Superfund: A Brief Comparison of the Chairmen's Bills

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ABSTRACT

This report compares three bills intended to amend and reauthorize the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, or "Superfund"), the federal program to clean up hazardous waste sites. There are numerous Superfund bills introduced in the current Congress. The three bills chosen for comparison (S. 8, as reported by the Committee on Environment and Public Works (S. Rept. 105-192); the subcommittee-approved version of H.R. 2727; and H.R. 3000) are those introduced by the chairmen of the subcommittees with jurisdiction over the program. The report focuses on the four most contentious issues in the reauthorization debate: the law's retroactive, strict, joint, and several liability scheme; remedy selection and cleanup standards, including the law's preference for permanence and treatment; the role of the states in cleanup; and efforts to limit natural resource damages. CRS Issue Brief 97025, *Superfund Reauthorization Issues in the 105th Congress*, treats the topic more broadly. References to other pertinent CRS products are included. The report assumes basic knowledge by the reader of CERCLA and the Superfund program. It will be updated as legislative actions occur.

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Summary

The chairmen of three subcommittees with jurisdiction over Superfund have introduced comprehensive reauthorization bills: Senator Bob Smith introduced S. 8 (the May 19, 1998 reported version is used here), Representative Sherwood Boehlert introduced H.R. 2727 (the subcommittee-approved version of March 11, 1998, is used here) and Representative Michael Oxley introduced H.R. 3000. This report compares the three bills, focusing on four disputed issues: liability, remedy selection, the role of the states, and natural resource damages.

All three bills would provide protection from liability for small businesses and parties who contributed small amounts of waste to sites on the National Priorities List, though the precise categories of exemption vary substantially. They all also would establish an allocation process, conducted by a neutral person, to divide cleanup costs among responsible parties, while limiting litigation. Those not accepting the allocation would be subject to CERCLA's joint and several liability.

The remedy selection titles of the bills all require that human health and the environment be protected while adding flexibility to increase the pace and reduce the costs of cleanup. They delete the present law's preference for treatment, permitting hazardous substances to remain onsite provided that institutional controls are used that ensure protection; H.R. 2727 and S. 8 retain a preference for treatment of high risk source materials or areas. All three require remedy selection to consider current and reasonably anticipated uses of land and water resources, state and local viewpoints, and reasonableness of cost. Regarding the current law's applicable or relevant and appropriate requirements (ARARs), the bills delete the "relevant and appropriate" language to help clarify which federal and state requirements do apply to cleanups. Groundwater remediation requirements and details differ among the bills. The bills all require EPA to conduct facility-specific risk assessments or evaluations, and to communicate the results in easily understood language.

All of the bills would authorize EPA either to delegate or authorize program responsibility over all or some NPL facilities in a state, and for all or some aspects of cleanup activity, giving states the flexibility to choose; federal funding would be provided. EPA could withdraw the authority under certain circumstances. The bills would reduce states' share of operation and maintenance costs from 100% to no more than 10%. The House bills would give Governors a veto over the addition of new sites to the National Priorities List. They would also give states with program authorization the power to use state law for cleanup of federal facilities; S. 8 expressly bars the use of state standards at federally owned sites.

Regarding natural resource damages, the three bills would bar recovery for "non-use" values (values that are unrelated to actual use of the resource), and would base damage assessments on site-specific conditions and restoration requirements. S. 8 would also require the Interior Department to rewrite its assessment rules. H.R. 3000 forbids the use of contingent valuation methodology; S. 8 allows it, but bars recovery of its costs. The restoration alternative must be feasible and cost-effective; S. 8 would require considering natural recovery as an option.

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Introduction

Reauthorizing the Superfund law is said to be a major environmental goal of the 105th Congress. Formally known as the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA, P.L. 96-510), it was last amended comprehensively by the Superfund Amendments and Reauthorization Act of 1986 (SARA, P.L. 99-499).

Three committees have jurisdiction over CERCLA's programmatic provisions,[1] and the chairmen of the pertinent subcommittees have each introduced a comprehensive reauthorization bill, namely:

- S. 8, introduced by Senator Bob Smith, chairman of the Senate Environment and Public Works Subcommittee on Superfund, Waste Control, and Risk Assessment, on January 21, 1997 (the bill ordered reported on May 19, 1998, is used here; S. Rept. 105-192);
- H.R. 2727, introduced by Representative Sherwood Boehlert, chairman of the House Transportation and Infrastructure Subcommittee on Water Resources and Environment, on October 23, 1997 (this report uses the subcommittee-approved version of March 11, 1998); and
- H.R. 3000, introduced by Representative Michael Oxley, chairman of the House Commerce Subcommittee on Finance and Hazardous Materials, on November 9, 1997.

Hearings have been held on all of them. Democratic House Members have offered three comprehensive bills. Representatives James Barcia and Calvin Dooley introduced H.R. 2750 on October 28, 1997, Representative Frank Pallone introduced H.R. 3262 on February 25, 1998, and Representative Thomas Manton introduced H.R. 3595 on March 30, 1998.

This report summarizes the three chairmen's bills, and focuses on the four most controversial areas: liability, remedy selection, the role of the states, and natural resource damages. The report will be updated as legislative actions occur. (See also CRS Issue Brief 97025, *Superfund Reauthorization Issues in the 105th Congress*.)

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[1]In addition, the House Ways and Means and Senate Finance Committees have exercised authority over the law's tax provisions which supply the Superfund Trust Fund. For further information, see CRS Report 96-774 E, *Taxes to Finance Superfund*. September 13, 1996. 10 p.

Liability

Current Law

Current law imposes "joint and several liability" on a strict and retroactive basis.[2] "Joint and several" means that, in theory, any responsible party can be held liable for the full cost of cleanup, not just for the share attributable to his individual actions.[3] "Strict" means that meeting the appropriate standard of care (including compliance with applicable laws) is no defense: release of a hazardous substance results in liability, regardless of whether the person responsible fell short of the appropriate standard of care. And "retroactive" means that the liabilities imposed by the Act extend to conduct prior to its enactment.

Superfund liability can affect both current and past owners and operators of sites, transporters of the hazardous substances who selected the sites, and those who arranged for disposal (often called "generators"). It also permits third party suits, in which the parties identified and held responsible by EPA (generally the largest generators of waste and the owners and operators of the site) may sue others for contribution. This has resulted, at times, in hundreds of parties, many of them small businesses or entities that may have sent waste containing only minute quantities of hazardous substances to the site, being sued.

CERCLA does provide some mechanisms to facilitate settlements and minimize litigation costs. It authorizes EPA to settle with potentially responsible parties (PRPs), provides authority for EPA to prepare non-binding allocations of responsibility, and has expedited settlement provisions for *de minimis* parties. EPA may use mixed funding (in which the fund pays the cost share of non-settling PRPs), and "orphan share" funding (in which the fund pays for insolvent or defunct parties). The Agency may also provide settling parties protection from third-party lawsuits and covenants not to sue.

Despite these provisions, there is a sense that Superfund's liability scheme is too broad, and that small and innocent parties, in particular, need protection from liability.

Proposed Amendments

All three of the bills would provide protections to small businesses and parties who contributed small amounts of waste to sites on the National Priorities List (NPL). The precise categories of exemption vary substantially from bill to bill, however, making it difficult to compare the scope of the offered exemptions. H.R.

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[2]For additional discussion, see CRS Report 98-136 ENR, *Superfund Act Reauthorization: Liability Issues*. February 12, 1998. 20 p.

[3]In reality, contribution actions, *de minimis* settlements, mixed funding, and orphan share coverage by the Superfund, non-binding allocations of responsibility, and, of course, Department of Justice and judicial restraint all serve to soften the theoretical harshness of this standard.

3000 can probably lay claim to the broadest exemption: it would exempt generators and transporters of any size for all activities at a listed site that occurred on or before January 1, 1987, provided that they do not impede performance of the response action or natural resource damage restoration and that they comply with all requests for information gathering and access. Neither of the other bills contains such a broad exemption.

The broadest exemption in the other two bills is for small businesses. Both exempt small businesses from liability for their actions at NPL sites prior to the date of enactment (S. 8) or the date the bill was introduced (H.R. 2727). The bills define small business in similar, though not identical, terms -- generally, 75 or fewer full-time employees, or $3 million or less in annual gross revenues. They would not provide the exemption if the business contributed significantly to the cost of response (S. 8), or if the business controlled disposal at the site or had actual knowledge that disposal or treatment at the site presented a significant risk to public health or the environment (H.R. 2727).

Exemptions or special settlement provisions are provided in all three bills for parties that contributed small amounts of waste (the so-called *de minimis* or *de micromis* parties). As noted, CERCLA already contains special settlement provisions for *de minimis* parties, but *de minimis* is not defined and there is only a vague deadline for Agency action ("as promptly as possible"). The Boehlert bill modifies these by requiring EPA to offer a settlement to generators and transporters of *de minimis* wastes within 180 days of determining that they are eligible. A contribution is presumed to be *de minimis* if it is not more than 1% of the total volume of materials containing hazardous substances and the hazardous substances are not significantly more hazardous or toxic than other such substances at the site. Owners and operators of sites would also be covered by this provision if the materials disposed during their ownership or operation qualified as *de minimis*. S. 8 provides a similar definition of *de minimis* and provides for a reduction in settlement amounts for natural persons, small businesses, or municipalities that have a limited ability to pay.

S. 8 and H.R. 3000, however, focus on *de micromis* parties, exempting generators and transporters who contributed up to 110 gallons or 200 pounds of hazardous substances, provided that the material did not contribute significantly to response costs. All three bills also exempt waste generators and transporters or limit their liability if they only shipped municipal solid waste or municipal sewage sludge to an NPL site, although the specific provisions vary.

Other groups that would be given new protection against liability include recyclers (all three bills); railroad spur lines (all three bills); response action contractors (all three bills, with varying provisions); innocent recipients of property through inheritance (all but S. 8); innocent owners and operators who acquired a facility after the disposal or placement of hazardous substances took place (H.R. 2727); governments acquiring property through eminent domain (H.R. 2727) or tax forfeiture, abandonment, bankruptcy, or foreclosure (S. 8); owners of property contiguous to NPL sites (H.R. 2727); holders of pipeline rights of way / easements, or oil or gas leases (H.R. 3000); owners or operators of roads, streets, or other rights of way over which hazardous substances are transported, except railroads (H.R.

2727); innocent construction contractors (H.R. 2727 and H.R. 3000); "501(c)(3)" religious, charitable, educational, and scientific organizations (S. 8 and H.R. 2727); innocent owners and operators of sewage treatment works (H.R. 2727); states, tribes, and local governments who take action to improve water quality at abandoned mine sites (H.R. 2727); and municipal owners and operators of codisposal landfills (H.R. 2727 and S. 8).

In addition to exemptions from liability, a second feature common to all the bills is a nonbinding allocation process for dividing liability at multi-party sites. All three of the bills establish allocation schemes in an attempt to fairly divide response costs among responsible parties, while limiting litigation. The bills list the same allocation factors, which do *not* include joint and several liability. This is a departure from current law, under which the primary objective is to get on with the business of cleaning up, leaving it to the PRPs to allocate liability among themselves.

In general, under the three bills, allocations would be performed by neutral third parties picked by the PRPs from a list provided by EPA. Using information-gathering and subpoena authority, the allocator would determine the share of response costs for each PRP and the Fund, and would issue a report. EPA and the Department of Justice may reject an allocation report, in which case a second allocation would be performed. If the government does not reject the allocation, parties may settle based on the report. Settlements may include protection from contribution law suits and covenants not to sue. EPA would remain free to seek recovery of outstanding response costs from any party that does not settle, under joint and several liability.

Within the general allocation framework, there are numerous, but generally minor differences among the three bills, most regarding deadlines, authorities of the allocator, procedures for mixed funding, and post-settlement litigation.

Remedy Selection

Current law

Another key issue in the Superfund debate concerns the selection of remedies and cleanup standards.[4] The law currently states a preference for "treatment which permanently and significantly reduces the volume, toxicity or mobility of the hazardous substances, pollutants, and contaminants . . . ." The law also directs EPA to select a cost-effective response; however, it does not authorize EPA, when selecting a remedy, to consider whether the benefits of a proposed remedy are "reasonable" given the remedy's costs.

In general, CERCLA requires that remedial actions must attain a degree of cleanup that complies with any legally applicable or relevant and appropriate requirements (ARARs) under state and federal environmental laws and state facility

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[4]For a background discussion of Superfund cleanup issues, see CRS Report 97-914 ENR, *Superfund Cleanup Standards Reconsidered*, October 2, 1997.

siting laws. Each site has unique conditions, and the "relevant and appropriate requirements" language has caused contention about which cleanup standards and levels would apply at each site. Although EPA may waive ARARs due to technical impracticability, the Agency has seldom done so.

Proposed Amendments

The chairmen's Superfund bills all aim to increase the flexibility in the Act to increase the pace and reduce the costs of cleaning up Superfund sites while protecting human health and the environment. The bills share similarities but also contain notable differences in their details, many of which are not addressed in this overview.

All of the bills would add flexibility to the cleanup process by modifying the law's general preference for treatment in exchange for an emphasis on protecting human health and the environment over the long term. They each would authorize EPA to select a remedy that allows hazardous substances to remain onsite above protective levels (or a required standard), provided that institutional controls are incorporated into the remedy and that the controls ensure protection of human health and the environment. The bills would require EPA, in such cases, to include restrictions on the use of land, water or other resources to provide long-term protection. S. 8 provides that remedies relying on institutional controls would be considered equal to any other remedies. H.R. 2727 would authorize the use of enforceable institutional controls as a supplement to, but not as a substitute for, other response measures except in extraordinary circumstances. The House bills would authorize the President to acquire easements that include land-use restrictions where institutional controls are part of a remedy. S. 8 simply states that institutional controls may include easements.

H.R. 2727 and S. 8 would retain the preference for treatment in certain cases. Under H.R. 2727, this preference would apply to "source materials that constitute a principal threat." Under S. 8, this preference would apply to discrete areas that cannot be reliably contained or that present a substantial risk to human health and the environment. H.R. 2727 provides that if the President selects a remedy that does not include treatment for such source materials, he must publish an explanation. H.R. 3000 would offer more flexibility by emphasizing source control which could include management or treatment of discrete, highly contaminated areas (called "hot spots"). S. 8 would allow the President to select a final containment remedy for such areas at landfills and mining sites under certain circumstances. Under H.R. 3000, hot spots would not include areas at mining and landfill sites.

Each bill would require remedy selection to take into account the current and reasonably anticipated uses of land and water resources, and to rely to various degrees on state and local input in making such determinations. H.R. 2727 would add that the Act's remedy objectives must be to restore property and water for beneficial use and to protect uncontaminated water.

H.R. 2727 and H.R. 3000 would add a general rule that remedies must protect human health and the environment and provide long-term reliability (with H.R. 3000 further adding "at reasonable cost"). S. 8 would add a general rule requiring the President to select a cost-effective remedy that achieves the mandate to protect

human health and the environment and meets applicable federal and state laws. All three bills would add reasonableness of cost to the list of factors that must be balanced in selecting a remedy. Under S. 8, no single factor would predominate in remedy selection, while H.R. 3000 includes an overarching requirement for the President to select a cost-effective, cost-reasonable remedy.

Among other remedy objectives, H.R. 3000 and S. 8 both specify a residual risk range that remedies would be required to achieve (i.e., one in 10,000 to one in 1,000,000 cumulative lifetime additional cancer risk). EPA has testified that prescribing numeric risk goals would lock the Agency into current methods of expressing and measuring risk, which are in transition under the Agency's new cancer guidelines.[5] H.R. 2727 does not include numeric goals. H.R. 3000 adds that remedies should not seek to address unrealistic or insignificant risks.

Regarding ARARs, the bills all would delete the "relevant and appropriate" language to help clarify which federal and state requirements would apply to cleanups. They each would place conditions on the applicability of state requirements and would require states to identify applicable state laws or standards to EPA.

Groundwater remediation requirements and details differ among the bills. H.R. 2727 would add to the Act that the objectives of remedies must be to return groundwater to beneficial uses and to prevent migration of contaminated groundwater. For groundwater not suitable for drinking water, S. 8 would require that remedies seek to restore groundwater to current or reasonably anticipated beneficial uses. Each bill would require that, if the beneficial use of groundwater is drinking water, remedies generally must meet Safe Drinking Water Act standards at reasonable points of compliance. H.R. 2727 and H.R. 3000 add that remedies, at a minimum, must prevent ingestion of contaminated water and may include the provision of alternative water supplies. Under S. 8, if restoration to drinking water standards is technically impracticable, a remedy must include provision of an alternative water supply, point-of-use, or point-of-entry treatment or other treatment methods to ensure no ingestion of contaminated water.

Groundwater protection requirements also differ. H.R. 2727 would generally require remedies to protect uncontaminated groundwater to the extent technically feasible. S. 8 would require remedies to protect uncontaminated groundwater that is suitable for drinking water, unless technically impracticable, and to protect other groundwater and related surface water for other current or future beneficial uses, if technically practicable. H.R. 3000 would require protection of groundwater for which the current or anticipated use is drinking water, to the extent practicable and consistent with balancing factors (including cost).

Each bill would require EPA to conduct site-specific risk assessments or evaluations. The assessments would variously be used to determine what is protective of human health and the environment, to assist in setting remedial objectives and identifying exposure pathways, and to evaluate alternative remedies.

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[5]Testimony of EPA Administrator Carol Browner before the Senate Environment and Public Works Committee. September 4, 1997.

S. 8 further would require that facility-specific risk evaluations use chemical-specific and facility-specific data in preference to default assumptions, when practicable.

The three bills would require risk assessments to be objective and neither minimize nor exaggerate the risks posed by a site, and exposure assessments to be based on reasonably anticipated uses of land and water resources. The bills would require risk assessments to be based on the best available scientific information, with H.R. 2727 and H.R. 3000 including epidemiological and bioavailability data. These two bills would also require risk assessments to be based on an analysis of the weight of scientific evidence, with H.R. 3000 further requiring EPA to base risk estimates on reasonable high-end estimates of exposure distributions. Each bill outlines risk communications requirements.

All three bills would establish at least one remedy review board to review proposed remedy options that meet certain criteria (particularly cost) and to make recommendations to EPA. Also, the bills generally would require EPA to review, upon request, existing cleanup decisions, and, if appropriate, modify decisions to allow remedies to reflect current scientific and technological knowledge.

Among other provisions, each bill would direct the President to revise and streamline procedures for conducting remedial investigations and feasibility studies and to adopt a phased approach to site characterization and cleanup. Similarly, S. 8 and H.R. 2727 authorize the use of generic (or presumptive) remedies in order to expedite the remedy selection process.

State Role

Current Law

CERCLA gives the federal government the lead role in cleaning up hazardous waste sites.[6] Unlike most other environmental laws, CERCLA did not envision that states would assume responsibility to run the program. State authorities concerning the federal program are concentrated in three areas. EPA is required to confer with states concerning the choice of remedial actions. States may impose requirements more stringent than federal standards, if the state pays incremental costs. States may undertake cleanups at NPL sites, under contracts and cooperative agreements with EPA. However, states have come to play an important role in waste site cleanup (through cooperative arrangements for about 10% of federal Superfund sites and, more significantly, through state cleanup programs addressing non-federal sites). Despite their limited substantive role, states must make significant financial contributions to remedial actions that are funded through the Superfund. States now seek more responsibility for the federal program, in recognition of their growing capabilities and to reduce duplication and delay in current federal-state roles. Most interested parties, including EPA, support such a change. At issue is how to balance

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[6]For additional information, see CRS Report 97-953, *Superfund and States: The State Role and Other Issues*. Updated March 18, 1998.

giving states enhanced responsibility and flexibility while including adequate criteria to ensure state capability for a larger role in the federal Superfund program.

Proposed Amendments

All three bills establish procedures to give states more substantive responsibility for the federal program; this would complement the existing state-EPA cooperative agreement structure of the law that gives states limited responsibility over NPL sites. All of the bills would authorize EPA either to delegate or authorize program responsibility over all or some NPL facilities in a state, and for all or some aspects of cleanup activity, giving states the flexibility to choose. Under delegation, states would operate the program using federal authorities. Under authorization, states would utilize state cleanup laws and liability standards in lieu of CERCLA. H.R. 2727 and H.R. 3000 permit delegation or authorization for federal and non-federal sites on the NPL; S. 8 limits delegation or authorization to non-federal NPL sites, but allows states to apply for a transfer of authorities at federal facility sites.

The three bills contain essentially similar procedures and criteria for states to apply for delegation or authorization, EPA review and approval, and withdrawal by EPA under certain circumstances. S. 8 alone contains procedures for a court to require EPA to act, if it fails to meet deadlines for approving or disapproving a state's application. H.R. 2727 and S. 8 establish a pilot program for expedited approvals of an application for authorization, while H.R. 3000 provides for presumptive approval of authorization if a state meets 3 of 5 specified criteria. H.R. 2727 includes provisions intended to achieve orderly transfer of authority over ongoing cleanup projects. Under all of the bills, following delegation or authorization, EPA is barred from taking action at a covered site, with limited exceptions. A state would use its own enforcement authority, but not take over federal enforcement authority, which is consistent with procedures under other federal environmental laws.

All three bills authorize federal grant funding for delegated or authorized states. H.R. 2727 and S. 8 include similar provisions that direct EPA to fund administrative, preconstruction, and remedial activities through contracts or agreements. H.R. 3000 authorizes grants to states for facility-specific costs, as well as general grants, based on listed factors, for administrative or nonfacility-specific costs.

Under current law, states pay 10% of cleanup costs at sites where the Trust Fund is paying for cleanup and 100% of operation and maintenance costs. All three bills reduce the state share of operation and maintenance to 10%, as well. Concerning addition of new sites to the National Priorities List, H.R. 2727 and H.R. 3000 require concurrence by a Governor, which is not required by CERCLA but was required by Congress for a limited time through an appropriations bill. H.R. 2727 waives concurrence if a Governor does not ensure within 24 months that cleanup will take place at the facility, either through an enforceable agreement with PRPs or a commitment of state funds. S. 8 has no similar provision.

Concerning state authority over federal facility sites on the NPL, current law bars states from applying their own cleanup standards at federal facilities, if they are more stringent than federal. Under H.R. 2727 and H.R. 3000, states with program authorization could utilize provisions of state law for cleanup of federally owned

NPL sites. S. 8 (which permits transfer of authority for federal facilities to states, but not delegation or authorization) expressly bars a state from applying its own standards at federal facilities. All three bills contain procedures for resolving disputes between the state and a federal agency over remedy selection (under H.R. 2727 and H.R. 3000, these would apply to delegated states). S. 8 amends CERCLA concerning compliance by federal facilities. It waives sovereign immunity (allowing states to sue federal agencies and impose penalties) and clarifies application of state, local, and other federal requirements to such facilities with respect to response actions or hazardous waste management.

Natural Resource Damages (NRD)

Current Law

CERCLA currently requires liable parties to make good the environmental harm they caused by restoring or replacing publicly owned natural resources they have injured or destroyed, and by paying damages for the lost use of the resources.[7] The costs of the natural resource damage assessment to determine the amount owed is also a recoverable cost. The law names federal and state governments and Indian tribes as trustees for the natural resources they manage or control, and they are the only ones who can bring an NRD action. Several large suits in recent years, and the prospect of a number more have concerned industrial interests, and led them to seek limits to the amounts of natural resource damages they are required to pay.

Pursuant to the law, in 1986 the Department of the Interior (DOI) promulgated standardized procedures for all trustees to consider when assessing and valuing natural resource injuries.[8] Trustees are not required to use the rules, but have a rebuttable presumption of correctness if the case goes to court. The rules permit the use of a contingent valuation methodology for placing a monetary value on the injured or lost resources. Contingent valuation, a survey technique that attempts to replicate actual markets, typically by asking respondents how much they would be willing to pay in higher prices or taxes for a particular environmental improvement, has been controversial.

Proposed Amendments

All three bills allow damages to be recovered for the cost of restoration or replacement of the natural resources and the costs of the natural resource damage assessment, although S. 8 excludes the cost of conducting a study that relies on contingent valuation methodology (CVM). The Oxley bill forbids the use of CVM and other economic polling techniques to place a value on lost resources or on a restoration alternative. The Boehlert and Smith bills also make compensable the

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[7]Liability for lost use has resulted from judicial interpretation of CERCLA.

[8]The regulations also apply to a discharge of oil under the Clean Water Act. The National Oceanic and Atmospheric Administration published rules in 1996 under authority of the Oil Pollution Act for assessing damages resulting from a discharge of oil.

public's lost use of the resource after Superfund was enacted (December 11, 1980); and the Oxley bill offers the cost of temporary restoration methods, a potentially cheaper alternative. Using different terms for the same concept, H.R. 3000 bars recovery for "non-use values," the more traditional phrase, and H.R. 2727 excludes the recovery of "psychological damages," defined as "damages based on how a person or group of persons feels about or perceives a resource." While S. 8 authorizes the consideration of a resource's "unique intrinsic values" in selecting restoration measures, it does not provide for separate recovery of monetary damages for losses associated with non-use values.

Injury assessment would be based on site-specific conditions and restoration requirements, and performed in accordance with generally accepted scientific methodologies under the two House bills. S. 8 calls for amended injury assessment regulations to be issued within 2 years that incorporate similar provisions. H.R. 2727 requires that the injury assessment process allow for reasonable public participation; any information that is not made available at the time the public record is compiled would not be admissible in any subsequent judicial or administrative proceeding.

The Boehlert bill states that any court review of an injury assessment would be in a new trial, as opposed to a "record review" in which the only evidence permitted would be that in the administrative record compiled during the decision-making process, a circumstance that industry feels would be unfair to them; EPA, however, prefers record review. CERCLA is unclear on the subject, and the other bills do not address it.

The two House bills require a trustee to select a range of possible restoration alternatives that are feasible and cost-effective, and to give preference to ones where the incremental costs are justified by the incremental benefits, and that can be achieved in a timely manner. S. 8's language is parallel to them, and requires natural recovery to be considered among the alternatives. As noted previously, the Senate bill also allows a trustee to consider a resource's "unique intrinsic values" to justify expedited or enhanced restoration measures, provided the incremental costs are reasonable, and H.R. 3000 authorizes the temporary replacement of the lost services of the injured natural resources.

Under the two House bills, for injured biological resources protected under the Wilderness Act or the Marine Protection, Research, and Sanctuaries Act, restoration would be measured by the reinstatement of populations of the resource to the condition that would have existed had the release not occurred. For those protected by the Endangered Species Act, restoration may be measured by compliance with a recovery plan under that act.

S. 8 creates a pilot program allowing the Governor of Idaho to determine cleanup plans for the Coeur d'Alene basin, and all three bills make the natural resources title inapplicable to any trial which began before July 1, 1997, which applies to the Clark Fork River case, *State of Montana v. Atlantic Richfield Co.*