act maintains the essential "polluter pays" principle established under the original statute, so that any party found to have polluted a site must help to pay for the cleanup. The legislation also encourages the EPA to bring the maximum number of potentially responsible parties to the negotiating table, minimizing the orphan shares assigned to the Hazardous Substance Superfund. It will also force the EPA and the states to do their homework, making them develop a more comprehensive body of information as to who is responsible for the hazardous waste at each site.

Mr. Speaker, we introduce the Superfund Liability Reform Act today to help move the debate forward, so that the Congress can complete the reauthorization of the Superfund program before the end of next year. This proposal has been very carefully crafted and enjoys substantial support from the private sector. Following this statement is a section-by-section analysis of the bill. I encourage my colleagues to examine this legislation closely and hope they can offer their support.

THE SUPERFUND LIABILITY REFORM ACT

Sponsored by U.S. Rick Boucher (D-VA)

BILL SUMMARY

The Superfund Liability Reform Act creates a new Title V to the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), establishing a new process for determining the liability of potentially responsible parties at Superfund sites. The principal features of the bill are as follows:

LIABILITY FOR COSTS OF RESPONSE ACTIONS

Section 107(a) of CERCLA is amended to provide that a liable party at a National Priority List site shall be liable only for its assigned share of the cost of the response action at that site, as determined by the liability allocation process established under the new Title V.

Section 107(a) is also amended to provide that the assigned shares of "orphan parties," or liable parties which are no longer in existence, insolvent or unknown, shall be paid out of the Hazardous Substance Superfund.

LIABILITY FOR PERFORMANCE OF RESPONSE ACTIONS

Section 107 is clarified to allow the Environmental Protection Agency to retain its enforcement authority to impose joint and several liability on any liable party to perform the entire response action at a National Priority List site. The party performing the response action retains its right to collect from other liable parties their respective allocated shares of the costs of the response action at the site, and may be reimbursed by the Hazardous Substance Superfund for the "orphan share" of the response costs at the site.

LIABILITY WITH RESPECT TO RECYCLING TRANSACTIONS

A new Section 127 is added to CERCLA, providing that a recycling transaction shall not be construed as an "arrangement for the treatment and disposal" of hazardous substances [which would subject a party to liability under Section 107(a)] if the following conditions are met:

- The material being used in the transaction meets a specification grade (referred to as "specification grade secondary material").

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- Such secondary material is used to make a new product and contains elements necessary to make such a product.
- Such secondary material competes with a virgin material.
- The production of the secondary material results in a substantial amount of the input material being made available for use as a feedstock to make a new product.
- There is evidence of a market for the secondary material.
- The secondary material does not include unnecessary hazardous substances introduced during recycling.
- The secondary material consists primarily of metal, paper, plastic, glass, textiles or rubber.

Section 127 also requires the EPA Administrator to promulgate management standards applicable to the production or transfer of secondary materials used as a feedstock to make new products.

BINDING ALLOCATIONS OF RESPONSIBILITY

A new Title V is added to CERCLA, providing a process for allocating shares of liability for the costs of response actions at National Priority List Superfund sites:

General Provisions

Allocation Panels

The EPA Administrator appoints panels composed of three administrative law judges, called "allocation panels," which perform expedited proceedings to determine the liability of parties at National Priority List sites.

Qualification of Administrative Law Judges

Each administrative law judge on an allocation panel is required to complete at least 40 hours of education and training in the operation of the Superfund program and in the science of soil and groundwater contamination and the technology for treating such contamination.

Powers of Allocation Panels

Allocation panels shall have the power and authority to issue requests for information and for production of documents, to rule upon motions and offers of proof, to issue orders, to administer oaths, to examine witnesses, to admit or exclude evidence, to hear and decide questions of fact and law, to require parties to attend settlement conferences, to obtain or employ clerical and investigative services and computer information and database management services and to establish a document repository for all documents associated with the liability allocation proceeding.

Allocation panels shall also have the power of subpoena to collect all necessary or relevant information for conducting the allocation process, including the power to compel the attendance and testimony of witnesses and the production of documents.

Informal Rules of Evidence

The binding allocation process is not bound by the Federal Rules of Evidence, but instead is governed by the informal rules of evidence currently used by the EPA in its enforcement and permit revocation proceedings.

Service of Process

Documents are deemed served on a party if they are mailed to the counsel of record for the party or to the address designated by a party not represented by counsel.

Binding Allocation of Responsibility Proceeding

Initial Petition

Within 30 days after initiating the remedial investigation study for a National Priority List site, the EPA or the State where the site is located files a petition at the EPA identifying the site and the potentially responsible parties and summarizing the legal and technical issues specific to the site.

Guardian of the Fund

The petition includes the name of a person appointed by the EPA Administrator to serve as the guardian for the Hazardous Substance Superfund for the site in question.

Parties' Statements

Within 30 days after the filing of the initial petition, the EPA, the State, the guardian and any potentially responsible parties identified in the petition may file statements stating defenses to liability, equitable considerations pertaining to any party's liability, additional relevant facts and issues and the names of additional potentially responsible parties.

Information Requests/Production of Documents

Within 30 days after the filing of the initial petition, the allocation panel mails requests for information and for production of documents to the State, to the guardian and to all potentially responsible parties. All parties have 45 days in which to respond.

Addition of Potentially Responsible Parties

Within 120 days after the filing of the initial petition, any party may identify and nominate additional parties as potentially responsible parties.

Initial List of All Potentially Responsible Parties

Within six months after the filing of the initial petition, the allocation panel causes to be published in the Federal Register and in general circulation newspapers in the State wherein the site is located a list of all potentially responsible parties. The allocation panel may add new potentially responsible parties at any time before the issuance of the final decision allocating shares of liability among liable parties.

"De Micromis" Settlements

Within six months after the filing of the initial petition, the allocation panel issues a list identifying parties found to have contributed only a miniscule amount of hazardous substances to the site in question. A "de micromis" party may resolve its liability and may be released from further liability at the site by paying a premium of \$1,000, which reflects the administrative costs and the cleanup costs to the federal government for the site for that party. The amount is earmarked in the Hazardous Substance Superfund to help cover the response costs at the site.

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Advocacy Papers

Within 30 days after the publication of the initial list of potentially responsible parties, the guardian, the State and any potentially responsible party may file an allocation advocacy paper outlining the legal and factual criteria to be used in determining whether a potentially responsible party at the site is a liable party. Parties also have an opportunity to submit a second advocacy paper after the allocation panel's issuance of the first allocation report.

Allocation Reports

Within 90 days after the publication of the initial list of potentially responsible parties, the allocation panel issues an allocation report specifying the criteria to be used in identifying the liable parties and how such criteria will be applied to the case in determining assigned shares of liability for response costs at the site.

Following receipt of the second round of advocacy papers the allocation panel issues its second allocation report identifying all liable parties at the site and specifying the assigned share of response costs for each liable party

Hearings

Any potentially responsible party may request a hearing before the allocation panel on the determination that the party is a liable party and on the determination of its assigned share. The allocation panel has the discretion to grant or deny such a request. Most evidence in the allocation process is offered through the submission of documents and not through hearings.

Determination of Orphan Share

The guardian, the State and each liable party may file an orphan share advocacy paper offering evidence as to which liable parties are orphan parties whose assigned share of response costs at the site should be assigned to the orphan share. Following receipt of orphan share advocacy papers the allocation panel issues an orphan share allocation report identifying the orphan share.

Determination of Non-Liable Parties

At any time during the period beginning six months after the filing of the initial petition and ending 18 months after the filing of the initial petition the allocation panel may issue a list identifying all potentially responsible parties determined not to have contributed any amount of hazardous substances to the site in question. Such non-liable parties are released from all future liability with regard to that site.

Final Binding Allocation of Responsibility Decision

Within 18 months after the filing of the initial petition the allocation panel shall issue a final decision listing all liable parties and the assigned share of response costs for each and all orphan parties and the total orphan share. The final decision is based on the following factors:

- the degree to which each liable party's contribution to a discharge, release or disposal of hazardous substances can be distinguished;
- the amount of hazardous substances contributed by each liable party at the site, compared to the total amount of hazardous substances at the site;
- the degree of toxicity of the hazardous substances contributed by each liable party;
- the degree of involvement by each liable party in the generation, transport, treatment, storage or disposal of the hazardous substances;
- the degree of care exercised by each liable party with respect to the hazardous substances concerned, taking into account the characteristics of such hazardous substances;
- the degree of cooperation by each liable party with federal, state or local officials to prevent any harm to the public health or to the environment;
- the weight of evidence as to the liability and the appropriate shares of each liable party; and
- any other equitable factors deemed appropriate.

"De Minimis" Settlements

As part of the final decision or at any time before the issuance of the final decision, the allocation panel issues a list of all potentially responsible parties determined to contribute 1.0 percent or less of the total quantity of hazardous substances present at the site in question. Such "de minimis" parties may settle with the EPA Administrator by paying a specified amount based on the EPA's estimate of the total cost of cleanup at the site multiplied by the de minimis party's allocated share, and increased by a reasonable premium to reflect the benefit of an early and complete resolution of liability. The proceeds of the de minimis settlements go towards the cost of the response action at the site.

Judicial Review

The binding allocation of responsibility decision constitutes a final agency action under the Administrative Procedures Act. Any challenge to the final decision must be filed in U.S. District Court. Unless the court finds the allocation decision to be arbitrary and capricious or an abuse of discretion, or that the challenging party is not liable as a matter of law, the unsuccessful challenger must pay all attorneys' fees incurred in defending the challenge and is held jointly and severally liable for the orphan share of response costs at the site.

Collection and Enforcement

After the final allocation decision any party which has incurred response costs above the amount allocated to that party is considered a "creditor party" entitled to collect from "debtor parties" any or all of their shares of allocated response costs, depending upon the amount incurred by the creditor party. The creditor party is also entitled to collect from the Hazardous Substance Superfund amounts corresponding to the orphan parties' allocated shares.

Liable parties are obligated to pay their allocated shares promptly and to manage the cleanup efforts if ordered to do so by the EPA Administrator, or face substantial civil and criminal penalties.

Moratorium on Cost Recovery Litigation

No cost recovery action, no government enforcement action and no contribution action may be filed with respect to any National Priority List site until 90 days after a final binding allocation of responsibility decision is issued.

Transition Provisions

At all National Priority List sites where potentially responsible parties are performing CERCLA cleanup work at the time of enactment of this legislation, whether the work is pursuant to a consent order or an enforcement order, the potentially responsible party's obligation to perform the work and the deadline for completion of that work remain unaffected.

At all National Priority List sites where cost recovery, enforcement or contribution litigation is ongoing, such litigation is stayed until a binding allocation or responsibility decision is issued. Such a decision will conclusively determine the liability of all parties at the site. Litigation over other issues, such as EPA claims for civil penalties or private party claims based on contracts for insurance or indemnification, may resume following completion of the binding allocation process.

At National Priority List sites where one or more potentially responsible parties have been determined to be liable for all past and future response costs, no binding allocation process shall be performed and the prior liability determinations remain in effect.

At National Priority List sites where liability has been partially determined, the binding allocation process shall proceed and the allocation panel shall allocate liability for the costs of the entire cleanup. In doing so, the allocation panel shall give credit to each potentially responsible party for prior costs incurred or for prior work performed.

Voluntary Settlements

Prior to the issuance of a final binding allocation decision, any group of potentially responsible parties may offer voluntarily to cover 100 percent of the costs of the response action at the site in question. No costs may be borne by the orphan share for such voluntary settlements and no party which is not a signatory to the voluntary binding allocation of responsibility may be held liable for any response costs at the site.

New Binding Allocations of Responsibility

A binding allocation decision may not be changed or revised for at least five years after the date of the final decision. New binding allocation proceedings may be available only if a party demonstrates that, due to new information not reasonably available during the original allocation proceeding, at least a 35 percent increase in total waste-in volume has been discovered.

H.L.C.
AS introduced

(Original signature of Member)

103D CONGRESS
1ST SESSION

H. R. 3624

IN THE HOUSE OF REPRESENTATIVES

Mr. BOUCHER introduced the following bill; which was referred to the
Committee on S.C.

A BILL

To amend the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 to establish a program for assigning shares of liability to liable parties at Superfund sites, and for other purposes.

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 "Superfund Liability
5 Reform Act."

6 **SEC. 2. DEFINITIONS.**

7 Section 101 of the Comprehensive Environmental Re-
8 sponse, Compensation, and Liability Act of 1980 (42

1 U.S.C. 9601), is amended by adding at the end the fol-
2 lowing:

3 “(39) The term ‘potentially responsible party’
4 means any person identified as potentially liable
5 under section 107, potentially responsible to perform
6 any response action under sections 104 or 106, or
7 potentially liable for contribution under section 113.

8 “(40) The term ‘de micromis party’ means a
9 potentially responsible party who is a generator or
10 transporter who contributed only a minuscule
11 amount of hazardous substances to a National Pri-
12 ority List site, as determined by an allocation panel
13 under title V.

14 “(41) The term ‘de minimis party’ means a lia-
15 ble party whose assigned share of liability is deter-
16 mined to be 1.0 percent or less in a final binding al-
17 location of responsibility decision under title V.

18 “(42) The term ‘liable party’ means any poten-
19 tially responsible party determined by an allocation
20 panel or a court to be liable under section 107, re-
21 sponsible to perform any action under sections 104
22 or 106, or liable for contribution under section 113.

23 “(43) The term ‘assigned share’ means the per-
24 centage of liability assigned, in accordance with the
25 factors set forth in section 503(f)(2), to a liable

1 party by an allocation panel in a binding allocation
2 of responsibility or by a court of law.

3 “(44) The term ‘orphan party’ means a liable
4 party at a site who is defunct, unknown, insolvent,
5 or whose assigned share has been subject to dis-
6 charge or limitation in bankruptcy, or who is other-
7 wise financially unable to pay all or part of its as-
8 signed share.

9 “(45) The term ‘creditor party’ means the Ad-
10 ministrator, a State, or any person who is deter-
11 mined to be a liable party with respect to a National
12 Priority List site and who incurs or has incurred
13 costs with respect to the site that are not inconsis-
14 tent with the National Contingency Plan.

15 “(46) The term ‘debtor party’ means the Haz-
16 ardous Substance Superfund and any person who is
17 determined to be a liable party with respect to a Na-
18 tional Priority List site.

19 “(47) The term ‘binding allocation of respon-
20 sibility’ means a final binding determination by an
21 allocation panel pursuant to title V.

22 “(48) The term ‘orphan share’ means the total
23 of the assigned shares of all orphan parties at a site.

24 “(49) The term ‘guardian of the fund’ or
25 ‘guardian’ means the person appointed by the Ad-

1 ministrator to represent the Environmental Protec-
2 tion Agency in a binding allocation of responsibility
3 proceeding.

4 “(50) The term ‘National Priority List site’
5 means any site or facility that the Administrator has
6 listed on, or proposed for listing on, the list estab-
7 lished pursuant to section 105(a)(8)(B).

8 **SEC. 3. ASSIGNMENT OF SHARES OF LIABILITY FOR COSTS**
9 **OF RESPONSE ACTIONS AT NATIONAL PRIOR-**
10 **ITY LIST SITES.**

11 Section 107(a) of the Comprehensive Environmental
12 Response, Compensation, and Liability Act of 1980 (42
13 U.S.C. 9607(a)), is amended by inserting before the
14 phrase “The amounts recoverable” the following: “With
15 respect to any National Priority List site, each liable party
16 who accepts the results of the allocation of responsibility
17 process under title V or who successfully appeals the re-
18 sults of such process shall be liable only for its assigned
19 share of the costs incurred pursuant to subparagraphs
20 (A), (B), and (D) of this section. The orphan share of
21 a National Priority List site shall be paid out of the Haz-
22 ardous Substance Superfund or by a liable party who un-
23 successfully appeals a final binding allocation of respon-
24 sibility decision under section 507.”

1 **SEC. 4. ENFORCEMENT OF RESPONSE ACTIONS THROUGH**
2 **JOINT AND SEVERAL LIABILITY.**

3 Section 107 of the Comprehensive Environmental Re-
4 sponse, Compensation, and Liability Act of 1980 (42
5 U.S.C. 9607) is amended by adding at the end the fol-
6 lowing:

7 “(n) **JOINT AND SEVERAL LIABILITY OF PARTIES**
8 **WHO FAIL TO PERFORM RESPONSE ACTIONS.**—In any
9 case in which no liable party or potentially responsible
10 party agrees to perform a response action at a National
11 Priority List site, or a liable party or potentially respon-
12 sible party agrees to perform a response action but the
13 party fails to perform such response action, as determined
14 by the Administrator or the State in which the site is lo-
15 cated, the following provisions apply:

16 “(1) The party is considered to have not re-
17 solved its liability to the United States, not-
18 withstanding the party’s acceptance of the results of
19 the binding allocation of responsibility process under
20 title V or the party’s successful appeal of the results
21 of such process.

22 “(2) The party is subject to civil action under
23 section 106, subparagraphs (A), (B), and (D) of
24 subsection (a) of this section, and section 113 for
25 the response action and all costs of the response ac-
26 tion with respect to the National Priority List site.

1 “(o) PAYMENT OF CERTAIN RESPONSE COSTS BY
2 FUND.—A potentially responsible party who performs and
3 pays for a response action at a National Priority List site
4 shall be reimbursed by the Hazardous Substance
5 Superfund.

6 “(p) AUTHORITY TO COLLECT RESPONSE COSTS
7 FROM OTHERS.—A liable party who performs and pays
8 for a response action at a National Priority List site is
9 a creditor party under section 508 with respect to the site
10 and may recover its response costs in accordance with that
11 section.”.

12 **SEC. 5. CLARIFICATION OF LIABILITY WITH RESPECT TO**
13 **RECYCLING TRANSACTIONS.**

14 The Comprehensive Environmental Response, Com-
15 pensation, and Liability Act of 1980 is amended by adding
16 at the end of title I the following new section:

17 **“SEC. 127. RECYCLING TRANSACTIONS.**

18 “(a) LIABILITY CLARIFICATION.—A recycling trans-
19 action meeting the requirements of subsection (b) shall not
20 be construed as arrangement for the treatment or disposal
21 of a hazardous substance under subsection (a) of section
22 107.

23 “(b) RECYCLING TRANSACTION.—(1) For purposes
24 of subsection (a), a recycling transaction is a transaction
25 in which a material is being used or sold to make a new

1 product, and the following conditions are met at the time
2 of the transaction:

3 “(A) The material being used in the transaction
4 meets a specification grade (hereinafter referred to
5 as a ‘specification grade secondary material’).

6 “(B) Such specification grade secondary mate-
7 rial is used to manufacture a new product and con-
8 tains elements necessary to manufacture such prod-
9 uct.

10 “(C) Such specification grade secondary mate-
11 rial competes with virgin material.

12 “(D) The production of the specification grade
13 secondary material results in a substantial amount
14 of the input material being available for use as a
15 feedstock to make a new product.

16 “(E) There is evidence of a market for the
17 specification grade secondary material.

18 “(F) The specification grade secondary material
19 does not include unnecessary hazardous substances
20 introduced during recycling.

21 “(G) The specification grade secondary material
22 consists primarily of one or more of the following:
23 metal, paper, plastic, glass, textiles, or rubber.

24 “(H) Effective after the promulgation of man-
25 agement standards under subsection (c), the second-

1 ary materials are sold to a facility that meets the
2 management standards promulgated under sub-
3 section (c).

4 “(2) A recycling transaction does not include a trans-
5 action that leads to the burning of material, even for the
6 recovery of energy, or the use of material in a manner
7 determined by the Administrator to constitute a disposal.

8 “(c) MANAGEMENT STANDARDS.—Not later than 24
9 months after the date of enactment of the Superfund Li-
10 ability Reform Act, the Administrator shall promulgate
11 regulations containing management standards applicable
12 to persons which produce in a facility or transfer through
13 a facility specification grade secondary materials for use
14 as a feedstock to make a new product.

15 **SEC. 6. ESTABLISHMENT OF BINDING ALLOCATION OF RE-**
16 **SPONSIBILITY PROCESS.**

17 The Comprehensive Environmental Response, Com-
18 pensation, and Liability Act of 1980 (42 U.S.C. 9601 et
19 seq.) is amended by adding at the end the following new
20 title:

21 **“TITLE V—BINDING ALLOCA-**
22 **TION OF RESPONSIBILITY**

“Sec. 501. General rules governing binding allocations of responsibility.

“Sec. 502. Qualifications and powers of administrative law judges and allocation panels

“Sec. 503. Specific rules and procedures.

“Sec. 504. Duty to answer information requests and requests for production of documents.

"Sec. 505. Civil and criminal penalties.

"Sec. 506. Document repository; confidentiality; no waiver.

"Sec. 507. Final agency action and judicial review.

"Sec. 508. Collection, enforcement, and implementation.

"Sec. 509. Transition provisions.

"Sec. 510. Voluntary settlements.

"Sec. 511. New binding allocations of responsibility.

1 **"SEC. 501. GENERAL RULES GOVERNING BINDING ALLOCA-**
2 **TIONS OF RESPONSIBILITY.**

3 “(a) GENERAL.—The Administrator shall appoint
4 panels of administrative law judges to perform expedited
5 administrative proceedings, to be known as ‘binding allo-
6 cations of responsibility’, for purposes of determining the
7 liability of potentially responsible parties at National Pri-
8 ority List sites. Each such panel shall be composed of
9 three administrative law judges appointed by the Adminis-
10 trator under section 3105 of title 5, United States Code,
11 and shall be known as an ‘allocation panel’.

12 “(b) RULES OF DECISION.—The decisions of alloca-
13 tion panels under this title shall be rendered based on the
14 provisions of this Act and the court decisions interpreting
15 such provisions.

16 “(c) RELATIONSHIP TO NATURAL RESOURCES DAM-
17 AGE.—Binding allocations of responsibility shall not ad-
18 dress or affect the liability of any person with respect to
19 damage to natural resources under section 107(a)(4)(C).

1 **"SEC. 502. QUALIFICATIONS AND POWERS OF ADMINISTRA-**
2 **TIVE LAW JUDGES AND ALLOCATION PANELS.**

3 “(a) **QUALIFICATIONS.**—An administrative law judge
4 may not be appointed to an allocation panel under section
5 501 unless the judge completes at least 40 hours of edu-
6 cation and training, as specified by the Administrator, in
7 the following subject areas:

8 “(1) The operation of this Act and the regula-
9 tions promulgating this Act.

10 “(2) The science of soil and groundwater con-
11 tamination and the technology for treating such con-
12 tamination.

13 “(b) **GENERAL POWERS.**—An allocation panel shall
14 have the power and authority to perform all functions nec-
15 essary to administer and perform the binding allocations
16 of responsibility, including the power to—

17 “(1) issue information requests and requests for
18 production of documents to any person;

19 “(2) require the Administrator and the State
20 concerned to provide all information relevant to a
21 binding allocation of responsibility, including the
22 production of copies of all documents and informa-
23 tion obtained pursuant to section 104(e) or pursuant
24 to similar State law;

1 “(3) rule upon motions, requests, and offers of
2 proof, dispose of procedural requests, and issue all
3 necessary orders;

4 “(4) administer oaths and affirmations and
5 take affidavits;

6 “(5) examine witnesses and receive documen-
7 tary or other evidence;

8 “(6) grant and manage such discovery by the
9 parties as the allocation panel deems appropriate
10 and consistent with the expedited nature of the bind-
11 ing allocation of responsibility process;

12 “(7) admit or exclude evidence;

13 “(8) hear and decide questions of fact and law;

14 “(9) require the parties, including the State
15 and the guardian of the Fund, to attend conferences
16 for the settlement or simplification of the issues or
17 the expedition of the proceedings;

18 “(10) require, at any time, that potentially re-
19 sponsible parties wishing to present similar legal or
20 factual arguments use a common spokesman or con-
21 solidated briefing for the presentation of such facts
22 and legal positions;

23 “(11) obtain or employ such support services as
24 are necessary to conduct the binding allocation of re-
25 sponsibility, including secretarial and clerical serv-

1 ices, investigative services, and computer information
2 and database management services;

3 “(12) establish a document repository where all
4 documents associated with the binding allocation of
5 responsibility shall be maintained and made avail-
6 able to all parties to the binding allocation of re-
7 sponsibility in accordance with section 506; and

8 “(13) do all other acts and take all measures
9 necessary for the maintenance of order and for the
10 efficient, fair, and impartial adjudication of issues
11 arising in the binding allocation of responsibility.

12 “(c) SUBPOENA POWER.—Allocation panels shall
13 have the power of subpoena to collect information nec-
14 essary or appropriate for conducting the binding allocation
15 of responsibility or for otherwise implementing this sec-
16 tion. This authority shall include the power to compel the
17 attendance and testimony of witnesses and the production
18 of reports, papers, documents, answers to questions, and
19 other information that the allocation panel deems nec-
20 essary. Witnesses shall be paid the same fees and mileage
21 that are paid witnesses in the courts of the United States.
22 In the event of contumacy or failure or refusal of any per-
23 son to obey any such subpoena, any district court of the
24 United States in which venue is proper shall have jurisdic-

1 tion to order any such person to comply with such sub-
2 poena.

3 “(d) INFORMAL RULES OF EVIDENCE.—In conduct-
4 ing the binding allocation of responsibility, an allocation
5 panel shall not be bound by the Federal Rules of Evidence,
6 but shall instead use such informal rules of evidence and
7 evidentiary procedures, such as those set forth at sections
8 22.22 and 22.23 of title 40 of the Code of Federal Regula-
9 tions, as will promote the expeditious completion of the
10 proceeding.

11 “(e) NATIONWIDE SERVICE OF PROCESS.—Any docu-
12 ment required to be served on a party under this title may
13 be served in any district where the person is found, re-
14 sides, transacts business, or has appointed an agent for
15 service of process. Any such document is deemed to be
16 served on a party if it is mailed to the counsel of record
17 for the party or to the address designated by the party
18 if the party is not represented by counsel.

19 **“SEC. 503. SPECIFIC RULES AND PROCEDURES.**

20 “(a) INITIATION OF ALLOCATION PROCESS.—

21 “(1) IN GENERAL.—A binding allocation of re-
22 sponsibility with respect to a National Priority List
23 site shall be initiated by filing a petition with the Of-
24 fice of the Administrative Law Judges of the Envi-
25 ronmental Protection Agency. Such a petition may

1 be filed by the Administrator or the State where the
2 National Priority List site is located.

3 “(2) WHEN INITIATED.—The Administrator or
4 a State shall file a petition to initiate a binding allo-
5 cation of responsibility at a National Priority List
6 site not later than 30 days after initiating the reme-
7 dial investigation study (or its equivalent) for the
8 site. In any case where the petition is filed more
9 than 30 days after initiation of the remedial inves-
10 tigation study (or its equivalent), all governmental
11 response costs incurred or contracted for prior to the
12 filing of the petition shall be allocated entirely to the
13 orphan share.

14 “(3) CONTENTS OF PETITION.—The petition to
15 initiate the binding allocation of responsibility pro-
16 ceeding shall identify the petitioner and shall include
17 all relevant information reasonably available
18 concerning—

19 “(A) the identity, location, history, current
20 status, and environmental condition of the Na-
21 tional Priority List site;

22 “(B) the identity and address of each per-
23 son believed by the petitioner to be a liable
24 party and the basis for such belief;

1 “(C) any proposed questions and document
2 requests that the petitioner believes should be
3 included in the allocation panel’s first informa-
4 tion request and document request; and

5 “(D) a list of any legal or technical issues
6 that the petitioner believes may be raised in the
7 binding allocation of responsibility.

8 “(4) SERVICE.—A copy of the petition shall be
9 served by mail, publication, or otherwise on the Ad-
10 ministrator, the State where the site is located, and
11 each potentially responsible party identified in the
12 petition. Within 20 days after the filing of the peti-
13 tion, the Hearing Clerk of the Office of Administra-
14 tive Law Judges shall cause a notice of the filing of
15 the petition, together with a brief description of the
16 site and a list of all potentially responsible parties
17 identified in the petition, to be published in the Fed-
18 eral Register. The petitioner shall cause a similar
19 notice, description, and list to be published in a
20 newspaper of general circulation within the State
21 where the site is located.

22 “(5) PRIOR INVESTIGATION AND SEARCH.—The
23 Administrator or the State, as the case may be,
24 shall, prior to filing a petition, conduct a thorough
25 investigation and search, under section 104(e) or

1 any other relevant Federal or State statutory or reg-
2 ulatory authority, for all potentially responsible par-
3 ties. All information, answers, and documents dis-
4 covered in such investigation or search and relevant
5 to any aspect of the binding allocation of responsibil-
6 ity shall, simultaneously with the filing of the peti-
7 tion, be filed in the document repository for the
8 binding allocation of responsibility. If the allocation
9 panel determines that the Administrator or the
10 State failed to conduct a diligent search for poten-
11 tially responsible parties in accordance with this
12 paragraph, and if another party performs additional
13 investigations and successfully identifies additional
14 potentially responsible parties, then the allocation
15 panel may, in its discretion, credit all or part of the
16 costs of such additional search against the assigned
17 share, if any, of the party that performed such addi-
18 tional investigation or search.

19 “(6) APPOINTMENT OF GUARDIAN FOR THE
20 HAZARDOUS SUBSTANCE SUPERFUND.—Any petition
21 filed by the Administrator shall include the name
22 and address of the person appointed to serve as the
23 guardian for the Hazardous Substance Superfund
24 for that binding allocation of responsibility. In any
25 case where a petition is initiated by a State, the Ad-

1 administrator shall notify the Hearing Clerk of the Of-
2 fice of the Administrative Law Judges within 10
3 days after the petition is filed of the name and ad-
4 dress of the person designated by the Administrator
5 as the guardian for the Hazardous Substance
6 Superfund. If the Environmental Protection Agency
7 is also a potentially responsible party or a liable
8 party with respect to the National Priority List site
9 concerned, then the agency may participate in the
10 binding allocation of responsibility with regard to
11 such liability, but the person designated as the
12 guardian shall not represent the agency with regard
13 to the agency's status as a potentially responsible
14 party or liable party.

15 “(b) IDENTIFICATION OF POTENTIALLY RESPON-
16 SIBLE PARTIES.—

17 “(1) INITIAL STATEMENT.—(A) Not later than
18 30 days after receipt of a copy of a petition or after
19 publication in the Federal Register of a notice of the
20 filing of an initial petition (whichever is earlier)
21 under subsection (a)(4), the guardian, the State and
22 any potentially responsible party may file an initial
23 statement setting forth—

24 “(i) any defenses to liability;

1 “(ii) any equitable considerations pertain-
2 ing to any party’s potential liability;

3 “(iii) any additional facts and issues rel-
4 evant to the binding allocation of responsibility;

5 “(iv) any proposed questions or document
6 requests that the person filing the statement
7 believes should be included in the first informa-
8 tion request issued by the allocation panel; and

9 “(v) the name and address of any addi-
10 tional person or persons that the person filing
11 the statement believes may be a liable party at
12 the National Priority List site and all reason-
13 ably available information as to the relationship
14 between each proposed additional party and the
15 site.

16 “(B) Any initial statement shall be filed with
17 the Hearing Clerk and served on all parties named
18 in the petition and named in such initial statement.

19 “(2) INFORMATION REQUESTS AND REQUESTS
20 FOR PRODUCTION OF DOCUMENTS.—(A) Not later
21 than 30 days after the filing of the petition, the allo-
22 cation panel shall mail initial information requests
23 and requests for production of documents to the
24 guardian, the State, all potentially responsible par-
25 ties identified in the petition, and all additional par-

1 ties identified in the initial statements. Responses to
2 such requests shall be made in accordance with this
3 paragraph and section 504.

4 “(B) Within 45 days after a person receives
5 any information request or request for production of
6 documents, such person shall file a response with the
7 Hearing Clerk. For good cause shown, the allocation
8 panel may grant a single 45-day extension for the
9 filing of any such response. Each party shall have a
10 continuing obligation to supplement its response
11 upon the receipt of additional relevant information.

12 “(3) ADDITIONAL NOMINATIONS OF POTEN-
13 TIALY RESPONSIBLE PARTIES.—The parties may
14 identify and nominate additional potentially respon-
15 sible parties until the expiration of the 120-day pe-
16 riod beginning on the date of filing of the petition.
17 Any nominations received by the Hearing Clerk after
18 that period may be disregarded by the allocation
19 panel. Each nomination shall include all reasonably
20 available information supporting the assertion that
21 the nominee is a liable party and shall be made at
22 the earliest possible time. Any party making an ad-
23 ditional nomination shall serve notice of such nom-
24 ination on the nominated party and file a copy of
25 such notice with the Hearing Clerk. The nominated

1 party may file its initial response not later than 30
2 days after receipt of the notice. The allocation panel
3 may issue information requests and requests for the
4 production of documents to any nominated party at
5 any time.

6 “(4) INITIAL LIST OF ALL POTENTIALLY RE-
7 SPONSIBLE PARTIES.—Within six months after the
8 filing of the petition, the allocation panel shall cause
9 to be published in the Federal Register and a news-
10 paper of general circulation in the State where the
11 site is located a list identifying all parties that the
12 allocation panel preliminarily deems to be potentially
13 responsible parties with respect to the site. The allo-
14 cation panel also shall attempt to mail a copy of the
15 list to all parties to the binding allocation of respon-
16 sibility. The allocation panel shall reject the nomina-
17 tion of any person as a liable party or potentially re-
18 sponsible party if it finds that the nomination al-
19 leges no connection between the nominated person
20 and the site. The allocation panel may also identify,
21 on its own motion or the motion of a potentially re-
22 sponsible party, additional potentially responsible
23 parties at any time before issuance of the final bind-
24 ing allocation of responsibility.

1 “(c) DE MICROMIS SETTLEMENTS.—(1) Not later
2 than six months after the filing of the petition, the alloca-
3 tion panel shall issue a list identifying all potentially re-
4 sponsible parties that the allocation panel determines con-
5 tributed only a minuscule amount of hazardous substances
6 to the National Priority List site, to be known as ‘de
7 micromis parties’. The allocation panel shall base the de-
8 termination on an evaluation of all evidence received at
9 the time of the issuance of the list with respect to the
10 amount of hazardous substances contributed by poten-
11 tially responsible parties.

12 “(2) The allocation panel shall notify each de
13 micromis party of its inclusion on the list issued under
14 paragraph (1) not later than 20 days after issuing the list.

15 “(3) Any de micromis party may resolve its liability
16 to the United States by paying \$1,000 by certified check
17 to the Hazardous Substance Superfund not later than 60
18 days after receiving notification under paragraph (2). A
19 copy of the canceled certified check is conclusive proof of
20 payment. Such settlement may not be reopened after pay-
21 ment is made, except on grounds of fraud.

22 “(4) De micromis parties that make the settlement
23 payment referred to in paragraph (3) shall have no other
24 liability, under Federal or State law, to any person for

1 response actions or for any past, present, or future costs
2 incurred at the site.

3 “(5) All proceeds from de micromis settlements under
4 this subsection shall be earmarked in the Hazardous Sub-
5 stance Superfund to be used specifically for costs of re-
6 sponse action at the site concerned. Any amounts of such
7 settlements remaining in the Superfund after completion
8 of the response action at the site concerned shall be avail-
9 able in the Superfund for general use.

10 “(6) Not later than three years after the date of the
11 enactment of this title, the Administrator shall submit to
12 Congress a study that estimates the average cleanup cost
13 at National Priority List sites for purposes of determining
14 whether the \$1,000 de micromis settlement amount under
15 this section needs adjustment.

16 “(d) IDENTIFICATION OF LIABLE PARTIES AND DE-
17 TERMINATION OF ASSIGNED SHARES.—

18 “(1) FIRST ALLOCATION ADVOCACY PAPER.—

19 Unless the allocation panel determines that it would
20 unduly delay the process, the guardian, the State,
21 and any potentially responsible party may file an al-
22 location advocacy paper with the Hearing Clerk not
23 later than 30 days after the publication of the initial
24 list of potentially responsible parties in the Federal
25 Register. Any such allocation advocacy paper, which

1 shall be served on the guardian, the State, and each
2 potentially responsible party, shall be a concise
3 statement, together with citations to relevant sup-
4 porting evidence and law, of the party's position
5 with regard to—

6 “(A) the legal and factual criteria that
7 should be used in determining whether a poten-
8 tially responsible party at the site is a liable
9 party; and

10 “(B) how the allocation factors set forth in
11 subsection (f)(2) should be applied to determine
12 the assigned share of each liable party.

13 “(2) FIRST ALLOCATION REPORT.—Within 90
14 days after the publication of the initial list of poten-
15 tially responsible parties in the Federal Register, the
16 allocation panel shall issue its first allocation report
17 tentatively specifying the criteria to be used in iden-
18 tifying the liable parties, tentatively specifying how
19 the allocation factors will be applied to the case to
20 determine assigned shares, and setting forth the
21 process and schedule that will be used to allow par-
22 ties the opportunity to present written evidence and
23 argument regarding how such criteria and factors
24 apply to the case. The first allocation report shall be

1 served on the guardian, on the State, and on each
2 potentially responsible party.

3 “(3) SECOND ALLOCATION ADVOCACY PAPER.—

4 The guardian, the State, and each potentially re-
5 sponsible party may file an allocation advocacy
6 paper with the Hearing Clerk not later than 60 days
7 after receipt of the first allocation report. The allo-
8 cation advocacy paper, which shall be served on the
9 guardian, the State, and each potentially responsible
10 party, shall be the primary opportunity for the
11 guardian, the State, and each potentially responsible
12 party to present evidence and argument regarding
13 how the liability criteria and the allocation factors
14 should be applied to such party and, if desired by
15 the person filing the paper, how those criteria and
16 factors should be applied to other potentially respon-
17 sible parties at the site.

18 “(4) HEARING.—Any potentially responsible
19 party may request a hearing on the determination
20 that such party is a liable party and on the deter-
21 mination of its assigned share. The allocation panel
22 may hold such a hearing if the allocation panel de-
23 termines that it would expedite or materially assist
24 in the resolution of disputed factual or legal issues.
25 The allocation panel shall have broad discretion in

1 managing the conduct of any such hearing, including
2 limiting the time available to each party and requir-
3 ing that parties with generally similar interests be
4 represented by a single spokesperson or common
5 counsel. The allocation panel may allow or prohibit
6 the cross-examination of witnesses.

7 “(5) RULE OF DECISION.—Any party may
8 present written evidence or argument on whether it,
9 or any other potentially responsible party, is a liable
10 party and on the appropriate assigned share for it-
11 self or any other potentially responsible party. A po-
12 tentially responsible party shall be deemed a liable
13 party if the allocation panel determines that the pre-
14 ponderance of the evidence supports the conclusion
15 that such party is liable.

16 “(6) SECOND ALLOCATION REPORT.—Following
17 the submission of advocacy papers and at the con-
18 clusion of any hearings, the allocation panel shall
19 issue a second allocation report identifying all liable
20 parties at the site and specifying the assigned share
21 of each liable party. If the second allocation report
22 changes or expands the list of potentially responsible
23 parties or the criteria or factors set forth in the first
24 allocation report, then the second report shall so
25 specify and provide a brief explanation of any such

1 change. The second allocation report shall be served
2 on the guardian, the State, all potentially responsible
3 parties, and all liable parties.

4 “(e) DETERMINATION OF ORPHAN SHARE.—

5 “(1) ORPHAN SHARE ADVOCACY PAPER.—Un-
6 less the allocation panel determines that it would un-
7 duly delay the process, the guardian, the State, and
8 each liable party may file an orphan share advocacy
9 paper with the Hearing Clerk not later than the 30-
10 day period beginning on the date of issuance of the
11 second allocation report. The orphan share advocacy
12 paper shall be the primary opportunity for the
13 guardian, the State, and each liable party to present
14 written evidence and argument as to which liable
15 parties are orphan parties whose assigned share
16 should, in whole or in part, be assigned to the or-
17 phan share.

18 “(2) ORPHAN SHARE REPORT.—Following the
19 expiration of the 30-day period referred to in para-
20 graph (1), the allocation panel shall issue an orphan
21 share allocation report identifying the orphan share.
22 The orphan share report shall be served on the
23 guardian, the State, all potentially responsible par-
24 ties, and all liable parties.

1 “(f) DETERMINATION OF NONLIABLE PARTIES.—(1)

2 At any time during the period beginning six months after
3 the filing of the petition and ending 18 months after the
4 filing of the petition, the allocation panel shall issue a list
5 identifying all potentially responsible parties that the allo-
6 cation panel determines did not contribute any amount of
7 hazardous substances to the National Priority List site.
8 The allocation panel shall base the determination on an
9 evaluation of all evidence received at the time of the issu-
10 ance of the list with respect to the amount of hazardous
11 substances contributed by potentially responsible parties.

12 “(2) The allocation panel shall notify each nonliable
13 party of its inclusion on the list issued under paragraph
14 (1) not later than 20 days after issuing the list.

15 “(3) Nonliable parties shall have no other liability,
16 under Federal or State law, to any person for response
17 actions or for any past, present, or future costs incurred
18 at the site.

19 “(g) FINAL BINDING ALLOCATION OF RESPONSIBIL-
20 ITY DECISION.—

21 “(1) DECISION.—(A) Not later than the dead-
22 line set forth in subparagraph (B), the allocation
23 panel shall issue a final binding allocation of respon-
24 sibility decision (in this subsection referred to as the
25 ‘final BAR decision’) based on the allocation factors

1 listed in paragraph (2). The decision shall include a
2 list of all potentially responsible parties, a list of all
3 liable parties and the assigned share for each (in-
4 cluding all de minimis parties as determined under
5 paragraph (3)), a list of all orphan parties and the
6 portion of the assigned share of each orphan party
7 that is assigned to the orphan share, and the total
8 orphan share. Where an orphan party is able to pay
9 only a portion of its assigned share, the allocation
10 panel shall to the orphan share the portion of the
11 assigned share that the party is unable to pay and
12 require the party to pay the remainder. The final
13 BAR decision shall provide a concise explanation of
14 the basis for the decision. The decision may consist,
15 in whole or in part, of a compilation of the first allo-
16 cation report, the second allocation report, and the
17 orphan share report.

18 “(B) The final BAR decision shall be issued not
19 later than 18 months after the date of publication
20 under section 503(a)(4) of notice that a petition for
21 a binding allocation of responsibility has been filed,
22 except that, in a case of exceptional complexity, the
23 final decision shall be issued not later than 24
24 months after such date.

1 “(2) ALLOCATION FACTORS.—An allocation
2 panel shall determine the assigned share of each lia-
3 ble party based up the following factors:

4 “(A) The degree to which the liable party’s
5 contribution to a discharge, release, or disposal
6 of a hazardous substance can be distinguished.

7 “(B) The amount of hazardous substances
8 contributed by the liable party at the site con-
9 cerned, compared to the total amount of haz-
10 ardous substances at that site.

11 “(C) The degree of toxicity of the hazard-
12 ous substance contributed by the liable party.

13 “(D) The degree of involvement by the lia-
14 ble party in the generation, transportation,
15 treatment, storage, or disposal of the hazardous
16 substance.

17 “(E) The degree of care exercised by the
18 liable party with respect to the hazardous sub-
19 stance concerned, taking into account the char-
20 acteristics of such hazardous substance.

21 “(F) The degree of cooperation by the lia-
22 ble party with Federal, State, or local officials
23 to prevent any harm to the public health or the
24 environment.

1 “(G) The weight of the evidence as to the
2 liability and the appropriate share of the liable
3 party.

4 “(H) Any other equitable factors deemed
5 appropriate.

6 “(3) DE MINIMIS SETTLEMENTS.—(A) As part
7 of the final BAR decision, or at any time before the
8 issuance of the final BAR decision, the allocation
9 panel shall issue a list identifying all potentially re-
10 sponsible parties that the allocation panel deter-
11 mines contributed only 1.0 percent or less of the
12 total quantity of hazardous substances present at
13 the National Priority List site, to be known as ‘de
14 minimis parties’.

15 “(B) Not later than 60 days after issuance of
16 the final BAR decision or the issuance of the list of
17 de minimis parties under subparagraph (A), which-
18 ever is earlier, the Administrator shall make a firm
19 written offer of settlement to all de minimis parties.
20 The amount of the settlement offer for a de minimis
21 party shall be based on the Environmental Protec-
22 tion Agency’s estimate of the total cleanup cost at
23 the site multiplied by the de minimis party’s allo-
24 cated share as determined by the allocation panel
25 and increased by a reasonable premium (expressed

1 as a percentage) to reflect the benefit of an early
2 and complete resolution of liability. All settlement
3 offers by the Administrator to de minimis parties at
4 the same site shall be based on the same estimate
5 of cleanup costs and the same premium percentage.
6 The settlement offer under this subparagraph is not
7 subject to judicial review.

8 “(C) A de minimis party may accept or decline
9 a settlement offer, but any acceptance of the offer
10 must be made within 60 days after receipt of the
11 offer. A de minimis party that accepts the offer may
12 resolve its liability to the United States by paying
13 the amount of the offer to the Hazardous Substance
14 Superfund. Such settlement may not be reopened
15 after payment is made, except on grounds of fraud.

16 “(D) De minimis parties that accept the settle-
17 ment offer and pay the amount of the offer shall
18 have no other liability, under Federal or State law,
19 to any person for response actions or for any past,
20 present, or future costs incurred at the site.

21 (E) All proceeds from de minimis settlements
22 under this paragraph that represent the allocated
23 shares of de minimis parties at a site shall be paid
24 by the Administrator directly to the person perform-
25 ing the response action at the site. All proceeds from

1 de minimis settlements under this paragraph that
2 represent premiums paid by de minimis parties at
3 the site shall be earmarked in the Hazardous Sub-
4 stance Superfund to be used specifically for costs of
5 response action at the site. Any amounts of such set-
6 tlements remaining in the Superfund after comple-
7 tion of the response action shall be available in the
8 Superfund for general use.

9 “(4) SERVICE AND PUBLICATION.—The binding
10 allocation of responsibility decision shall be served
11 on the guardian, the State, and all liable parties.
12 The Hearing Clerk shall cause a notice of the bind-
13 ing allocation of responsibility decision to be pub-
14 lished in the Federal Register and in a newspaper of
15 general publication in the State where the site is lo-
16 cated.

17 “(5) BINDING EFFECT.—The binding allocation
18 of responsibility decision shall be binding as to all
19 past, present, or future liability (i) for response
20 costs incurred under section 107(a)(4)(A), (B), or
21 (D), and (ii) for contribution under section 113. The
22 binding allocation of responsibility decision shall be
23 binding on all persons, including, without limitation,
24 the United States, any affected State or local gov-
25 ernmental agency or Indian Tribe, any alleged or

1 nominated potentially responsible party (regardless
2 of whether such party participates in the binding al-
3 location of responsibility), and the public.

4 “(6) EFFECT ON OTHER PROCEEDINGS.—A de-
5 termination that a person is a liable party under a
6 binding allocation of responsibility proceeding is ap-
7 plicable only with respect to liability being assigned
8 in the proceeding and not with respect to liability
9 being determined in any other criminal, civil, or ad-
10 ministrative proceeding.

11 **“SEC. 504. DUTY TO ANSWER INFORMATION REQUESTS AND**
12 **REQUESTS FOR PRODUCTION OF DOCU-**
13 **MENTS.**

14 “(a) DUTY TO ANSWER.—Each person who receives
15 any information request or request for production of docu-
16 ments from the allocation panel during a binding alloca-
17 tion of responsibility must provide full and timely re-
18 sponses to the request.

19 “(b) CERTIFICATION OF DOCUMENTS.—Answers to
20 information requests and requests for production of docu-
21 ments shall include a certification by a responsible rep-
22 resentative who meets the criteria established in section
23 270.11(a) of title 40 of the Code of Federal Regulations
24 that the answers—

1 “(1) are true and correct to the best of their
2 knowledge;

3 “(2) are based on a diligent good faith search
4 of records in the possession or control of the person
5 to whom the request was directed;

6 “(3) are based on a reasonable inquiry of the
7 current and former officers, directors, employees,
8 and agents of the person to whom the request was
9 directed;

10 “(4) accurately reflect information obtained in
11 the course of conducting such search and such in-
12 quiry;

13 “(5) that the person executing the certification
14 understands that there is a duty to supplement any
15 such answers if, during the binding allocation of re-
16 sponsibility, any significant additional, new, or dif-
17 ferent information becomes known or available to
18 the answerer; and

19 “(6) that the person executing the certification
20 understands that there are significant penalties for
21 submitting false information, including the possibil-
22 ity of fine and imprisonment for knowing violations.

23 “(c) SANCTION.—In addition to any other penalty or
24 sanction, any person who fails to answer an information
25 request or request for production of documents, and who

1 is determined to be a liable party, shall be assigned a as-
2 signed share of up to 500 percent of whatever its assigned
3 share would otherwise have been, or up to 50 percent of
4 the total liability at the site, whichever is greater. If this
5 results in a binding allocation of responsibility that allo-
6 cates more than 100 percent of the total liability, then
7 the excess shall be deposited into the Hazardous Sub-
8 stance Superfund.

9 **"SEC. 505. CIVIL AND CRIMINAL PENALTIES.**

10 “(a) CIVIL PENALTIES.—Any person who fails to
11 submit a complete and timely answer to an allocation pan-
12 el’s information request or request for production of docu-
13 ments or other discovery request, or who submits a re-
14 sponse that lacks the certification required under section
15 504(b), or who makes any false or misleading material
16 statement or representation in any submission to the allo-
17 cation panel during the binding allocation of responsibility
18 process, including statements or representations in con-
19 nection with the nomination of another potentially respon-
20 sible party, shall be subject to civil penalties of up to
21 \$10,000 per day of violation. The violation shall be
22 deemed a continuing one until such time as the request
23 is answered or the necessary certification is submitted or
24 the false or misleading statement or representation is cor-
25 rected. Such penalties may be assessed by the President

1 in accordance with section 109 or by any other party in
2 a citizen suit brought under section 310. A prevailing
3 plaintiff in such a citizen suit shall be awarded its attor-
4 neys fees and up to 50 percent of the penalty imposed
5 by the court.

6 “(b) CRIMINAL PENALTIES.—Any person who know-
7 ingly makes any false material statement or representation
8 in the response to an allocation panel’s information re-
9 quest or request for the production of documents or other
10 discovery request, or in any other submission to the alloca-
11 tion panel during the binding allocation of responsibility,
12 including statements or representations in connection with
13 the nomination of another potentially responsible party,
14 may be fined under title 18, United States Code, impris-
15 oned for not more than 2 years, or both.

16 **“SEC. 506. DOCUMENT REPOSITORY; CONFIDENTIALITY; NO**
17 **WAIVER.**

18 “(a) DOCUMENT REPOSITORY.—The allocation panel
19 shall establish and maintain a document repository where
20 copies of all petitions, initial statements, advocacy papers,
21 reports, answers to information requests and requests for
22 production of documents by the allocation panel, answers
23 to Federal or State information requests or requests for
24 the production of documents issued prior to the filing of
25 the petition, produced documents, and all other similar

1 material shall be maintained and organized. The docu-
2 ments and information in the document repository shall
3 be available only to the parties to the binding allocation
4 of responsibility for review and copying at their own ex-
5 pense, subject only to the confidentiality provisions of sub-
6 section (b). All responses to any information request or
7 request for production of documents by the allocation
8 panel shall be filed with the clerk for the document reposi-
9 tory and need not be served on other potentially respon-
10 sible parties, the State, or the guardian.

11 “(b) CONFIDENTIALITY.—(1) All pleadings, docu-
12 ments, and materials submitted to the allocation panel or
13 placed in the document repository, together with the
14 record of any depositions or testimony adduced during the
15 binding allocation of responsibility, shall be confidential
16 and shall not be subject to release under section 552 of
17 title 5, United States Code (the Freedom of Information
18 Act). The Hearing Clerk and each party to the binding
19 allocation of responsibility proceeding shall maintain such
20 pleadings, documents, and materials, together with the
21 record of any depositions or testimony adduced during the
22 binding allocation of responsibility, as confidential. Such
23 material shall not be discoverable or admissible in any
24 other Federal, State or local judicial, administrative, or
25 legislative proceeding of any kind whatsoever, except—

1 “(A) to the extent necessary to collect or other-
2 wise enforce in court the assigned share of a liable
3 party as determined by the binding allocation of re-
4 sponsibility;

5 “(B) in a proceeding for judicial review of the
6 binding allocation of responsibility;

7 “(C) in any new binding allocation of respon-
8 sibility proceeding concerning the same site; and

9 “(D) in any binding allocation of responsibility
10 involving a different site where the allocation panel
11 determines that the sites are related and that speci-
12 fied documents from the first binding allocation of
13 responsibility could materially assist the second
14 binding allocation of responsibility.

15 “(2) Notwithstanding paragraph (1)(D), if the origi-
16 nal of any document or material submitted to the alloca-
17 tion panel or placed in the document repository during the
18 binding allocation of responsibility was, while in the pos-
19 session of the party which provided it, otherwise discover-
20 able or admissible, then such original document, if sub-
21 sequently sought from such party, shall remain discover-
22 able or admissible. If a fact covered in any deposition or
23 testimony adduced during the binding allocation of respon-
24 sibility was, in the knowledge of the witness or deponent,
25 otherwise discoverable or admissible, then such testimony,

1 if subsequently sought from such other party, shall remain
2 discoverable or admissible.

3 “(c) NO WAIVER OF PRIVILEGE.—The submission of
4 documents or information pursuant to the binding alloca-
5 tion of responsibility proceeding shall not be deemed to
6 be a waiver of any privilege, applicable to the original doc-
7 ument or fact, under any Federal or State law, regulation,
8 or rule of discovery or evidence .

9 “(d) DISCOVERY.—In any case where a party to a
10 binding allocation of responsibility receives any request for
11 any pleading, document, or material, or for the record of
12 any depositions or testimony adduced in a binding alloca-
13 tion of responsibility, such party shall promptly notify the
14 person who originally submitted such item and shall pro-
15 vide such submitting person the opportunity to assert and
16 defend the confidentiality of such item. No party to the
17 binding allocation of responsibility shall release or provide
18 a copy of any pleading, document, or material, or the
19 record of any depositions or testimony adduced therein.
20 to any person not a party to such binding allocation of
21 responsibility, except in compliance with an order from a
22 court.

23 “(e) CIVIL PENALTY FOR VIOLATION OF CON-
24 FIDENTIALITY REQUIREMENTS.—Any person who fails to
25 maintain the confidentiality of any pleadings, documents,

1 or materials, or the record of any deposition or testimony
2 adduced during the binding allocation of responsibility, or
3 who releases any such information in violation of this sec-
4 tion, shall be subject to a civil penalty of up to \$25,000
5 per violation. Such a penalty may be assessed by the Presi-
6 dent in accordance with section 109 or by any other party
7 in a citizen suit brought under section 310. A prevailing
8 plaintiff in such a citizen suit shall be awarded its attor-
9 neys fees and up to 50 percent of the penalty imposed
10 by the court.

11 **"SEC. 507. FINAL AGENCY ACTION AND JUDICIAL REVIEW.**

12 “(a) FINAL AGENCY ACTION.—The binding alloca-
13 tion of responsibility decision of the allocation panel shall
14 constitute final agency action pursuant to section 706 of
15 title 5, United States Code, subject only to review by the
16 Administrator in situations of fraud or gross misconduct.

17 “(b) JUDICIAL REVIEW.—

18 “(1) IN GENERAL.—No Federal or State court
19 shall have jurisdiction to review, modify, or enjoin
20 any aspect of any binding allocation of responsibility
21 proceeding except as expressly set forth in this sub-
22 section. No aspect of any action, decision, ruling, or
23 determination by an allocation panel in any binding
24 allocation of responsibility proceeding shall be sub-
25 ject to administrative or judicial review in any Fed-

1 eral or State court until after the final binding allo-
2 cation of responsibility decision (in this subsection
3 referred to as the 'final BAR decision') is issued by
4 the allocation panel. Thereafter the Administrator,
5 the guardian, the State, or any person determined
6 by the allocation panel to be a liable party may ob-
7 tain judicial review of a final BAR decision by filing
8 a petition for review with the United States Court
9 of Appeals for the Circuit in which the facility is lo-
10 cated or for the District of Columbia.

11 “(2) PETITION.—Any such petition for review
12 must be filed within 60 days after the date of the
13 final BAR decision by the allocation panel. The peti-
14 tion shall set forth either the specific assigned share
15 of liability that the petitioner believes should have
16 been assigned to it (or, in the case of a petition filed
17 by the guardian, the assigned share that the guard-
18 ian believes should have been assigned to the orphan
19 share) in the binding allocation of responsibility, or
20 stating specifically that the petitioner believes it
21 should not have been found to have any liability at
22 all.

23 “(3) REVIEW.—Judicial review of the final
24 BAR decision shall be conducted on the administra-
25 tive record, which shall include all materials relating

1 to the issues raised on appeal by the petitioner that
2 are contained in the document repository described
3 in section 506(a). The court shall set aside the bind-
4 ing allocation of responsibility only if it is found to
5 be arbitrary, capricious, an abuse of discretion, or
6 contrary to constitutional right, power, privilege, or
7 immunity.

8 “(4) PAYMENT DURING PENDENCY OF RE-
9 VIEW.—During the pendency of a petition for review
10 under this section, the petitioner shall pay any de-
11 mand notices rendered for its assigned share in ac-
12 cordance with the binding allocation of responsibility
13 decision, subject to later refund if the petitioner pre-
14 vails in the litigation.

15 “(5) LIABILITY OF SUCCESSFUL PETITIONER.—
16 If the petitioner is a liable party and the court
17 adopts the assigned share proposed by the peti-
18 tioner, then the difference between that share and
19 the share originally assigned to the petitioner shall
20 be added to the orphan share. If the petitioner is the
21 guardian and the court adopts the orphan share pro-
22 posed by the petitioner, then the matter shall be re-
23 manded to the allocation panel for the issuance, as
24 soon as possible, of a revised binding allocation of

1 responsibility decision in accordance with the deci-
2 sion of the court.

3 “(6) LIABILITY OF UNSUCCESSFUL PETI-
4 TIONER.—(A) In the case of a petitioner who is a
5 liable party petitioning for a change in the petition-
6 er’s assigned share, and the court does not adopt the
7 assigned share proposed by the petitioner, the fol-
8 lowing provisions apply:

9 “(i) The petitioner shall reimburse all
10 other parties that participated in the appeal for
11 the actual attorneys’ fees and costs that they
12 incurred in defending the binding allocation of
13 responsibility decision.

14 “(ii) The petitioner is considered to have
15 not resolved its liability to the United States
16 and is subject to civil action under section 106,
17 107(a), and 113 for the following response
18 costs with respect to the National Priority List
19 site concerned:

20 “(I) The assigned share of the peti-
21 tioner, as determined in the final BAR de-
22 cision, plus

23 “(II) the orphan share for that site.

24 “(iii) The petitioner is subject to claims for
25 contribution from other unsuccessful petitioners

1 with respect to the National Priority List site
2 concerned.

3 “(iv) The petitioner may make claims for
4 contribution against other unsuccessful petition-
5 ers with respect to the National Priority List
6 site concerned.

7 “(B) In the case of a petitioner who is a liable
8 party petitioning for a determination that the peti-
9 tioner is not liable with respect to the site concerned
10 (for reasons such as the fact that the petitioner is
11 a successor to, or a parent or subsidiary of, a com-
12 pany which the petitioner believes should be assigned
13 liability instead), and the court denies the petition,
14 the petitioner is liable for its assigned share as de-
15 termined in the final BAR decision.

16 **“SEC. 508. COLLECTION, ENFORCEMENT, AND IMPLEMEN-**
17 **TATION.**

18 “(a) COLLECTION.—

19 “(1) AMOUNT RECOVERABLE.—After a final
20 binding allocation of responsibility decision is made
21 with respect to a National Priority List site, any
22 creditor party may, in accordance with paragraph
23 (2), recover from any debtor party the following:

24 “(A) With respect to a debtor party who is
25 a liable party, that party's assigned share, as

1 determined under the binding allocation of re-
2 sponsibility.

3 “(B) With respect to a debtor party which
4 is the Hazardous Substance Superfund, the or-
5 phan share, as determined under the binding al-
6 location of responsibility.

7 “(C) With respect to a debtor party who is
8 either a liable party or the Hazardous Sub-
9 stance Superfund, any attorneys’ fees incurred
10 by the creditor party in a judicial action seeking
11 to recover costs from the debtor party.

12 “(2) PROCEDURES FOR RECOVERY.—Recovery
13 by a creditor party from a debtor party shall be car-
14 ried out in accordance with the following provisions:

15 “(A) The creditor party shall file a cer-
16 tified copy of the final decision of the binding
17 allocation of responsibility in the United States
18 District Court for the district in which the site
19 is located.

20 “(B) The creditor party shall file a verified
21 statement with the same court specifying the
22 actions taken and the costs incurred by the
23 creditor party, and stating that such actions
24 and costs are not inconsistent with the National
25 Contingency Plan.

1 “(C) The creditor party shall serve a de-
2 mand notice to each debtor party against whom
3 enforcement is sought and shall deliver a copy
4 of each such notice to the Administrator and
5 the State in which the site is located. The de-
6 mand notice shall specify the total amount of
7 costs covered by the notice, state a demand
8 amount (consisting of the debtor party’s as-
9 signed share or, with regard to the Fund, the
10 orphan share), and demand that the debtor
11 party pay such demand amount within 30 days
12 after receipt of the notice. A copy of the de-
13 mand notice shall be filed with the United
14 States District Court for the district in which
15 the site is located.

16 “(D) With respect to any response actions
17 or expenditures of a continuing nature, verified
18 statements and demand notices shall be filed
19 with the court and delivered to the debtor par-
20 ties and the guardian quarterly.

21 “(E) Where several liable parties, or a lia-
22 ble party and the Administrator or the State,
23 each take actions or incur costs not inconsistent
24 with the National Contingency Plan, different
25 demand notices may be issued concurrently.

1 “(b) PENALTIES AND DAMAGES.—Except in the case
2 of a challenge to collection duly filed in accordance with
3 subsection (c), if a liable party, including any Federal,
4 State, or local governmental agency, fails to pay the sum
5 specified in a demand notice within 30 days after receipt
6 of the notice, such party shall be liable for the interest
7 thereon, civil penalties of up to \$10,000 per day, and dam-
8 ages of up to an amount equal to 3 times the sum specified
9 in the demand notice. In the case of the orphan share,
10 if the Hazardous Substance Superfund fails to pay the
11 sum specified in a demand notice within 30 days after re-
12 ceipt of the notice, the Fund shall be liable for interest
13 thereon and damages of up to the amount equal to 2 times
14 the sum specified in the demand notice.

15 “(c) CHALLENGES TO ENFORCEMENT.—There shall
16 be no administrative or judicial review of any aspect of
17 a demand notice filed and delivered pursuant to subsection
18 (a) except in accordance with this subsection. Within 30
19 days after receipt of a demand notice, a liable party or,
20 in the case of the orphan share, the guardian may file
21 a petition with the allocation panel that issued the binding
22 allocation of responsibility decision contending that the
23 costs reflected in the demand notice were incurred for ac-
24 tions inconsistent with the National Contingency Plan. If
25 such a petition is filed, the allocation panel shall conduct

1 an expedited review of the matter. The review shall be lim-
2 ited solely to the issue of the alleged inconsistency of the
3 response actions and costs with the National Contingency
4 Plan. The person challenging the demand notice shall have
5 the burden of proof that such actions and the claimed
6 costs are inconsistent with the National Contingency Plan.
7 The allocation panel's decision shall not be subject to judi-
8 cial review. Payment need not be made, and no interest
9 shall accrue, pending the allocation panel's decision.

10 “(d) SUBSEQUENT ADDITIONS TO ORPHAN
11 SHARE.—If good faith collection and enforcement efforts,
12 whether by the Federal or State government or by any
13 other creditor party, against a liable party results in a ju-
14 dicial or administrative determination that such liable
15 party is an orphan party, then such liable party's share
16 will be added to the orphan share amount and will be re-
17 coverable from the Hazardous Substance Superfund.

18 “(e) CONTRIBUTION PROTECTION.—Liable parties
19 that pay their assigned share and comply with the binding
20 allocation of responsibility decision shall have no other li-
21 ability, under Federal or State law, to any person for costs
22 incurred at the site, except that the binding allocation of
23 responsibility decision shall not affect any contract for in-
24 surance or indemnification.

1 "SEC. 509. TRANSITION PROVISIONS.

2 “(a) IN GENERAL.—Except as provided in subsection
3 (b), no person may initiate any administrative or judicial
4 action under section 106, subparagraph (A), (B), or (D)
5 of section 107(a)(4), or section 113, or under any other
6 Federal or State law or regulation, for the recovery of re-
7 sponse costs, contribution, or performance of response ac-
8 tions regarding any National Priority List site until 90
9 days after a final binding allocation of responsibility is is-
10 sued.

11 “(b) EXCEPTIONS.—Subsection (a) is subject to only
12 the following exceptions:

13 “(1) ADMINISTRATIVE ORDERS FOR EMER-
14 GENCY REMOVAL ACTIONS.—The President may
15 issue an order under section 106, prior to the issu-
16 ance of a final binding allocation of responsibility, if
17 the order is limited to those actions required to pro-
18 tect human health and the environment pending the
19 issuance of the final binding allocation of respon-
20 sibility decision.

21 “(2) CONTINUATION OF PENDING RESPONSE
22 ACTIONS.—In any case where, as of the date of en-
23 actment of this title, the Administrator or a State
24 has already issued a binding contract for the per-
25 formance of a remedial investigation/feasibility study
26 or has issued an administrative order or executed a

1 consent decree for the performance of any response
2 action, the binding allocation of responsibility proc-
3 ess shall not affect the timing or manner of imple-
4 mentation of such response actions.

5 “(c) STAY OF EXISTING ACTIONS.—

6 “(1) STAY OF PENDING ENFORCEMENT AC-
7 TIONS.—In any case where, as of the date of enact-
8 ment of this title, the Administrator or the State has
9 already initiated any administrative or judicial en-
10 forcement action regarding the liability of any party
11 under section 106, subparagraph (A), (B), or (D) of
12 section 107(a)(4), or section 113, or under any other
13 Federal or State law or regulation for the response
14 costs, contribution, or performance of response ac-
15 tions, such action shall be automatically stayed until
16 90 days after a binding allocation of responsibility is
17 issued, any judicial review of such allocation is com-
18 pleted, and a final administrative or judicial alloca-
19 tion decision is rendered.

20 “(2) STAY OF PENDING PRIVATE PARTY LITIGA-
21 TION.—In any case where, as of the date of enact-
22 ment of this title, any private person has initiated
23 any administrative or judicial action regarding the
24 liability of any party under section 106, subpara-
25 graph (A), (B), or (D) of section 107(a)(4), or sec-

1 tion 113, or under any other Federal or State law
2 or regulation for the response costs, contribution, or
3 performance of response actions, such action shall be
4 automatically stayed until 90 days after a binding
5 allocation of responsibility is issued, any judicial re-
6 view of such allocation is completed, and a final ad-
7 ministrative or judicial allocation decision is ren-
8 dered.

9 “(d) CREDIT FOR ACTIONS AND COSTS IN PENDING
10 MATTERS.—In the case of any response action performed
11 or cost incurred in any activity carried out pursuant to
12 subsection (b), the liability for such response action shall
13 be governed by, and the costs of implementing any such
14 response action or other activity carried out pursuant to
15 subsection (b), shall be included in, the subsequently is-
16 sued binding allocation of responsibility for such National
17 Priority List site. In conducting the binding allocation of
18 responsibility, the allocation panel shall, to the extent rea-
19 sonably possible, give credit for any prior costs incurred
20 or response actions performed at the National Priority
21 List site.

22 “(e) LIMITATIONS ON EXISTING ACTIONS.—(1) The
23 time period described in paragraph (2) shall not be count-
24 ed in determining the statute of limitations applicable to
25 any administrative or judicial action under section 106,

1 subparagraph (A), (B), or (D) of section 107(a)(4), or sec-
2 tion 113, or under any other Federal or State law or regu-
3 lation, for the recovery of costs, for contribution, or for
4 the investigation, cleanup, or remediation of any National
5 Priority List site.

6 “(2) The time period referred to in paragraph (1) is
7 the period beginning on the date that any person first files
8 a petition for the initiation of a binding allocation of re-
9 sponsibility for that site and ending on the date that a
10 binding allocation of responsibility is issued.

11 **“SEC. 510. VOLUNTARY SETTLEMENTS.**

12 “Prior to the issuance of a binding allocation of re-
13 sponsibility decision, any group of potentially responsible
14 parties may submit a private allocation for the National
15 Priority List site (to be known as a ‘voluntary binding
16 allocation of responsibility’) to the allocation panel. If such
17 voluntary binding allocation of responsibility meets the fol-
18 lowing criteria, the allocation panel shall promptly adopt
19 it as the binding allocation of responsibility:

20 “(1) The voluntary binding allocation of respon-
21 sibility shall be a binding allocation of 100 percent
22 of past, present, and future recoverable response
23 costs at the site.

1 “(2) The voluntary binding allocation of respon-
2 sibility shall not allocate any costs or
3 requirements—

4 “(A) to the orphan share, unless the
5 guardian agrees, in writing, to such allocation;
6 or

7 “(B) to any person who is not a signatory
8 to the voluntary binding allocation of respon-
9 sibility.

10 “(3) Signatories to the voluntary binding alloca-
11 tion of responsibility shall be entitled to contribution
12 protection as specified in section 508(e). Such sig-
13 natories shall be prohibited from pursuing any cost
14 recovery action or contribution against any non-sig-
15 natory, but may seek additional recovery against
16 non-signatories based on a contract for insurance or
17 indemnification.

18 “(4) Signatories to the voluntary binding alloca-
19 tion of responsibility shall be entitled to enforce it in
20 the same manner as any binding allocation of re-
21 sponsibility final decision by the allocation panel.

22 **“SEC. 511. NEW BINDING ALLOCATIONS OF RESPONSIBIL-**
23 **ITY.**

24 “A binding allocation of responsibility shall constitute
25 a permanent determination of the assigned share of each

1 liable party and of the orphan share and, except for addi-
2 tions to the orphan share pursuant to section 508(d) and
3 judicially mandated changes pursuant to section 507(b),
4 the binding allocation of responsibility shall not be subject
5 to any change or revision for at least 5 years after the
6 date of the binding allocation of responsibility final deci-
7 sion. Thereafter a new binding allocation of responsibility
8 process shall be available only if the party requesting it
9 demonstrates that, due to new information not reasonably
10 available during first binding allocation of responsibility,
11 a 35 percent or greater increase in total waste-in volume
12 has been discovered. If such a request for a new binding
13 allocation of responsibility is granted, the same rules and
14 procedures described for initial binding allocations of re-
15 sponsibility apply to the new or revised binding allocation
16 of responsibility. New binding allocations of responsibility
17 shall only apply to funds actually expended after the effec-
18 tive date of the new binding allocation of responsibility de-
19 cision, with no credits for funds already expended. Sub-
20 sequent new binding allocations of responsibility requests
21 are prohibited until 5 years after the date of issuance of
22 the prior new binding allocation of responsibility.”.

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
Washington, D.C. 20503

URGENT

July 22, 1993

LEGISLATIVE REFERRAL MEMORANDUM

LRM #M-528

TO: Legislative Liaison Officer -

AGRIC-CR - Hal Gross (all testimony) - (202)720-7095 - 230
COMMERCE - Michael A. Levitt - (202)482-3086 - 324
DEFENSE - Samuel T. Brick, Jr. - (703)697-1305 - 325
ENERGY - Bob Rabben - (202)586-6718 - 209
HHS - Frances White - (202)690-7760 - 328
HUD - Edward J. Murphy, Jr. - (202)708-1793 - 215
INTERIOR - Ralph Hill - (202)208-6706 - 329
JUSTICE - Sheila F. Anthony - (202)514-2141 - 217
TRANSPORTATION - Tom Herlihy - (202)366-4687 - 226
TREASURY - Richard S. Carro - (202)622-1146 - 228
ARMY Civilworks - Morgan Rees - (703)695-1370 - 205
CEA - Francine Obermiller - (202)395-5036 - 242
CORPS ENGINEERS - Susan Bond - (202)272-0030 - 239
GSA - William R. Ratchford - (202)501-0563 - 237
NASA - Jeff Lawrence - (202)358-1948 - 219
NEC - Sonia Mathews - (202)456-6722 - 429
SBA - Christine Swedin - (202)205-6702 - 315
USPS - Stanley F. Mires - (202)268-2958 - 211

FROM: RONALD K. PETERSON (for) *Ronald K. Peterson*
Assistant Director for Legislative Reference

OMB CONTACT: Mark KRAMER (395-3445)

SUBJECT: EPA Proposed Testimony on Oversight of the
Superfund Program

DEADLINE: 2:00 PM July 23, 1993

OMB requests the views of your agency on the above subject before
advising on its relationship to the program of the President, in
accordance with OMB Circular A-19.

Please advise us if this item will affect direct spending or
receipts for purposes of the the "Pay-As-You-Go" provisions of
Title XIII of the Omnibus Budget Reconciliation Act of 1990.

CC:

K. Turco
D. Baker
R. Minsk
K. McGinty
C. Walden/B. Burke
H. Paster

*FAX
22pgs*

_____ Concur
_____ No objection
_____ No comment
_____ See proposed edits on pages _____
_____ Other: _____
_____ FAX RETURN of _____ pages, attached to this
_____ response sheet

07/21/93 18:00

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OCLA/DLA DIV

STATEMENT OF
ROBERT M. SUESSMAN
DEPUTY ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE
SUBCOMMITTEE ON OVERSIGHT
OF THE
COMMITTEE ON WAYS AND MEANS
UNITED STATES HOUSE OF REPRESENTATIVES

JULY 26, 1993

INTRODUCTION

Mr. Chairman and members of the Subcommittee, I am Robert Sueßman, Deputy Administrator of the United States Environmental Protection Agency (EPA). Thank you for the opportunity to appear before you today to discuss the Superfund program.

As you are aware, the Superfund law (the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, or "CERCLA") created one of this country's most ambitious environmental programs. First enacted in 1980 and then amended in 1986, the law marks the first attempt by any nation to provide a comprehensive program to respond to chemical accidents and emergencies and to clean up sites contaminated by hazardous chemicals.

In Fiscal Year 1993, Superfund is operating under a budget of \$1.5 billion, almost 22 percent of EPA's total budget. Moreover, billions more are being spent by State and local governments, private companies, and other parties responsible for cleaning up hazardous waste sites.

Superfund is now more than 12 years old. In that time, we have learned much about analyzing and comparing risks at specific

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sites. We have developed new, more effective, and less costly cleanup technologies. We have become much more sensitive to the value of local community involvement. We have also learned that the scope and complexities of the problem are far greater than EPA and others envisioned. Most important, after 13 years we knew that the Superfund program is still flawed, and that we have to improve it even more to fulfill the promise envisioned in 1980.

EPA has initiated an aggressive course, both inside and outside the Agency, to improve the Superfund program and to prepare for reauthorization. We are implementing a set of administrative improvements to the Superfund program that will address many areas of concern and provide us with an opportunity to evaluate EPA's proposed solutions. Because reauthorization of Superfund is a key priority at EPA and within the Administration, Administrator Browner has formed a high-level steering committee within EPA to oversee the reauthorization. I am chairing that steering committee.

The Administrator has also formed a Superfund Evaluation Committee under the auspices of the National Advisory Council on Environmental Policy and Technology (NACEPT) to develop ideas on how the Superfund law can be improved. The committee reflects the diverse stakeholders in the Superfund program. Its membership includes representatives from state and municipal governments, private industry, environmental groups, local community organizations, and universities. Over the summer and

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into the fall, the Committee will identify the concerns of affected constituencies about the program's operations, identify possible administrative and legislative improvements in the program, and assess the advantages and disadvantages of these improvements. This fall, the NACEPT Committee will present the Administrator with an assessment of available administrative and legislative options to improve Superfund.

I am also representing EPA as the chair of the Interagency CERCLA Reauthorization Committee. That Committee is comprised of officials from the many Federal agencies with an interest in the Superfund program. It held its first meeting July 9 and will meet regularly through the fall as we develop Superfund legislation and consider further administrative options. These meetings will provide all the interested agencies an opportunity to have a meaningful role in the reauthorization process.

To facilitate the analysis of legislative options, we have developed a data initiative in coordination with outside groups that links the various existing databases that contain core, site-specific information on all NPL sites and supplements our existing data with additional information to be collected on all NPL sites in August and September.

These data improvement projects will give EPA and other researchers access to consistent and reliable data and will allow us to provide information essential to the Superfund reauthorization process.

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As you requested in your letter of invitation, I would like to focus first on our recently announced Administrative Improvements.

SUPERFUND ADMINISTRATIVE IMPROVEMENTS

We recognize that certain aspects of the Superfund program have generated criticism. We share the public's concern with the pace and cost of cleanup and the fairness of the liability scheme. We have sought, in developing and implementing the administrative improvements package, to address these issues.

The Administrative Improvements initiative presents an ambitious agenda for making improvements in the Superfund program prior to reauthorization of the statute. It provides us with an opportunity to work within the existing statutory framework and to evaluate the potential of the improvements to meet the Administrator's goals. The administrative changes cover four major areas: enhancing enforcement fairness and reducing transaction costs, enhancing cleanup effectiveness and consistency, enhancing public involvement, and enhancing the States' role in Superfund. These topics respond directly to concerns raised both inside and outside the Agency.

For each of these areas, we have identified several specific initiatives that EPA has begun to execute. In addition, over the past several years, EPA has implemented a series of reforms to improve the effectiveness, efficiency, and equity of the Superfund program. These reforms have had a significant impact on the program in such areas as accelerating cleanups, focusing

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on enforcement first, increasing construction completions, and improving our contracts management. I continue to support the positive results that these activities have produced.

Enhancing Enforcement Fairness and Reducing Transaction Costs -- The first group of Administrative Improvements aim at enhancing fairness in the enforcement process and reduction of transaction costs. First, we will make a greater use of allocation tools to facilitate deliberations among PRPs. EPA recently issued a new policy that encourages the sharing of information on allocation and liability issues with identified potentially responsible parties (PRPs) early in the settlement process.

EPA has begun work to select superfund sites at which we will test the use of binding arbitration for allocation determinations. Over the next year, EPA will identify approximately 20 sites with upcoming remedial design/remedial action (RD/RA) negotiations at which alternative dispute resolution (ADR) will be offered to facilitate allocation deliberations among the PRPs. At approximately three sites, we will experiment with binding arbitration to resolve such disputes. I am personally enthusiastic about the possibility of reducing unnecessary transaction costs and will follow the progress of this effort.

Second, EPA will take actions to foster more small waste contributor settlements. Small volume waste contributors often complain that they are not able to settle with EPA until very

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late in the remedy process. To foster more settlements with de minimis parties, we will simplify our procedures for determining a party's eligibility for a de minimis settlement and streamline the settlement process. To foster more settlements with so-called "de minimis" parties (parties whom, as a matter of enforcement discretion, EPA would not normally pursue), we will issue policy guidance to the Regions on settling with these parties and move aggressively to reach settlements with de minimis parties that are subject to third-party contribution actions brought against them by other FRPs.

Third, we will take several actions to provide greater fairness for owners at Superfund sites. EPA will issue guidance on filing Federal liens against property at Superfund sites. The guidance will provide the site owner the opportunity to submit information to or meet with EPA officials prior to EPA placing a Federal lien on the owner's property. Additionally, we will clarify the requirements for the Superfund "innocent landowner" defense. To qualify for that defense, the landowner must establish that, at the time the property was acquired, he or she took undertook "all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability."

We will examine standards for "all appropriate inquiry" developed by private organizations and other Federal agencies and will evaluate the need for EPA to clarify the requirements for

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"all appropriate inquiry" under the Superfund statute. We will also prepare a model prospective purchaser agreement and expand the use of such agreements when it will facilitate or assist the re-use or redevelopment of contaminated or formerly contaminated property.

Fourth, EPA will examine its mixed funding settlement policy. Mixed funding settlements are settlements where it is appropriate to settle with PRPs for less than 100% of the costs incurred or to be incurred at a particular site. EPA is carefully evaluating mixed funding options, including the implications to the Superfund Trust Fund, of expanding the use of mixed funding settlements. In connection with this evaluation, we will negotiate several mixed funding agreements to gain more experience with this settlement tool.

Enhancing Cleanup Effectiveness and Consistency -- EPA's administrative improvements also aim at enhancing the cleanup process. EPA will streamline and expedite the process by issuing guidance and undertaking demonstration projects on the use of presumptive remedies at certain kinds of Superfund sites. The presumptive remedy initiative involves using the knowledge we have gained at similar site types to streamline the remedy selection process. Work on presumptive remedies has already begun on municipal landfill sites, woodtreater sites, ground water contamination sites, sites with volatile organic compounds in soil, coal gasification sites, PCB sites and grain storage sites.

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We will also focus attention on ground water contamination. Certain ground water contamination sites are suspected of containing dense non-aqueous phase liquids (DNAPLs) that often elude detection because of their complex fate and transport characteristics. The presence of DNAPLs can determine the success or failure of a remedy. Because of the importance of detecting and addressing DNAPLs, EPA will develop a methodology for quickly assessing the presence of DNAPLs, for characterizing site contamination problems, and for addressing DNAPL contamination.

Further, we will develop soil trigger levels. Soil contamination is common at Superfund sites, but soil cleanup levels have historically been set at each individual site, depending upon the site's conditions and the risk it poses. This takes significant time and effort. We will establish soil trigger levels to accelerate the investigation of soil contamination at Superfund sites, streamline the baseline risk assessment, and improve consistency between correction actions under the Resource Conservation and Recovery Act (RCRA) and Superfund cleanups.

Enhancing Public Involvement -- The initiative also calls for increasing public involvement in the Superfund process. EPA will implement an environmental justice strategy for Superfund sites, and as part of this strategy we will work with State and Tribal governments to identify sites where disadvantaged communities may be specially affected. We will