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Superfund Act Reauthorization: Liability Provisions of Leading Congressional Proposals

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ABSTRACT

This report describes the liability scheme in the Superfund Act — who is liable for what, and under what standard — and discusses the policy choices that lead to its creation. It then explains the changes in that scheme that would be made by the two committee-reported Superfund reauthorization bills in the House (H.R. 1300 and H.R. 2580) and by the House Committee on Commerce minority substitute, introduced by Representative Towns. This report will be updated as legislative events warrant.

Superfund Act Reauthorization: Liability Provisions of Leading Congressional Proposals

Summary

Congress is currently seeking to reauthorize and amend the Superfund Act (Comprehensive Environmental Response, Compensation and Liability Act, or "CERCLA"). This report targets the liability issues addressed in the two House committee-reported bills, H.R. 1300 and H.R. 2580, and the House Committee on Commerce's minority substitute offered by Representative Towns. Senate bills are not covered at this time because the Senate has decided to wait until the House acts.

CERCLA creates a stringent liability scheme so that persons associated with sites contaminated by hazardous substances bear their share of cleanup and associated costs. Whenever a hazardous substance is released (or threatened to be released) from a facility, potentially responsible parties (PRPs) include the generators of the substance, transporters who selected the disposal/treatment facility, and the owners or operators of the facility both now and when the hazardous substance was disposed of. Several exemptions from liability are provided — e.g., for innocent purchasers who made due diligence inspection of the site. PRPs are liable for "response" (cleanup) costs, natural resource damages, and costs of federal health assessments. The liability standard is strict, joint and several, and retroactive.

This liability scheme flowed from two policy choices made by the Congress that enacted it — adoption of the "polluter pays" principle and a correlative decision that, in light of the many contaminated sites, disbursements from the newly created Superfund at each site should be as low as possible. These choices dictated an expansive liability scheme that maximized the chance of finding PRPs able to fund cleanup at most sites. With the passing of time, however, issues have arisen as to this scheme's high transaction costs (for litigation, studies, oversight) and its inclusion of PRPs who, in the view of some, should not be held liable.

None of the bills would repeal the existing liability scheme outright, but all contain a nonbinding, nonlitigation alternative through which a PRP can avoid the scheme. At sites with multiple PRPs (which is most), a neutral "allocator" would assign each PRP a percentage of the overall liability, which the PRP can accept or reject. Acceptance has certain advantages, such as avoidance of possibly large transaction costs and protection from further liability.

In addition, all the bills would add to or clarify the current categories of liability-exempt parties — addressing de minimis and de micromis contributors to a site, small businesses, municipalities and municipal waste, codisposal landfills, and nonprofit institutions, among others. Importantly, the bills all would expand upon EPA's longstanding initiative to encourage brownfields development — e.g., by exempting from liability the innocent purchaser who wants to improve the site.

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Continuing a debate begun in the 103rd Congress, the 106th Congress now has before it several bills that seek to reauthorize or amend the Superfund Act. This report deals with one set of issues, those involving the Act's liability scheme, as addressed by the major House bills and a House Democratic substitute. Senate bills are not covered at this time, since the Senate has decided to wait until the House of Representatives passes a bill.

The Superfund Act has three main purposes, conveniently indicated by the statute's formal name — the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).[1] First, "Response." The Act authorizes federal response (i.e., cleanup) to releases or substantial threats of release of hazardous substances, and pollutants and contaminants, into the environment. Second, "Compensation." CERCLA creates a Hazardous Substance Superfund to pay costs of cleanup not allocable to a solvent, responsible party. Third, "Liability." The Act creates a broad and stringent liability scheme so that persons linked to hazardous substance contamination bear their share of cleanup and other costs.

The last of these three components, liability, lies at the very heart of the Act. CERCLA is often referred to as a "liability driven" or "litigation driven" statute. Other federal environmental statutes affect the private sector through prospective rules of general application — Clean Air Act auto emission standards, for example. Only when the rules are violated do questions of liability (in the form of penalties) arise. CERCLA is quite different. It prescribes few rules of general application. Rather, the Act operates chiefly by imposing liability for the costs of cleanup (among other things) based on past or current status. Thus, a liability issue, and the likelihood of litigation, arises almost every time the Superfund Act is applied, not merely when some regulation is transgressed.

This report (1) describes the existing CERCLA liability scheme, (2) explains why it seemed to make sense to the Congress that first enacted it, but now provokes some dissatisfaction, and (3) sets out the major proposals in the House of Representatives for modifying the liability scheme.

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[1] 42 U.S.C. §§ 9601-9675.

The Existing CERCLA Liability Scheme

The CERCLA liability scheme is set out principally in sections 106 and 107 of the Act,[2] and is unaffected by whether the site is one of those targetted for permanent cleanup by the National Priorities List (NPL). Section 106 governs abatement orders. When EPA determines that there may be an "imminent and substantial endangerment" because of the actual or threatened "release" of a "hazardous substance" from a "facility,"[3] it may either issue an administrative order or seek a court order. Either type of order commands affected parties to take appropriate measures to abate the danger.

In contrast, section 107 is for recovering from a responsible party when the cleanup is done by others (other private parties or the government). It states who is liable for what. Most of the CERCLA liability debate revolves around the desired reach of section 107, and its liability standard.

Since 1989, EPA has followed an "Enforcement First" policy, under which it seeks to have the responsible parties at a site do the cleanup — as opposed to cleaning up itself using Superfund money, then filing cost recovery actions against such parties.[4]

Who is liable for what and to whom?

Who is liable? CERCLA's universe of potentially responsible parties (commonly called "PRPs") is quite broad. The following entities are liable under section 107 when there is a release or threatened release of a hazardous substance into the environment from a facility.[5]

> *"Arrangers" (often called "generators").* In the words of CERCLA: "any person who ... arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity ...."[6] Almost always, the arranger is the entity that generated the hazardous substance. For this reason, the word "generator" is commonly used in place of "arranger," though it is not found in CERCLA.

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[2]42 U.S.C. §§ 9606, 9607 (respectively). Determination as to who is a responsible party may also be made under § 104 in connection with government cleanups, 42 U.S.C. § 9604.

[3]The quoted terms are all defined — and defined quite broadly — in CERCLA section 101 (and in case law). For example, "release" includes not only the obvious — "spilling, leaking, pumping, pouring" and so on — but also the mere abandonment or discarding of closed receptacles containing hazardous substances. CERCLA § 101(22)

[4]OSWER Directive No. 9201.01-A (1989).

[5]Hereinafter, references to "releases" in this report should be read to include threatened releases.

[6] CERCLA § 107(a)(3).

Transporters who selected the facility. In the statute's words: "any person who accepts ... any hazardous substances for transport to disposal or treatment facilities ... selected by such person ...."[7]

Owners and operators. That is, a person who owns or operates the facility from which there is a release — both the current owner/operator and the owner/operator at the time the hazardous substance was disposed of.[8]

These PRP categories apply to governments (federal, state, and local), corporations, and individuals alike. Thus, a municipality that operates a trash disposal site that accepts hazardous waste is covered. Note, too, that section 107 is viewed by most courts as delimiting who can be held liable under section 106 as well.[9] So any entity that can be required to reimburse others for cleanup costs they incurred can also be ordered to perform the cleanup itself (when there is an "imminent and substantial endangerment").

CERCLA carves out several exemptions from the basic liability scheme. These "carve-outs," however, are often qualified (do not apply in all circumstances), may only limit CERCLA liability rather than eliminate it, and do not necessarily affect any liability the PRP has under other federal statutes or state law. They include:

innocent purchasers who undertook a due diligence inspection of the site before acquisition,[10]

lenders and fiduciaries,[11]

response action contractors,[12]

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[7] CERCLA § 107(a)(4).

[8] CERCLA § 107(a)(1)-(2). The owner/operator category of PRPs also expressly extends to the current owner or operator of a "vessel," a term excluded from the definition of "facility." *Id.* at § 101(9).

[9] *See, e.g.*, United States v. Hardage, 663 F. Supp. 1280 (W.D. Okla. 1987). Thus, for example, section 106 orders can be issued to *past* generators, since past generators are liable under section 107.

[10] CERCLA §§ 101(35)(A)(i), 101(35)(B).

[11] From the outset, CERCLA section 101(20) exempted holders of security interests in a contaminated facility (typically, lenders) from "owner" or "operator" liability, as long as they do not participate in the facility's management. EPA regulations seeking to clarify and expand the existing case law on this liability exemption were judicially invalidated, however, as beyond the agency's authority. Congress responded by codifying the EPA regulations — through the Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996, Pub. Law No. 104-208, Title II, §§ 2501-2505. Provisions relating to holders of security interests were inserted into CERCLA section 101(20). Provisions related to fiduciaries were added as new CERCLA section 107(n).

[12] CERCLA § 119.

governments that acquired a facility by escheat or other involuntary acquisition, and persons who acquired by inheritance,[13]

federally permitted releases,[14] and

application of a federally registered pesticide.[15]

CERCLA also declares that if not a PRP, a person is not liable under CERCLA for providing cleanup assistance in accordance with the National Contingency Plan (NCP) or as directed by an on-scene coordinator (but may still be liable for common-law negligence). Similarly, again if not a PRP, state and local governments are not liable under CERCLA for their emergency actions (but may still be liable for gross negligence or intentional misconduct).

For what are PRPs liable? Section 107 says that PRPs are liable for three types of consequences of a hazardous substance release:[16]

> *Response (chiefly cleanup) costs* — whether incurred by the United States, a state or Indian tribe (if "not inconsistent" with the NCP) or by any other person (if "consistent" with the NCP). Response costs include a share of EPA's administrative and enforcement costs, plus private-party legal costs closely linked to the actual cleanup.[17]
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> *Natural resource damages.* As CERCLA puts it: "damages for injury to, destruction of, or loss of natural resources."[18] The assessment of natural resource damages by the natural resource "trustee" (the designated official charged with acting on behalf

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[13] CERCLA § 101(35)(A)(ii)-(iii).

[14] CERCLA § 107(j).

[15] CERCLA § 107(i).

[16] Note that CERCLA liability is not as broad as CERCLA response authority. Liability, imposed under section 107, requires the release of a *hazardous substance*. Authority to respond to a release, under section 104, includes hazardous substances *and pollutants or contaminants*.

[17] Key Tronic Corp. v. United States, 511 U.S. 809 (1994). *Key Tronic* held that legal fees pertaining to a private plaintiff's activities in identifying other PRPs are a "necessary cost[] of response" under CERCLA § 107(a)(4)(B), hence recoverable. In contrast, litigation-related attorney fees incurred by private parties are not response costs, and so are not recoverable.

The United States recovers its attorney fees under the explicit reference to "enforcement activities" in CERCLA's definition of "response." CERCLA § 101(25).

[18] "Damages" is used here in the strict legal sense of the word — meaning monetary compensation. It does not refer to the damage or injury itself. Thus, it is not redundant to speak of "damages for injury to ... natural resources."

There is no liability under CERCLA for harm to natural resources clearly identified as an irreversible commitment of natural resources in an environmental analysis, where the decision to grant a permit or license authorizes that commitment. CERCLA § 107(f)(1).

of the public to recover damages) acts as a rebuttable presumption, if the assessment was done in accordance with the natural resource damages regulations.[19]

Health assessments costs. Health assessments are carried out by the Agency for Toxic Substances and Disease Registry in the Public Health Service under CERCLA section 104(i).

Liability includes interest.

Ceilings on a particular PRP's liability (per incident) are imposed based on the type of PRP — vessels (depending on size and whether hazardous substance is carried as cargo or residue); motor vehicles, aircraft, pipelines and rolling stock; and other facilities and incineration vessels.[20] These liability limits do not apply under certain circumstances — e.g., when the release resulted from willful misconduct within the privity or knowledge of the PRP. Moreover, as a practical matter, the limits have had scant application, since courts have viewed each discrete release as a separate incident.

Stiff penalties are provided for a PRP who fails "without sufficient cause" to comply with a section 106 or section 104 cleanup order. Such a PRP may be liable for civil punitive damages equal to three times the costs incurred by the Fund as a result of the PRP's failure to act,[21] in addition to those costs. Fines of up to $25,000/day are authorized if the failure to comply "without sufficient cause" is willful.[22]

To whom is the PRP liable? A PRP's liability for response costs is generally to the entity, government or private, that incurred them. PRP liability for natural resource damages is to the government entity (federal, state, or Indian tribe) with jurisdiction over the natural resource.[23] Private parties may not bring suits for natural resource damages.

The liability standard

The liability standard in any liability scheme defines what must be part of the complaining party's case. In formulating that standard, the legislature makes a policy decision: How should the interests of plaintiff and defendant be balanced? In the Superfund Act, Congress created a very broad liability standard that seeks to promote

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[19] CERCLA § 107(f)(2)(C).

[20] CERCLA § 107(c).

[21] CERCLA § 107(c)(3).

[22] CERCLA § 106(b)(1).

[23] *Id.* The development of natural resource damages regulations under CERCLA was delegated to the Department of the Interior. *See* 43 C.F.R. part 11. Under the Oil Pollution Act of 1990, the development of virtually identical regulations was delegated to the National Oceanic and Atmospheric Administration.

successful recoveries by public and private parties when they incur cleanup costs, and to encourage cleanups by the PRPs themselves.

The CERCLA liability standard has three key elements. It is —

> *Strict.* As customarily used in the law, "strict liability" means that a plaintiff may prevail by proving only two things: (1) the defendant did the act of which it is accused, and (2) that act caused the plaintiff's injury. Importantly, the plaintiff need *not* show, as it must in a negligence case, that the defendant's conduct was less careful than it should have been — i.e., that it fell short of the appropriate standard of care. In effect, strict liability makes the defendant an insurer against any injury it causes.[24]
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> CERCLA, in its variant of strict liability, dispenses with certain aspects of causation as part of plaintiff's case. Instead, the Act attaches liability based on status categories (e.g., "arranger" or "transporter") regardless of whether a particular defendant's substance at a site can be shown to have *caused* the particular release that provoked cleanup. However, the United States is not relieved of having to show causation between the release and the incurrence of response costs.
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> *Joint and several.* Joint and several liability is a common law tort standard used when more than one party contributed to the plaintiff's injury, but there is no reasonable basis for allocating liability among them. Under it, liability for plaintiff's entire injury can be imposed on any one tortfeasor, or any combination of the aggregate. In this way, the plaintiff is made whole expeditiously, and the burden of who should pay what share of the total liability is shifted to the defendant(s), to resolve on their own.
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> Under the Superfund Act, joint and several liability is triggered whenever it would be used under the common law of tort. Thus, joint and several liability is not applied automatically, though it is used in the large majority of cleanups since courts usually conclude that the common law precondition (no reasonable basis for allocating liability) is met. As a result, the CERCLA plaintiff, such as the Federal Government, is often free theoretically to seek recovery of all its site costs from a fraction of the total number of PRPs at the site. Notwithstanding, there is a small minority of cases where a basis for allocating liability among PRPs *is* found by the court, so joint and several liability is rejected.

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[24]Strict liability has been the general liability rule in federal environmental statutes since enactment of the Clean Air Act and Clean Water Act in the early 1970s.

The theoretical harshness of joint and several liability is softened by several mechanisms in CERCLA: nonbinding EPA allocations of responsibility,[25] "mixed funding" (using Superfund money to reimburse PRPs who clean up pursuant to a settlement with EPA for the share of cleanup costs attributable to non-settlor PRPs),[26] "orphan share" funding (using Superfund money — or, more frequently, compromising government claims for costs it has already incurred — in recognition of PRPs that are insolvent or defunct),[27] and "contribution actions" (suits by a PRP seeking reimbursement for a portion of its cleanup costs from other PRPs).[28] The frequent use of de minimis settlements (entered into on a proportional contribution basis, plus a premium) and the threat of de micromis settlements also reduce the impact of joint and several liability (see discussion below under "Exemptions from liability").

The executive branch has long regarded joint and several liability as the essential "stick" for encouraging PRPs to settle with the government. The executive branch does not typically seek to assign liability shares to individual PRPs, preferring to seek a proportionate share of liability from the settling PRPs collectively. The settling PRPs may then on their own work out a mutually acceptable allocation of liability. The Department of Justice asserts that where helpful to achieve a settlement, the United States in some cases assists PRPs in resolving allocation issues.

Retroactive. The liability imposed by CERCLA extends to conduct occurring prior to the original enactment of CERCLA in 1980. Thus, a company disposing of a hazardous substance in 1970 (or, in theory, 1870) may find itself liable under CERCLA for government cleanup costs being incurred now — even though such disposal complied fully with applicable laws at the time. Some courts dispute that such liability is truly "retroactive," noting that the liability is for cleanup costs

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[25] CERCLA § 122(e)(3).

[26] CERCLA § 122(b)(1). Non-settling PRPs are often called "recalcitrants."

[27] Orphan share funding through compromise of the government's CERCLA claims against the PRP is a government favorite, since it does not draw from appropriated funds. EPA recently asserted that in FY 1996, it "offered over $57 million in orphan share compensation to potentially settling parties, and continued that practice this past fiscal year at *every* eligible negotiation." *Superfund Reauthorization and Reform Legislation: Hearing on H.R. 2727 Before the Subcomm. on Water Resources and Environment of the House Comm. on Transportation and Infrastructure*, 105th Cong. (Oct. 29, 1997) (statement of Carol Browner, EPA Administrator) (emphasis in original).

[28] CERCLA § 113(f)(1).

> occurring *after* enactment, but the term is so often employed that we adopt it here.

It may come as a surprise that none of these elements of CERCLA liability is stated in the statute in so many words. Rather, their origins lie in CERCLA's express incorporation of the liability standard in Clean Water Act section 311,[29] CERCLA's structure, legislative history, and case law, or some combination. For example, the controversial "joint and several" component was present in early versions of the bills that contributed to the enacted CERCLA, but was deleted as part of a last-minute Senate compromise. Those members who opposed express inclusion of joint and several liability compromised by accepting floor statements that the bill contemplated use of joint and several liability whenever the common law would employ that standard.[30] Regardless of their source, the elements of CERCLA liability are today well settled.

CERCLA allows few general defenses to its liability regime. A PRP may escape liability only by making the difficult demonstration that the hazardous release was caused *solely* by an act of God, act of war, or act (or omission) of a third party who is not an employee or agent of the PRP, and has no direct or indirect contractual relation with the PRP.[31] The last-listed defense, for third parties, covers releases caused by vandalism, assuming the PRP took precautions against such occurrences. There is also a statute of limitations that may be asserted as a defense.[32] For example, an initial action for recovery of remedial action costs must be brought within six years after construction of the remedial action began.

Because litigation exhausts time and money, CERCLA seeks to encourage parties in cost-recovery litigation to reach a settlement. Incentives to settle in the Act include: protection for parties that have resolved their liability to the United States from contribution actions (as to matters addressed in the settlement) brought by non-settlors;[33] nonbinding EPA allocations of responsibility for cleanup costs;[34] and an "early cash-out" provision allowing innocent landowners (who failed to do a due diligence inspection prior to acquiring the property) and de minimis contributors to resolve their response cost liability by expedited settlement.[35]

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[29]CERCLA § 101(32).

[30]*See, e.g.,* 126 Cong. Rec. 31965 (Dec. 3, 1980) (statement of Rep. Florio, House floor manager, that "The terms joint and several liability have been deleted with the intent that the liability of joint tortfeasors be determined under common or previous statutory law.").

[31] CERCLA § 107(b).

[32] CERCLA § 113(g).

[33]CERCLA § 122(g)(5).

[34]CERCLA § 122(e)(3).

[35]CERCLA § 122(g).

Policies Underlying the Liability Scheme, and Why Some Want to Modify It

The existing CERCLA liability regime seemed to the Congress that enacted it in 1980 to be dictated by two fundamental policy choices made by that body. At least so the legislative history suggests. Congress' first policy choice was adoption of the still-debated "polluter pays" principle. The congressional thinking appeared to be that morally blameworthy or not, whether occurring after CERCLA's enactment or before, the conduct that led to the release of hazardous substances is the proper locus of liability for the resultant cleanup costs. Those that benefitted economically from the contamination-causing conduct, many members believed, should be asked to bear the costs — not the general taxpayer. Viewed from this policy perspective, the Superfund Act is simply a burden-shifting statute, not (with an exception or two) a punitive one. Hence, one might argue, it is inappropriate to judge it by the standards of fairness associated with punitive liability regimes.

The second policy choice embodied in CERCLA liability flows from two congressional realizations. The first was that the cleanup of hazardous waste sites would be costly. The second was that at a sizeable fraction of sites, particularly the many abandoned ones, there was an inadequate paper trail to link dumpers to the site. Even where the necessary linkage could be established, many parties were insolvent or long since dissolved. It was clear, then, that unless a broad and government-friendly liability scheme were used, no PRP source of cleanup funds would exist at many sites. That, in turn, would mean that the lion's share of cleanup costs under the new statute would be borne by the Superfund (largely industry financed), or by the taxpayer. To forestall that eventuality, Congress adopted a liability scheme designed to maximize PRP funding.

So if the CERCLA scheme is rooted in such apparently sensible policy precepts, why is it today so controversial? Several reasons suggest themselves. A key one is the huge transaction costs (especially attorney fees) often expended to resolve the liability of each PRP at a site. CERCLA relegates this critical determination, often involving millions of dollars, to the PRPs themselves. Though nonbinding EPA allocations of responsibility are occasionally used, the PRPs are essentially on their own in working out a mutually agreeable allocation. And some have argued (though government studies do not support the contention) that such squabbling among PRPs over liability is a prime reason for the typically lengthy period of time between site identification and cleanup completion.

Other reasons for the controversiality of the Act's liability system are variations on the theme of overinclusiveness. First, contrary to the rationale that those who benefitted from use of hazardous chemicals should shoulder the consequences, some entities swept into the CERCLA liability net have *never* generated hazardous waste in more than trivial quantities, or benefitted therefrom. For example, one who sends ordinary household trash to a disposal site may in theory be hauled into court under

CERCLA based on testimony that such trash contains trace quantities of hazardous substances.[36]

A second arguable example of overinclusiveness stems from the Act's impact on small businesses, due to both liability itself and the high transaction costs often incurred to determine it. A third instance is the Act's failure to give special consideration to those willing to buy contaminated land in order to economically revitalize it (the brownfields issue). A fourth is the nonexemption of several entities whose current inclusion arguably offends a sense of fairness — municipalities that sent only municipal waste or sewage sludge to a solid waste landfill; religious, educational, and other charitable institutions; recyclers; owners of land contaminated by migrating hazardous substances released on other property; and so on.

Major House Proposals in the 106th Congress

A key point of difference between the Administration and many in Congress has been how far to modify existing CERCLA liability. Supporters of some pending Superfund bills assert that considerations of fundamental fairness call for numerous exceptions in the reach of CERCLA liability.

By contrast, the Administration and its allies in Congress have sought to hold such retrenchments to a minimum.[37] They assert that those responsible for the contamination should pay for the cleanup, at least if they are financially able. New statutory exemptions are sought only for very small volume contributors, generators and transporters of municipal solid waste, and bona fide prospective purchasers. EPA has deflected some of the legislative pressure to amend CERCLA through use of administrative reforms in the Act's enforcement. EPA guidance, for example, calls for greater use of the Superfund to pay the "orphan share" of site cleanup costs (meaning less liability for PRPs) and expanded accommodation of de micromis PRPs.[38] EPA argues that the pending bills are based on criticisms of the Superfund program as it once was, not on the "faster, fairer, more efficient" program it claims to have brought about through its reforms.

Currently, two committee-reported House bills and a House Committee on Commerce minority substitute seem most likely to supply the substantive ingredients

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[36] As later discussion shows, this might happen through a contribution action, not through EPA enforcement.

[37] "The Clinton Administration's Superfund Legislative Reform Principles." Enclosure to Letter from Carol Browner, EPA Administrator, to Hon. John Chafee, Chairman, Sen. Comm. on Environment and Public Works (May 7, 1997).

[38] EPA, *FY 1998 Superfund Reforms Strategy*, OERR Directive No. 9200.0-28 (Nov. 13, 1997). Orphan share funding and de micromis settlements were the two administrative reforms in CERCLA enforcement stressed by EPA in recent congressional testimony. *See, e.g., Superfund Reauthorization and Reform Legislation: Hearing on H.R. 2727 Before the Subcomm. on Water Resources and Environment of the House Comm. on Transportation and Infrastructure*, 105th Cong. (Oct. 29, 1997) (statement of Carol Browner, EPA Administrator).

of any floor debate on Superfund Act reauthorization. The first bill is H.R. 1300, as reported from the House Committee on Transportation and Infrastructure. The second is H.R. 2580, as reported from the House Committee on Commerce. The Commerce Committee minority substitute, an expanded version of the Democratic caucus' brownfields bill (H.R. 1750), is entitled "Substitute to the Amendment in the Nature of a Substitute Offered by Mr. Towns." The CERCLA liability reforms proposed by these bills address the following key areas.

> *In the interest of brevity, discussion of the bills and Towns substitute includes key features only. Because the bills and substitute contain many differences, even when addressing the same matter, the reader with an interest in a particular liability reform should consult the actual text of these documents.*

Allocation among multiple parties

Most Superfund sites have more than one PRP — sometimes *many* more than one. The allocation of cost liability among these PRPs is likely to be a matter of great interest to them, since the average cleanup cost at an NPL site is $20 million, according to EPA. Needless to say, however, the combination of high stakes and the Act's absence of guidance as to who should pay for what virtually invites litigation. To reduce the volume of liability-share litigation and direct more PRP dollars into actual cleanup, H.R. 1300 and H.R. 2580 propose, in near-identical language, a non-litigation, nonbinding-on-the-PRPs alternative for allocating liability. PRPs who accept their allocation can pay up and be protected from future liability, including contribution suits from other parties.

The H.R. 1300/H.R. 2580 proposal states that the purpose of an allocation under the bills is to "determine an equitable allocation of the costs of a removal or remedial action at a facility on the National Priorities List that is eligible ... including the share to be borne by the Trust Fund ...." The bills make it mandatory on the "President" (EPA in most cases) to initiate the allocation process at certain NPL facilities -- i.e., where the cleanup is not the subject of a decree or administrative order as of date of bill introduction, there are unrecovered costs of over $2 million, and there are response costs attributable to the Trust Fund. The "President" may, in his discretion, initiate an allocation for other response actions at NPL facilities.

For mandatory allocations, the "President" must ensure an equitable allocation of liability by a neutral allocator selected by the parties, under procedures agreed to by the parties. Initiation of an allocation process triggers a moratorium on litigation seeking recovery of response costs at the site, which lasts until 150 days after issuance of the allocator's report. The allocation process does not alter the CERCLA liability scheme, but merely offers PRPs an alternative to it.

The allocator shall determine the share of response costs to be allocated to the Fund. The share of liability for which no generator, transporter, or owner/operator at the time of disposal can be identified shall be divided pro rata among the PRPs and the Fund share.

PRPs may submit to the allocator a private allocation, which the allocator must accept if the bills' criteria are met. The "President" shall accept an offer of settlement based on the allocation, unless the EPA Administrator and the Attorney General reject the allocator's report. Governmental agencies that are PRPs shall be subject to the allocation process just as any other PRP.

The Towns substitute contains no liability allocation procedures.

Relief from liability

The debate over whether to add to the exemptions from liability already in CERCLA echoes some of the themes noted before. For example, some argue that adding more exemptions to CERCLA erodes the "polluter pays" principle. Others contend that the principle is better served by targetting those who own and operate contaminated facilities, rather than the larger universe of PRPs under the current statute. More broadly, the conflict is between the desire not to burden certain societal activities, versus the need to retain a large pool of PRPs to supply cleanup funding. Businesses likely not to be covered by an exemption see this as a matter of fairness as well.

As with the Act's existing carve-outs, the bills and Towns substitute impose many qualifications on eligibility for the new exemptions. Generally, the PRP must not have impeded the response action or natural resource restoration, must have substantially complied with information requests from EPA, and so on. We do not mention these cooperativeness-oriented conditions for liability exemptions in each case below.

De minimis / de micromis. The "de minimis" provisions in CERCLA refer to parties whose contribution to a contaminated site is minimal both as to amount and toxicity. As noted, CERCLA allows such PRPs the opportunity to settle with EPA on expedited terms, in advance of other PRPs. The hope is that a speedy exit from the complex settlement negotiations that CERCLA often entails may hold the small PRP's transaction costs to a minimum.

For the smallest of the small contributors of hazardous substances to a site, EPA may exercise its enforcement discretion to enter into "de micromis" settlements.[39] (They are not mentioned in the Act.) Such settlements are contemplated for use chiefly where contributors of larger amounts of hazardous substances, who are being pursued by government as PRPs, bring contribution actions against contributors of minuscule amounts, against whom the government likely would never enforce. On several occasions, such large-amount contributors have sued hundreds of small businesses, towns, schools, and non-profit organizations (Little League, symphony orchestras, etc.) arguing that the ordinary trash they sent to a disposal site contained hazardous substances, requiring that they be brought into the PRP negotiations at the site. By entering into a de micromis settlement for zero dollars, EPA gives the de micromis contributor protection against such contribution actions.

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[39] EPA, *Revised Guidance on CERCLA Settlements with De Micromis Waste Contributors* (June 3, 1996).

In practice, the availability of de micromis settlements is regarded mostly as a deterrent, and the relative infrequency of the device's actual use is regarded by the Administration as an indicator of its success. Notwithstanding, some have suggested that for de micromis contributors there should be no settlement negotiations at all. Rather, they should be removed from the CERCLA liability regime altogether.

H.R. 1300 and H.R. 2580 have identical de minimis provisions. As under the present Act, qualifying PRPs are not exempted from liability, but rather are entitled to expedited settlement with the United States. A key difference from the current Act is that terms in the current Act that give the "President" unreviewable discretion as to whether to offer a de minimis settlement are removed by the bills. The bills also define how great a PRP's contribution of hazardous substances can be and still be de minimis (unless EPA sets a different threshold). The Towns substitute does not address de minimis contributors.

H.R. 1300 and H.R. 2580 are also identical as to de micromis contributors. A transporter or arranger is completely exempt from CERCLA liability at NPL facilities if no more than 110 gallons or 200 pounds of materials containing hazardous substances are attributable to such person, and the arranging/transporting took place before the bill's enactment. The exemption is unavailable, however, if the "President" determines the material contributes significantly to the costs of response at the facility.

The Towns substitute uses the same quantitative ceiling for de micromis contributors, but gives EPA authority to change the ceiling up or down. Also, the substitute makes the exemption unavailable where all or part of the disposal or treatment occurred after September 1, 1999. An important difference is that under the Towns substitute, the determination that the materials contribute significantly to response costs is in EPA's "sole discretion" -- meaning not judicially reviewable. The standard in the committee-reported bills, above, appears to impose a greater evidentiary burden on the United States, and confer judicial reviewability. The same standard also is used elsewhere in the bills.

Small businesses. Liability for CERCLA cleanup costs may be especially onerous for small businesses. The present statute makes no special provision for the small-business status of a PRP.

H.R. 1300 and H.R. 2580 are nearly identical. Each provides that as to actions before the bill's introduction date, no small business shall be liable as a transporter or arranger for response costs or natural resource damages at an NPL facility. "Small business" is defined to mean a business that, on average over the last three years, has no more than 75 full-time employees and no more than $3 million in gross revenues. The exemption is unavailable if the hazardous substances attributable to the small business contributed significantly to response costs.

H.R. 1300 and H.R. 2580 also provide relief to small businesses through their municipal solid waste and inability-to-pay provisions. See pertinent headings below.

The Towns substitute contains no provision devoted exclusively to small business. As with the committee-reported bills, however, small businesses are among the benefited groups under its municipal solid waste and inability-to-pay provisions.

Municipalities and municipal solid waste/sewage sludge. CERCLA treats a municipality no differently than other PRPs, and municipal solid waste (MSW) no differently than other potentially hazardous substance. Therein lies a problem. The quantity of MSW and sewage sludge sent to a dump may be quite large, and inevitably contains some hazardous waste. Because courts have often fallen back on volumetric contribution as the basis for allocating CERCLA liability, municipalities are an inviting target for third-party actions by corporate PRPs. Corporate PRPs assert in such litigation that their admittedly more toxic contribution to the site being cleaned up was, nonetheless, in far smaller quantity than that of the municipal PRP. Therefore, they have argued, the municipality should bear the lion's share of liability.

While not differentiated in CERCLA, EPA has adopted a lenient enforcement policy toward municipal PRPs and MSW.[40] Under it, EPA will not notify municipalities or private parties that they are PRPs if the MSW they generated or transported contains only household hazardous wastes — unless a "truly exceptional situation" exists. This policy leaves a municipality vulnerable to EPA enforcement chiefly where it is or was the owner or operator of the site,[41] or where the waste contains hazardous substances from non-household sources.

A word about "codisposal landfills." Prior to the advent of federal regulation of hazardous waste — in 1980, under the Resource Conservation and Recovery Act (RCRA)[42] — it was common practice for landfills to accept both municipal trash and hazardous waste. These pre-hazardous waste regulation facilities, known as "codisposal landfills," raise some of the same issues as solid waste landfills. At codisposal landfills, there are many contributors (possibly thousands) of waste containing only small amounts or low concentrations of hazardous waste. These parties are tempting third-party defendants from which contributors of more toxic wastes can seek contribution for cleanup costs.

EPA has sought to blunt the threat of such contribution actions at codisposal landfills by offering non-de micromis generators and transporters of municipal solid waste the option of "cashing out" at $5.30 per ton of waste sent to the site.[43] (Recall that de micromis contributors may often settle with EPA for zero dollars.) Importantly, such a settlement allows EPA to confer contribution protection on the settlor.

H.R. 1300 and H.R. 2580 are identical in how they treat persons, including municipalities, in their capacity as *arrangers and transporters* of MSW and sewage

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[40] 54 Fed. Reg. 51071 (1989).

[41] An EPA policy document offers municipal owner/operators of NPL codisposal sites a "presumptive baseline settlement amount" of 20 to 30% of total estimated response costs to resolve their owner/operator liability. EPA, *Policy for Municipality and Municipal Solid Waste CERCLA Settlements at NPL Co-Disposal Sites* (Feb. 5, 1998).

[42] The first major set of RCRA hazardous waste regulations promulgated by EPA took effect on November 19, 1980. 20 Fed. Reg. 33066 (May 19, 1980).

[43] EPA, *Policy for Municipality and Municipal Solid Waste CERCLA Settlements at NPL Co-Disposal Sites* (Feb. 5, 1998).

sludge. Such persons are not liable for response costs or natural resource damages at an NPL landfill if the arranging or transporting occurred *prior to* enactment of the bill. Liability may be imposed on persons in the business of transporting waste, however, if the material transported contributed significantly to response costs. As for arranging and transporting MSW and sewage sludge *after* bill enactment, the aggregate liability of all arrangers and transporters at the NPL landfill shall not exceed 10% of response costs. A special rule exempts homeowners, small businesses, and small nonprofit organizations from CERCLA liability for generating and transporting MSW in connection with NPL landfills.

MSW is defined to include waste materials generated by households and hotels/motels, and also by commercial and institutional sources to the extent the waste is essentially the same as household waste or is collected with other MSW and contains only de micromis amounts of hazardous substances. The term does not include combustion ash and solid waste from processes involving ores and minerals.

H.R. 1300 and H.R. 2580 diverge, however, in their treatment of municipalities as *owners or operators* of facilities that receive MSW. H.R. 1300 simply states aggregate liability limits for small (population 100,000 or less) versus large municipalities, as to facilities proposed for NPL listing before March 25, 1999 and response costs on or after that date. Small municipalities are limited to 10% of total response costs; large municipalities, to 20%.

Under H.R. 2580, a municipality liable as an owner or operator of a landfill listed on the NPL on or before September 1, 1999 must be offered a settlement. The settlement shall be offered on the basis of a payment or other obligation equivalent to no more than 20% of total response costs. This ceiling may be increased to 35% if the municipality exacerbated the contamination or received operating revenues from the facility above a specified amount. The "President" may decline to offer a settlement if there is *only* MSW or sewage sludge at the facility, or all other PRPS are insolvent or eligible for a settlement.

The Towns substitute exempts homeowners, small businesses and small nonprofit organizations from liability as arrangers and transporters. Its definition of MSW is similar to that in the Republican bills, except that it does not exempt solid waste from processes involving ore and minerals.

The Towns substitute also ratifies EPA's MSW settlement policy for arrangers and transporters of MSW and sewage sludge sent to NPL codisposal facilities. Thus, the "President" is instructed by the substitute to offer a settlement to such party on the basis of a payment of $5.30 per ton of MSW or sewage sludge contributed. For a municipality to be eligible for settlement, acts giving rise to liability must have occurred less than 2 years after enactment of the substitute. A PRP shall be ineligible for a settlement if the facility contains *only* MSW or sewage sludge. Under certain conditions, persons who sent MSW together with other hazardous substances may be eligible for the per-ton settlement rate as to the MSW or sewage sludge sent.

As for municipal owners and operators, the substitute provides for settlements based on payment or other obligation equivalent to no more than 20% of total response costs. This percentage may be increased to 35% if the municipality

exacerbated environmental contamination at the facility or received operating revenues over a specified amount.

Charitable ("section 501(c)(3)") organizations. Existing CERCLA treats charitable institutions just as any other PRPs. This has discouraged such institutions from accepting donations of property that might contain hazardous contamination. Once the institution acquires such a site, it is an "owner" under CERCLA and fully subject to section 107 liability. Moreover, the liability of the institution is not limited by CERCLA to the value of the donated facility, but could easily be far greater.

H.R. 1300 and H.R. 2580 are identical on this matter. Each would limit the owner/operator liability of charitable organizations (those described under section 501(c)(3) of the Internal Revenue Code) to the lesser of the fair market value of the donated facility and the actual proceeds of the sale of the facility. To invoke this liability exemption, however, the organization would have to show that the facility was acquired after the hazardous substances were disposed of, and that it did not contribute to the release.

The Towns substitute does not address this issue.

Recyclers. Existing CERCLA treats recyclers just as any other PRPs. Given the social desirability of recycling, some argue that recyclers should be subject to a more lenient liability standard than other PRPs.

H.R. 1300 and H.R. 2580 are nearly identical in their treatment of recyclers, with the exception of H.R. 1300's inclusion of used oil. Each bill provides that a person who arranged for the recycling of recyclable material, or transported such material, shall not incur arranger or transporter liability under CERCLA. "Recyclable material" is defined to mean scrap paper, scrap plastic, scrap glass, scrap textiles, scrap rubber, scrap metal, spent batteries -- and, for H.R. 1300, used oil. The liability exemption does not apply, however, if the person had an objectively reasonable basis to believe that the material would not be recycled or would be burned (other than used oil), the person had reason to believe that hazardous substances had been added to the material, or the person failed to exercise reasonable care as to the management and handling of the material.

The Towns substitute is very similar to the above bills. Used oil is not covered.

A late development that moots almost all of the recycler provisions in the bills and substitute is the enactment of Public Law 106-113 on November 29, 1999. This law contained a rider, added by Senator Lott, which is almost identical with the recycler section of H.R. 2580.[44] The rider does not cover used oil, however, and thus leaves viable the used oil coverage of H.R. 1300. In addition, the rider, like the

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[44] Finding the rider language requires a bit of digging. Public Law 106-113 chiefly concerns District of Columbia appropriations. Division B, however, enacts into law S.1948, title VI of which contains the CERCLA recycling provisions. Title VI adopts the language of S. 1528, a bill introduced earlier by Senator Lott.

Towns substitute but unlike the bills, does not include "whole tires" as a component of scrap rubber.

Construction contractors. Current CERCLA affords no special treatment to construction contractors whose activities trigger releases of preexisting contamination at a site.

H.R. 1300 and H.R. 2580 exempt construction contractors from liability for cleanup costs and natural resource damages where the contractor can show that he did not know or have reason to know of the hazardous substances at the facility, and exercised appropriate care as to the discovered substances.

The Towns substitute does not address this issue.

Contiguous property owners. CERCLA does not exempt a landowner from liability merely because the contamination on his property arrived there from elsewhere, with no complicity on the landowner's part. At least in theory, a homeowner who has the misfortune to live near a hazardous dumpsite may become a PRP when contaminated groundwater from the dumpsite migrates onto his property. EPA policies state that the agency will not seek to impose CERCLA liability on residential homeowners unless their activities led to the release,[45] and on owners of land above aquifers contaminated by subsurface migration from outside the property.[46]

H.R. 1300, H.R. 2580, and the Towns substitute all contain exemptions, differently worded, for owners and operators of property contiguous to real property (under other ownership) from which there is a release of hazardous substances. H.R. 2580 and the Towns substitute also confer the exemption on those "similarly situated" to the contiguous property owner, while H.R. 1300 extends to any property onto which a release has migrated. Covered parties are exempted only if various conditions are met, such as (depending on the bill/substitute) -- the owner did not cause the release, is not affiliated with any person at the facility where the release occurred, fully cooperates with those conducting the cleanup, etc.

Brownfields development. EPA defines brownfields as "abandoned, idled, or under-used industrial and commercial facilities where expansion or redevelopment is complicated by real or perceived environmental contamination."[47] Many such sites are located in the urban core, and are well served by infrastructure. The current CERCLA, however, contains no provisions easing liability for persons who buy such sites with the socially desirable goal of upgrading them. The result is that capital investment is steered away from such desolate, close-in sites (termed "brownfields") and toward pristine, outlying areas ("greenfields").

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[45] EPA, *Policy Towards Owners of Residential Property at Superfund Sites*, OSWER Dir. No. 9834.6 (July 3, 1991).

[46] 60 Fed. Reg. 34790 (1995).

[47] 62 Fed. Reg. 4624, 4624 (1997).

While the statute is silent, EPA has undertaken several liability-related initiatives to encourage brownfields development. Most directly on point, the agency has allowed expanded use of "prospective purchaser agreements."[48] These constitute a "no action assurance" by EPA that it will not enforce against someone who wants to buy contaminated property for cleanup or redevelopment. There must be a clear benefit to EPA (often, obtaining cleanup funding not otherwise available) and/or to the community in entering into the agreement. Another initiative is the EPA "comfort letter," a notification to the prospective buyer of a brownfield (such as a closed military base) as to EPA's enforcement intentions there, based on information then known to EPA.[49] Comfort letters are not binding assurances, however, as the prospective purchaser agreements are. They are solely informational.

The above EPA policies, however, constrain only EPA. They provide no assurance that other parties may not sue under the Act. In some cases, however, EPA may consider de minimis settlement with a buyer to protect him/her from contribution suits.

Expanding on EPA's prospective purchaser policy, H.R. 2580 and the Towns substitute would exempt "bona fide prospective purchasers" from present-owner liability. A bona fide prospective purchaser is one who buys a facility after bill enactment and after all active disposal of hazardous substances, who made all appropriate inquiry into the previous uses of the facility, provided all required notices as to any hazardous substances discovered, exercised appropriate care, cooperates with any authorized cleanup, and is not affiliated with any PRP at the facility. Where a federal response action increases the market value of a bona fide purchaser's facility, the United States obtains a "windfall lien" against the facility for its unrecovered response costs.

The "innocent landowner" provisions in the bills and substitute also can be thought of as facilitating brownfields development. Innocent landowner provisions differ from prospective purchaser provisions (above) in that with the former, the pre-purchase "all appropriate inquiry" cannot reveal any hazardous substances. Both bills and the Towns substitute would clarify the meaning of "all appropriate inquiry," a precondition for invoking the innocent-purchaser exemption in the current Act.

Response action contractors. Soon after CERCLA was enacted in 1980, it was realized that the "response action contractors" (RACs) who clean up contaminated sites could conceivably be regarded as PRPs (e.g., as "operators" or "transporters"), exposing them to CERCLA liability. Obviously, this was a disincentive to companies coming forward to do the cleanup work. In the 1986 amendments to CERCLA, provisions were added to soften the liability exposure of RACs. New section 119 says that under CERCLA (or any other federal law), RACs are subject only to a negligence/intentional misconduct standard, not strict liability as under CERCLA. Moreover, under certain circumstances, the "President" may indemnify RACs for negligent conduct, but not grossly negligent or intentional misconduct.

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[48] 60 Fed. Reg. 34792 (1995).

[49] 62 Fed. Reg. 4624 (1997).

H.R. 1300 and H.R. 2580 contain very similar modifications to the liability provisions of section 119. Both would expand the negligence/intentional misconduct standard to preclude the use of a stricter standard under not just federal law, but state law as well. The federal liability threshold, however, would not apply where the state has enacted a law determining the liability of RACs. H.R. 1300, but not H.R. 2580, imposes a statute of limitations on claims against RACs -- namely, six years from completion of the RAC's work.

The Towns substitute does not address this issue.

Inability to pay. Current CERCLA does not explicitly note a PRP's ability to pay as a factor to be considered in assessing the dollar amount of liability.

Both the bills and the substitute would make a PRP's limited ability to pay a consideration under CERCLA by making it a circumstance authorizing an expedited settlement (the other circumstance being the de minimis contributor). As well, both bills and substitute stipulate that the party seeking expedited settlement must be a natural person, a small business, or a municipality and can demonstrate an inability or limited ability to pay response costs.

H.R. 1300 and H.R. 2580 define "small business" to mean a business that employs no more than 100 persons. The Towns substitute appears not to define small business for purposes of this ability-to-pay provision, though as noted above, it is defined elsewhere.