

# Issue Brief for Congress

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## Superfund and Brownfields in the 107<sup>th</sup> Congress

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# **CONTENTS**

SUMMARY

MOST RECENT DEVELOPMENTS

BACKGROUND AND ANALYSIS

Brownfields

A Brief Summary of the Cleanup Program

Superfund Issues

Revenue Issues: Appropriations and the Superfund Taxes

Appropriations

Reinstating the Superfund Taxes

Retroactive Liability

Cleanup Standards and Remedy Selection — Concerns Over Expense and Delay

Should Natural Resource Damages Be Narrowed?

Giving States More Control of the Program

Accompanying Issues Related to Lower Priority Sites

Expanding the Brownfields Program

Aiding Voluntary Cleanup Programs for Lower Risk Sites

Action in the 107<sup>th</sup> Congress

LEGISLATION

FOR ADDITIONAL READING

## Superfund and Brownfields in the 107<sup>th</sup> Congress

### SUMMARY

On January 11, 2002, the President signed H.R. 2869 (P.L. 107-118), which formally established EPA's brownfields program, and provided relief from Superfund liability for small businesses. The Act creates a \$200 million per year brownfield cleanup program (including cleanup of petroleum-contaminated sites); provides \$50 million for state programs; and relieves liability for contiguous property owners, prospective purchasers, and innocent landowners. It also provides liability relief for small businesses and others who disposed of small amounts of hazardous waste, and allows businesses to make a financial settlement for a lesser amount in cases of financial hardship. The House passed H.R. 2941 under suspension on June 4, 2002, a bill to make HUD brownfield grants more accessible, especially to smaller communities. The Senate Environment and Public Works Committee reported S. 1079 on April 25, providing funds for the Economic Development Administration's brownfield program

The Superfund Act's formal name is the Comprehensive Environmental Response, Compensation, and Liability Act, or CERCLA (P.L. 96-510, as amended). It is the principal federal program for cleaning up hazardous waste sites. As of February 2002, 777 non-federal sites (59%) placed on the Superfund's National Priorities List (NPL) had been removed to the Construction Completed List. Program critics say it is slow, ineffective, and expensive. Program supporters acknowledge that the statute needs to be updated, but argue that Superfund cleanups have prevented widespread health and environmental exposures and have created strong incentives for more careful hazardous waste management.

How to fund the program in the future is

a basic issue, as the authority to collect the taxes that have supported the Superfund trust fund ended in 1995. Congress has appropriated larger amounts from the Treasury since FY1999 as the trust fund balance has declined. The FY2002 appropriation for the Superfund program is \$1.27 billion, including \$97.7 million for brownfields (P.L. 106-377).

CERCLA's broad liability scheme has been one of the most difficult issues. The average cost of cleaning up a site is about \$20 million, a large enough amount to often make it worthwhile for parties to pursue legal means to spread the costs rather than to settle. So at large sites, where it is not unusual for there to be over a hundred potentially responsible parties, there can be a commensurate amount of expensive negotiation and litigation. Such situations can be especially burdensome for small businesses and other minor parties.

The law's cleanup standards and remedy selection procedures are also controversial. Requirements for treatment, permanence, and the application of both federal and state regulations have led to what some critics characterize as overly strict risk assessment, and increased costs and delay at many sites. Environmental groups, on the other hand, strongly support cleanup remedies that minimize remaining on-site pollution rather than remedies that, while designed to limit human and environmental exposure, leave wastes on site. Business interests also want to cap the amount of natural resource damages that can be assessed against them.

A number of states are seeking a full delegation to them of the authorities in CERCLA, including remedy selection, control over CERCLA's monies, and the determination of what sites go on and off the NPL.



## **MOST RECENT DEVELOPMENTS**

*The House passed H.R. 2941, as reported (H.Rept. 107-448), on June 4, 2002. The bill makes the Department of Housing and Urban Development's brownfield grants more accessible to a larger number of communities.*

*The Senate Environment and Public Works Committee on April 25, 2002, reported S. 1079, providing \$60 million per year for the Economic Development Administration's brownfields program.*

*On January 11, 2002, the President signed H.R. 2869 (P.L. 107-118), which formally established EPA's brownfields program, and provided relief from Superfund liability for small businesses. The bill combines the provisions of the Senate-passed S. 350 with the language of the House-passed H.R. 1831.*

## **BACKGROUND AND ANALYSIS**

Superfund is the principal federal program for cleaning up hazardous waste sites to protect public health and the environment from releases of hazardous substances. It was enacted in 1980 in the wake of discoveries of abandoned hazardous waste sites around the country. The situation was brought to public attention by the 1978 declaration of a health emergency at the Love Canal neighborhood of Niagara Falls, N.Y., where a residential subdivision and a school had been built atop a former chemical dump, and chemicals were seeping into residents' basements and surfacing in their yards. In the following weeks news stories told of greater than normal occurrences of miscarriages, birth defects, and cancer

among the residents.<sup>1</sup> Discoveries of other toxic sites in other parts of the United States were leading news items in the months that followed, and congressional committees, the Environmental Protection Agency (EPA), and the Surgeon General among others, launched investigations to determine the number of hazardous sites, and related risks to human health.

President Jimmy Carter declared a federal emergency at Love Canal, the first (and only) time a pollution incident was made eligible for disaster assistance. He did so because existing federal authority was limited to two small programs under the Clean Water Act, and to the imminent hazard provision of the Resource Conservation and Recovery Act (RCRA),<sup>2</sup> which lacked the full range of authorities necessary to allow comprehensive emergency action. Among other issues RCRA provided no funds for cleanup. At the state level, response capability was either very limited or non-existent.

The legislative track for what became Superfund combined hazardous waste cleanup with oil spill and chemical spill provisions, amending the Clean Water Act which had passed the House and Senate in different versions in the 95<sup>th</sup> Congress. But during the 96<sup>th</sup> Congress (1979-1980), one news report after another kept attention focused on the cleanup of dumps containing hazardous wastes, and this issue was the driving force that ultimately brought forth the Comprehensive Environmental, Response, Compensation, and Liability Act of 1980, or CERCLA (P.L. 96-510) known by its short title as “Superfund.” The law was amended and enlarged in 1986 by the Superfund Amendments and Reauthorization Act (SARA, P.L. 99-499).

CERCLA makes potentially responsible parties<sup>3</sup> (PRPs) liable for the costs of response (primarily cleanup) associated with releases<sup>4</sup> of hazardous substances, and for damages (monetary compensation) for injuries to publicly owned natural resources. The law’s liability standard is strict, joint and several, and retroactive. Generators of hazardous substances, transporters who selected the disposal site, and past and present owners and operators of the site can all be held liable. CERCLA also allows PRPs to sue other parties (usually waste generators) to contribute to the cost of cleanup, sometimes leading to hundreds of others – including small businesses – being brought into Superfund’s liability net. This stringent liability regime and its consequent expenses have contributed to the law’s unpopularity in some quarters, and is a major sticking point in reauthorization. (See “Retroactive Liability” below.<sup>5</sup>) The most common sources of waste are manufacturing

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<sup>1</sup> Subsequent studies cast doubts that the wastes were causally related to these purported effects, however.

<sup>2</sup> RCRA established the federal program regulating solid and hazardous waste management.

<sup>3</sup> EPA uses the term “*potentially* responsible party” because the party who may ultimately bear the burden of paying for the cleanup and related costs may not be directly responsible for the activities that caused contamination at the site. Examples are insurers, and banks that have made loans to the owner or operator of the site.

<sup>4</sup> The term “release” is broadly defined to include not only such things as spilling and leaking, but also the “abandonment or discarding of barrels” and other closed receptacles (CERCLA Section 101(22)). Also, courts have held that a release need not be a discrete event, but can include seepage over a long period of time.

<sup>5</sup> See also CRS Report 98-136, *Superfund Act Reauthorization: Liability Provisions of Leading* (continued...)

operations (38.9% of total waste at Superfund sites) and municipal landfills (16.5%), followed by recycling operations (8.5%) and industrial landfills (6.5%).

CERCLA also established the Superfund Trust Fund, which was created primarily from a corporate environmental income tax, and excise taxes on petroleum and specified chemicals. It received about \$1.5 billion per year before the legislative authority to collect the taxes expired on December 31, 1995. Congress annually appropriates monies from the trust fund to EPA, and in most years has added a contribution from the general fund of the Treasury, usually \$250 million, the maximum authorized in CERCLA through FY1995. For FY1999, however, as the trust fund balance declined in the absence of tax receipts, the Treasury contribution was increased to \$325 million, and since then, about half of the appropriation has come from the Treasury (\$635 million in each of FY2000 - FY2002).

Monies from the fund are used where a financially viable party cannot be found to pay for cleanups, as well as to support the EPA's Superfund-related enforcement, management, and research and development activities. The lack of income-producing taxes has created some pressure to reauthorize the law. The Ways and Means Committee Chairman in the 104<sup>th</sup> -106<sup>th</sup> Congresses, Bill Archer, said that the taxes would not be restored until there were fundamental changes in the act, particularly its liability provisions. His position prevented further action in the 106<sup>th</sup> Congress on H.R. 1300 and H.R. 2580, both of which were reported (by the Transportation and Infrastructure, and Commerce Committees, respectively).

Since 1980, EPA has placed 1,479 sites on the Superfund National Priorities List (NPL): 1,309 non-federal sites, and 170 federal facilities. Over half of the non-federal sites, 59%, have been moved to the Construction Completion List (CCL), indicating that all physical work has been completed. At most CCL sites groundwater cleanup is ongoing, a process that takes many years. According to EPA, by the end of FY2000, 92% of all sites that have been listed on the NPL since its beginning were either undergoing cleanup construction (remedial or removal), were completed and on the CCL, or had been deleted from the NPL because cleanup goals were met. At the other 8% of sites work had not begun, or studies or design activities were underway.

Serious efforts have been made in the last four Congresses (1993-2000) to make changes in the law to address the criticisms of slow cleanups, overly stringent cleanup requirements, and unfair liability rules. Reauthorization bills were reported in the 103<sup>rd</sup>, 105<sup>th</sup>, and 106<sup>th</sup> Congresses, but none reached the floor in either chamber.

In 1993 EPA moved to address the criticisms on its own and started what became three rounds of 49 administrative reforms to make the agency's operation of the program "faster, fairer, and more efficient." Industry groups give the agency credit for improving the program, but say additional changes that require legislation are still needed. From their perspective, these should include replacing CERCLA's liability regime, reforming remedy selection, changing the law's provisions on natural resource damages, and instituting a different means of funding the program. (See CRS Report RS20772, *Superfund and Natural Resource Damages*.)

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<sup>5</sup> (...continued)  
*Congressional Proposals*.

**Brownfields.** Brownfields are less seriously contaminated sites where redevelopment is complicated by potential environmental contamination. (See “Expanding the Brownfields Program,” below, and CRS Report RL30972, *The Brownfields Program Authorization: Cleanup of Contaminated Sites*.) EPA initiated the program under Superfund authority, although it was not explicitly authorized in CERCLA. To help communities address these sites the agency awarded the first brownfield assessment grant in 1993, and by the end of FY2000 had made grants to 362 communities. For several years, Congress has recognized the program with its own line item in the Superfund appropriation, but supporters have wanted to give it its own specific legislative authority, as well as spell out appropriate activities for the program.

The growth of the brownfields effort has coincided with sentiment by some in Congress (and elsewhere) that Superfund has largely accomplished its original purpose of cleaning up the worst hazardous waste sites in the nation, and it is time to begin winding the program down. A 1998 General Accounting Office report<sup>6</sup> stated that of approximately 3,000 sites identified as possible NPL sites, only 232 were named by either EPA, a state, or both, as likely to be placed on the National Priorities List. The Smith bills of the 105<sup>th</sup> and 106<sup>th</sup> Congresses and the Boehlert and Oxley bills of the 106<sup>th</sup> Congress reflected this outlook (all three were Superfund subcommittee chairmen at the time). The bills enlarged the brownfields program on the one hand, and on the other hand looked to the end of Superfund by limiting the number of sites that could be added to the NPL or by authorizing declining appropriations to carry out the program.<sup>7</sup>

Another point of view was presented in July 2001, however, with the publication of a congressionally commissioned report by Resources for the Future, which found that the costs of cleaning up sites and administering the program are not likely to fall below current levels until FY2008.<sup>8</sup>

The Superfund reauthorization bills that were reported in the 105<sup>th</sup> and 106<sup>th</sup> Congresses were not brought to the floor because of opposition by key members. While some suggested that a stand-alone brownfields bill might have had a better chance, the Republican leadership wanted to keep the popular brownfields program within a Superfund reauthorization bill to help build support for a comprehensive CERCLA rewrite.

The efforts of the last four Congresses demonstrate the need for consensus to achieve significant changes in the law. The successful amendments to CERCLA during that time period have had general agreement and targeted a fairly narrow area: limiting the liability of financial institutions that had made loans to PRPs, easing the transfer of military bases to local entities (related to the Base Realignment and Closure laws), limiting the liability of recyclers, and providing a tax incentive to encourage the cleanup of brownfields.

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<sup>6</sup> *Hazardous Waste: Information on Potential Superfund Sites*. November 30, 1998, GAO/RCED-99-22.

<sup>7</sup> In the 105<sup>th</sup> Congress: S. 8. In the 106<sup>th</sup> Congress: S. 1090, H.R. 1300, and H.R. 2580. Senator Smith was a co-sponsor of S. 1090; full Environment and Public Works Committee Chairman John Chafee introduced the bill.

<sup>8</sup> Katherine N. Probst and David M. Konisky, *Superfund's Future: What Will It Cost?*

Now, however, after four Congresses without success in achieving reauthorization, there proved to be sufficient sentiment in both chambers and both parties to enact a brownfields bill, and the President signed H.R. 2869 (P.L. 107-118) on January 11, 2002.

## **A Brief Summary of the Cleanup Program**

When a hazardous waste site or an incident such as a spill is reported to EPA, the hazardous substance release is entered into CERCLIS (Comprehensive Environmental Response, Compensation, and Liability Information System), the agency's site tracking database. There were 11,177 active sites in CERCLIS as of May 8, 2001, and 32,542 in the CERCLIS archives; archive status indicates that EPA has completed its assessment of a site and has determined that no further steps will be taken to list it on the National Priorities List (NPL). A preliminary assessment is conducted at all CERCLIS sites to quickly determine if the site poses a sufficient threat to health and the environment to warrant further investigation, and if it might require an emergency removal. An "emergency removal" is a short-term, fast-track response to mitigate a dangerous situation that can be ordered at any time if conditions warrant.

If recommended by the preliminary assessment, a site inspection is conducted, during which environmental and waste samples are taken for laboratory analysis to determine if hazardous substances are present and the extent of their migration. Information from the site assessment is used in the Hazard Ranking System, and sites receiving a sufficiently high score are placed on the National Priorities List (NPL). The term "Superfund site" generally means a site on the NPL, and the long-term cleanup activities at an NPL site are referred to as "remedial actions."

As of February 13, 2002, there were 1,222 sites on the NPL, of which 159 are federal facility sites; another 74 were proposed for listing, of which 7 were federal facility sites (67 FR 8838, February 26, 2002). Proposed and final NPL sites total 1,296. Through FY2000, EPA and the Coast Guard had also conducted more than 6,400 emergency removal actions. (The Coast Guard is the lead agency in coastal areas.) There are or have been Superfund sites in all 50 states, as well as in American Samoa, Guam, the Northern Marianas, Puerto Rico, the Trust Territories of the Pacific, and the Virgin Islands.

After listing on the NPL, the next step is the remedial investigation, a detailed examination of the site and the wastes present, which is followed by (or conducted concurrently with) a feasibility study that examines alternative cleanup approaches. (These two steps are frequently referred to together as the "RI/FS.") In the Record of Decision (ROD) EPA decides which alternative to pursue, and the Agency or its designee — frequently the U.S. Army Corps of Engineers — prepares specifications and plans for the selected remedy. Cleanup construction may be followed by a requirement to operate, maintain, or monitor the site for a period of years (which is almost always the case if groundwater cleanup is involved). As of February 13, 2002, 777 non-federal sites (59% of the 1,309 total non-federal sites listed since inception) had been placed on the Construction Completion List; and 246 (19% of the 1,309) of those sites and portions of 26 others have also been deleted from the NPL.

The National Contingency Plan (NCP, codified at 40 CFR 300) provides a blueprint of how EPA is to respond to hazardous substance releases. It covers methods for discovering and investigating hazardous waste sites, the roles of federal and state agencies, the appropriate level of response activities, and other subjects. The Hazard Ranking System and the National Priorities List are appendices to the NCP. (For details on this and other Superfund topics, see CRS Report 97-312, *Superfund Fact Book*. See also EPA's Superfund web site: [<http://www.epa.gov/superfund/index.htm>]).

## Superfund Issues

A number of issues have proved challenging in the quest to reauthorize CERCLA. The ones most debated are discussed below: the Superfund taxes, liability issues, cleanup standards, natural resource damages, transferring authority to the states, and brownfields.

### Revenue Issues: Appropriations and the Superfund Taxes

**Appropriations.** The House and Senate adopted the conference report for the FY2002 Superfund appropriation on November 8 (H.R. 2620, H.Rept. 107-272), and the President signed it on November 26 (P.L. 107-73). The Superfund program received \$1.270 billion, including \$97,651,600 for the brownfields program. Half of the appropriation came from the Superfund trust fund, and half from the U.S. Treasury.

In January 2002, the program also received \$41,292,000 under P.L. 107-117, the FY2002 DOD Appropriations Act, for emergency expenses to respond to the September 11, 2001, terrorist attacks and to support activities related to countering terrorism.

For FY2003, the President's budget proposes \$1.273 billion for Superfund, essentially the same amount as appropriated for FY2002 (not including September 11 response funds). The budget also requests \$199,769,000, a doubling of resources, for the brownfields program. Of the total requested, \$700 million would come from the Treasury, with the remainder coming from the Superfund trust fund.

**Reinstating the Superfund Taxes.** Until the legislative taxing authority expired on December 31, 1995, the Superfund Trust Fund's principal sources of revenue were excise taxes on petroleum and designated chemical feedstocks, and a corporate environmental income tax. The trust fund historically supplied most of the monies appropriated (about 83%) for the Superfund program, with general revenues from the Treasury providing the rest (about 17%). (For proposals to renew the taxes, see "Action in the 107<sup>th</sup> Congress," below.)

Congress, if it chooses, could fund the program entirely through general revenues, and some Republican leaders have said they would not allow the program to go unfunded. GAO has said that there is nothing in CERCLA or the congressional budget resolution to prevent the appropriation from being funded completely from general revenues. The last four appropriations have helped extend the life of the fund by increasing the Treasury contribution from the usual \$250 million in most previous years, and reducing the amount taken from the fund. The FY1999 \$1.5 billion appropriation included \$1.175 billion from the fund (78%) and \$325 million from general revenues (22%) for a total appropriation of \$1.5 billion. For the FY2000, FY2001, and FY2002 appropriations, 50% came from the

trust fund and an equal amount came from general revenues. Former EPA Administrator Carol Browner and others have opposed this approach saying it amounts to taxpayers paying for cleanups instead of the polluters.

The Natural Resources Defense Council and the Environmental Defense Fund have expressed their “strong concern” that the taxes be reauthorized in order to keep cleanups moving forward. Business interests, including the Business Roundtable, the American Petroleum Institute (API), and the Chemical Manufacturers Association, have testified against authorizing any taxes unless there is comprehensive reform of the law, and API in particular wants Congress to change the overall tax structure.

From the 104<sup>th</sup> through the 106<sup>th</sup> Congresses, Ways and Means Chairman Bill Archer opposed reinstating the taxes until CERCLA was reauthorized and its liability provisions changed. He suggested creating a dedicated revenue stream from existing corporate income taxes to replace the expired Superfund taxes, but the idea was not pursued.

## **Retroactive Liability**

The most controversial element of CERCLA is its broad liability scheme. The generators of the hazardous substances, the transporters who selected the site, and the owners and operators (both past and present) of the facility or property where the substance was released are all liable under current law. Liability is strict, joint and several, and retroactive, and defenses allowed by the Act are few. While pervasive policy reasons support this approach (e.g., polluters should pay rather than the taxpayers), the program has run into implementation problems with certain groups of potentially responsible parties (PRPs).

Given that it is common for a waste disposal facility to have received wastes from throughout the region in which it operates, it is not unusual for there to be several hundred PRPs liable for cleanup costs at some Superfund sites. That, coupled with the high cost of cleanup — the average cost is currently around \$20 million per site — has led PRPs to try to spread the costs as much as possible. The result has been a large amount of litigation, not only among waste generators, but also between them and their insurance companies, which frequently claim that the policies they wrote were not intended to cover the kind of pollution, or the kind of liability, encountered at Superfund sites.

The litigation (and related transactions) are both costly and time-consuming, and for years business and industry groups, especially the insurance industry, have called for the repeal of CERCLA’s existing liability regime. The jurisdictional committees examined the issue during the 104th Congress and considered repealing retroactive liability for actions prior to CERCLA’s December 1980 passage, or alternatively prior to 1987. The January 1, 1987 cutoff date coincides with the use of new insurance policy language, as well as the institution of stricter solid waste record-keeping requirements.

The Congressional Budget Office (CBO) said that repealing prior liability would reduce transaction costs and increase efficiency for the nation as a whole. CBO’s Jan Acton testified that, “The main trade-off inherent in a liability cutoff [of 1980 or 1987] is that it

would shift responsibility [for cleanup] from the PRPs to the federal government, thus requiring some mix of cost savings, increased federal spending, and reduction in the pace of cleanup,” or alternatively, a change in standards to lower the cost of cleanup.<sup>9</sup> Under two different sets of assumptions, CBO estimated that repealing liability for pre-1987 actions would save the nation as much as \$1.0-1.1 billion annually in transaction costs, mainly from the private sector, according to CBO. The federal government would have an estimated net increase in cleanup costs of \$1.4-1.6 billion per year, plus a one-time cost of as much as \$6.5-7.5 billion to reimburse PRPs for ongoing expenses under existing cleanup commitments, plus \$5.3-6.0 billion for past costs.

If a cutoff date of December 31, 1980, were used, CBO said, private and federal transaction costs would fall about 50% and 30% respectively, compared with 90% under the 1987 cutoff. The shift in cleanup costs to the federal government would come to \$1.3 billion per year, and reimbursing PRPs would total about \$5.5 billion for ongoing work, and \$4.4 billion for past work. These high cost estimates prompted the committees to look for ways other than full repeal of retroactive liability to reduce the liability burden, particularly for small businesses, lenders, and municipalities. Environmental groups have opposed liability cut-off dates, arguing that reimbursement of PRPs would contradict the “polluter pays principle” and leave less money to address pending site cleanups.

CERCLA was amended in 1996 to protect lenders and fiduciaries from liability so long as they do not participate in the management of a facility contaminated with hazardous substances (Conservation, Lender Liability, and Deposit Protection Act, P.L. 104-208). Lenders at times have incurred liability after foreclosing on a contaminated property, and this law details what actions a lender may take without triggering liability. It also limits a fiduciary’s liability to the value of the assets held in trust. Protection from CERCLA liability was also extended to recyclers of paper, plastic glass, textiles, rubber, metal and batteries under certain conditions by the Superfund Recycling Equity Act, P.L. 106-113. In the 107<sup>th</sup> Congress, protection from liability has been extended to contributors of “de micromis” quantities of hazardous waste and to households and small businesses that contributed only municipal solid waste at Superfund sites. (See “Action in the 107<sup>th</sup> Congress,” below, for additional details.)

There have been two common elements in the major liability reform proposals. First, they have provided exemptions or limits to liability for certain groups and certain categories of waste. In general, the groups that would be protected from liability have included innocent parties (e.g., owners who inherited contaminated land, but did not cause or contribute to the release of hazardous substances); small contributors at multi-party sites (such as municipal landfills); and small businesses. Relief from liability has also been proposed for municipal solid waste, municipal sewage sludge, and small amounts of hazardous materials provided the material did not contribute significantly to response costs. Which groups and waste categories to relieve has been one of the contentious issues.

The second common element is establishment of a fast-track allocation process to apportion liability shares at a site among the responsible parties, performed by a neutral allocator. Any responsible party that did not accept the allocation and settle would be

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<sup>9</sup> *Superfund Reauthorization*, Hearings before the Subcommittee on Water Resources and Environment, Committee on Transportation and Infrastructure, June 22, 1995. p. 658.

subject to CERCLA's joint and several liability, under which EPA could seek recovery of all outstanding response costs. Environmental and business groups have approved of the allocation process, but have reservations about some of the liability exemptions. (See also CRS Report 98-136, *Superfund Act Reauthorization: Liability Issues*.)

## **Cleanup Standards and Remedy Selection — Concerns Over Expense and Delay**

Cleanup standards have also been controversial. CERCLA Section 121 states a preference for “*treatment* which *permanently* and significantly reduces the volume, toxicity or mobility of the hazardous substances, pollutants, and contaminants ...” (emphasis added). The Section also cites cost effectiveness as a factor to be considered in selecting remedies.

Section 121 requires Superfund cleanups to meet “ARARs”: any “legally Applicable or Relevant and Appropriate standard, Requirement, criteria or limitation” that has been promulgated under federal or state environmental laws. The ARARs include such things as the Clean Water Act's water quality criteria, the Solid Waste Disposal Act's land disposal restrictions, and some states' ground water anti-degradation provisions that require cleanup to background levels. EPA can waive the ARARs in some situations.

While these requirements (the preference for permanence and treatment, and the mandate to meet ARARs) have made Superfund a technology-forcing law, promoting research into new means of permanently eliminating contamination, they have also created at least three areas of concern. First, critics say that EPA's risk assessment process during the remedial investigation phase of response overstates the true risk posed to the vast majority of people. This phase is important because the assessment determines in large part what remedial actions might be appropriate for the site and how much they will cost.

Second, critics say Section 121 has led to increased expense and delay. Despite the “cost effective” language in the statute, many PRPs have complained that EPA has little regard for cost when selecting the remedies they must implement.

Third, experience with the Superfund program has shown that some cleanups are too difficult to achieve. The 1980 enactment did not foresee that some types of wastes and some kinds of sites were not amenable to solution with current levels of technology. While EPA can waive ARARs due to “technical impracticability,” the waiver has not been greatly used, in part because of concern over public reaction. To address these issues, critics suggest giving cost greater weight, eliminating ARARs or the preference for permanence and treatment, and taking future land use into consideration when selecting a remedy.

Considerable debate has surrounded the proposed elimination of the preference for “permanence” and “treatment” in selection of Superfund remedies. Health and environmental groups have maintained that remedies that rely on the containment or isolation of pollutants may be ineffective and that a preference needs to be retained for cleanup plans which actually detoxify or remove contaminants. There appears to be consensus that future land and water use need to be taken into account in selecting remedies. Business interests strongly favor changes in EPA's risk assessments, wanting them to reflect actual site-specific conditions; environmental organizations would like to see a single national standard to provide all communities the same level of protection. Most interested

parties favor the elimination of the “relevant and appropriate” part of ARARs language (but keeping the “applicable”) because at times it has led to delays and disagreements between federal and state regulators as well as with PRPs. (See also CRS Report 97-914, *Superfund Cleanup Standards Reconsidered*.)

## Should Natural Resource Damages Be Narrowed?

CERCLA requires parties responsible for a release of hazardous substances that causes “an injury to, destruction of, or loss of natural resources” to reimburse the U.S. government and/or the appropriate state or tribal government for the costs of restoring the resources, or acquiring the equivalent of the natural resources injured by the release. But the law is not clear on two other costs that regulations and some court decisions have recognized. One is damages associated with *lost use* of the resource, such as the costs of providing alternative fishing opportunities where a fishing stream is contaminated. The other is damages associated with *non-use* (or passive use) values, values unrelated to the person’s actual use of the resource to date. Examples of non-use values are the “option value” of hiking or fishing in a place one hasn’t been to, the “existence value” of whooping cranes one hasn’t seen and doesn’t intend to, and the “bequest value” of passing a resource on to future generations.

These non-use values are the most controversial as responsible parties fear that they will be used to seek substantial and potentially arbitrary monetary damages. An increasing number of NRD claims has been filed in recent years, some with claims in the multi-hundred million dollar range. One of the largest cases involved the Clark Fork River basin in Montana, where the state and U.S. governments sought \$765 million for environmental injuries from mining activities. The suits were settled in 1998 for a total of \$260 million (*Montana v. ARCO*, D. Mont., No. CV-83-317-HLN-PGH, 6/19/98; and *U.S. v ARCO*, D. Mont., No. CV-89-39-BU-PGH, 11/16/98). (See also CRS Report RS20772, *Superfund and Natural Resource Damages*; and CRS Report RL30242, *Natural Resources: Assessing Nonmarket Values through Contingent Valuation*.)

## Giving States More Control of the Program

States have been lobbying for greater control over the Superfund program. States have gained substantial experience in managing cleanups, and many now have the resources and technical expertise necessary to conduct and oversee remedial actions. At present, EPA and states enter into cooperative agreements on a site-by-site basis that authorize the states to undertake most of the cleanup activities the Agency would perform. This does not, however, include remedy selection. While EPA must consult with the affected state before undertaking a remedial action, the state’s concurrence is not required. Disagreements between federal and state regulators regarding the application of ARARs or the ultimate selection of a remedy can significantly delay a cleanup and increase its costs.

Proponents of change suggest that the law be amended to authorize EPA to either *delegate* responsibility for the Superfund program to a requesting state, or alternatively, to *authorize* the state program to be operated in lieu of the federal Superfund program. Business groups are generally in favor of more state involvement in the Superfund program, but are especially concerned that PRPs only have to respond to one regulator/decision-maker at a site, whether federal or state. Environmental groups have pointed out that resources and

capabilities vary widely among the states, and legislation redefining the state role should be flexible enough to accommodate different situations.

States would also like the power to veto EPA-proposed listings on the National Priorities List (NPL). The NPL-veto authority was law for a brief period of time. EPA's FY1996 appropriation act (P.L. 104-134) contained a provision, valid only until the end of the fiscal year, requiring the concurrence of a state's Governor before a site in that state could be placed on the NPL. After the provision expired, the National Governors Association and several Senators expressed concern to EPA, and the agency directed its regional offices to determine the position of the Governor on sites being considered for placement on the list. Legally, EPA has final authority on listings. The Agency has threatened to list only one site over a state's objections, the Fox River site in Wisconsin; it was proposed on July 27, 1998, but has not been formally listed. (See also CRS Report 97-953, *Superfund and the States*.)

## **Accompanying Issues Related to Lower Priority Sites**

Because Superfund emphasizes the "worst first" in prioritizing cleanup, some lower risk sites not on the NPL receive little attention. Connected to reauthorization efforts are two popular programs which seek to expand cleanup of such sites. Business and industry groups have favored these efforts, but oppose using Superfund money for non-NPL sites.

### **Expanding the Brownfields Program**

The brownfields program for cleaning up less serious industrial and commercial hazardous waste sites targets idle or underused facilities where redevelopment is complicated by potential environmental contamination. It is an EPA initiative, done under Superfund's authority, but, until enactment of P.L. 107-118 in January of this year, not explicitly authorized in CERCLA. EPA's program includes financial awards to states, political subdivisions, and Indian tribes: \$200,000 grants for assessment and other pre-remedial activities; \$350,000 grants to establish revolving loan funds (RLFs) for cleanups; grants for job training; and other activities. As part of the effort, EPA changed certain policies that impeded brownfield redevelopment, such as clarifying the circumstances in which the agency would not enforce Superfund liability against brownfield owners.

In the last Congress 28 bills with brownfields provisions were introduced. The focus of most of them generally was to codify in law the program EPA created, and to specify uses of the funds. While there was little opposition to the program, the oil and chemical industries in particular objected to the use of Superfund money that they say should be dedicated to cleaning up NPL sites, not redeveloping brownfields. Using money for this purpose depletes the fund and increases the need for additional taxes, they said.

The Senate passed S. 350 (S.Rept. 107-2), the Brownfields Revitalization and Environmental Restoration Act, by 99-0 on April 25, 2001. The bill authorizes \$150 million per year in FY2002-2006 for brownfield assessment grants and cleanup grants, plus \$50 million per year to clean up "relatively low-risk" brownfield sites contaminated by petroleum, which was not previously allowed by CERCLA. The bill sets out ten ranking

criteria to be used in awarding the assessment grants and cleanup grants. It also provides \$50 million annually to enhance state and tribal voluntary cleanup programs, and prohibits EPA enforcement at sites being cleaned up under a state program unless the state requests it, contamination migrates across state lines or onto federal property, there is imminent danger, or new information not known by the state at the time of cleanup is discovered. In the last case (discovery of new information) EPA must consult with the state before taking enforcement action. S. 350 relieves liability from contiguous property owners, prospective purchasers, and innocent landowners. In addition, the bill requires EPA to defer listing a site on the National Priorities List if the site is being cleaned up under a state program, or negotiations are underway to do so.

The House Energy and Commerce environment subcommittee held a hearing June 28 on S. 350 and two discussion draft bills offered by Chairman Paul Gillmor and Ranking Democrat Frank Pallone. Much of the discussion dealt with “finality,” or what limits should be placed on EPA’s authority to take enforcement action if brownfield cleanups under state programs presented problems that endangered public health or the environment. See “Action in the 107<sup>th</sup> Congress,” below, for the insertion of S.350 in H.R. 2869.

On June 5, 2002, the House passed H.R. 2941, as reported (H.Rept. 107-448). The bill removes the connection between HUD’s Brownfield Economic Development Initiative (BEDI) program and the department’s Section 108 loan guarantees. The effect is to make the BEDI grants more obtainable by a larger number of cities, particularly smaller communities. The bill also authorizes funds as needed for 5 years, through FY2007.

Meanwhile, on April 25 the Senate Environment and Public Works Committee ordered S. 1079 reported, with an amendment. The bill provides \$60 million annually for FY2002-FY2006 to the Economic Development Administration (EDA) for grants to state, local governments, Indian tribes, and non-profit organizations to help restore brownfield sites.

Other brownfields bills introduced in the 107<sup>th</sup> Congress would make the brownfields tax incentive permanent, and/or provide other encouragement via the tax code (H.R. 1439, H.R. 2064, H.R. 2264, and S. 1082). In addition, H.R. 2064 would establish or broaden brownfields programs at HUD (also S. 1078), EDA, and the Small Business Administration. (See also CRS Report RL30972, *The Brownfields Program Authorization: Cleanup of Contaminated Sites.*)

## **Aiding Voluntary Cleanup Programs for Lower Risk Sites**

The Superfund program and state hazardous waste cleanup programs have focused on sites posing the greatest threat to human health and the environment. However, many low- and medium-risk sites remain. For them, 44 states have initiated voluntary cleanup (or response) programs in which the owner or developer works cooperatively with the state, as opposed to an often adversarial enforcement-driven program. Cleanups can take less time, and many states offer such additional benefits as technical assistance, financial support, and importantly, liability assurances. Many feel these programs should be encouraged and expanded, although environmental groups have expressed concern that cleanup standards might be relaxed when cleanups are performed under a state voluntary program. As noted above, S. 350 (P.L. 107-118) would provide \$50 million per year to states and Indian tribes to establish or enhance their response programs. Part or all of these grants may also be used to capitalize a revolving loan fund for brownfield remediation, or to purchase insurance or

develop another means of financing response actions. To qualify for a grant a state or tribe must show that its program includes elements listed in the bill or that it is working to include them. A state or tribe is automatically eligible for funding if it has a memorandum of agreement with EPA for voluntary response programs. (See also CRS Report 97-731, *Superfund and the Brownfields Issue*.)

## Action in the 107<sup>th</sup> Congress

In addition to the enactment of brownfields provisions in H.R. 2869 and the House passage of the HUD brownfields bill (H.R. 2941, H.Rept. 107-448) described above in “Expanding the Brownfields Program,” the 107<sup>th</sup> Congress has addressed liability relief for small businesses and other generators of small amounts of hazardous wastes, provided funds for EPA’s counter-terrorism efforts, and is considering renewing the Superfund taxes.

On May 22, 2001, the House passed H.R. 1831, the Small Business Liability Protection Act, under suspension of the rules. The bill moved swiftly after its introduction on May 15. The Transportation and Infrastructure Committee ordered H.R. 1831 reported on May 16, 2001, and the Energy and Commerce Committee followed suit the following day. Neither committee amended the bill. The bill exempts from Superfund liability contributors of “de micromis” quantities of material containing hazardous substances (less than 110 gallons of liquid or less than 200 pounds of solid material) at sites on the National Priorities List prior to April 1, 2001. It also protects from liability households and small businesses with fewer than 100 employees that disposed only municipal solid waste at Superfund sites. If the parties protected from liability are sued for contribution to the cleanup costs at NPL sites, the burden of proof would be on the suing party, except in the case of a government suing a small business, where the burden of proof would be on the business. In addition, H.R. 1831 allows expedited settlements for businesses based on their limited ability to pay. A companion bill, S. 1064, was introduced June 14<sup>th</sup> by Senator Christopher Bond.

Chairman Paul Gillmor and Ranking Member Frank Pallone took a major step toward final enactment of H.R. 1831 when they merged it with the Senate-passed S. 350 and introduced it on September 10 as H.R. 2869. Disagreement between Republican and Democratic members of the subcommittee over state finality language had held up the introduction of a brownfields bill in the House. The chairman and other Republicans wanted to give the states more authority in deciding whether a site is clean than S. 350 provided, but ultimately went forward with H.R. 2869 in the hope of getting it through both chambers and sending it to the President before the first session adjourned. The House leadership had scheduled a vote under suspension of the rules for September 11, but postponed it when the Capitol was cleared following the terrorist attack in New York and at the Pentagon. A rescheduled vote under suspension for September 24 was also put off when Democrats withdrew their support, requesting assurances from EPA that the Davis-Bacon Act would continue to apply to brownfield sites. That law requires that prevailing wages be paid to workers on federally financed or assisted construction. A technical change to the bill satisfied their concerns, and it was passed under suspension on December 20, 2001. The President signed it on January 11, 2002 (P.L. 107-118).

CERCLA authority and the expertise of Superfund program personnel were employed in the response to the September 11 terrorist attacks, and the cases of anthrax-contaminated

mail. On December 4 EPA Administrator Whitman said that EPA had spent \$7.5 million so far for its testing and cleanup activities at both the World Trade Center and in anthrax-contaminated buildings, including postal facilities and on Capitol Hill; the total could reach \$20 million, she said. Whitman also said she would ask Congress in the future for legislative authority to recover some of the costs of anthrax-related cleanups, and to indemnify contractors against liability while performing those cleanups. The FY2002 DOD Appropriations Act (P.L. 107-117) signed by the President January 10, 2002, provided an additional \$41,292,000 for Superfund, to remain available until expended, for emergency expenses to respond to the September 11, 2001, terrorist attacks and to support activities related to countering terrorism.

There are also efforts to renew the taxes that feed the Superfund Trust Fund. Senator Robert Torricelli submitted an amendment to the energy bill (S. 517) that would reinstate the Superfund taxes, but it was considered non-germane, and was not considered. The amendment is the same as Representative Pallone's H.R. 4060, introduced March 20, 2002, and would also renew the tax for the Oil Spill Liability Trust Fund, and extend the tax for the Leaking Underground Storage Tank Trust Fund, both until September 30, 1997.

## **LEGISLATION**

### **P.L. 107-118, H.R. 2869**

Title I of this bill is identical to the House-passed H.R. 1831, and Title II is identical to the Senate-passed S. 350. See Text. Introduced September 10, 2001; referred to Committees on Energy and Commerce, and Transportation and Infrastructure; passed both chambers under suspension December 20, 2001. Signed into law January 11, 2002.

### **H.R. 324 (Boehlert)**

Promotes brownfields development, and amends and reauthorizes Superfund. This is the same bill that was reported in the last Congress from the Transportation and Infrastructure Committee, H.R. 1300. Introduced January 31, 2001; referred to Committees on Energy and Commerce, Transportation and Infrastructure, and Ways and Means.

### **H.R. 1439 (Coyne)**

Makes the brownfields tax incentive permanent. Introduced April 4, 2001; referred to the Committee on Ways and Means.

### **H.R. 1831 (Gillmor)/S. 1064 (Bond)**

Small Business Liability Protection Act. See "Action in the 107<sup>th</sup> Congress," above. H.R. 1831 introduced May 15, 2001; referred to the Committees on Energy and Commerce and on Transportation and Infrastructure; ordered reported from Transportation and Infrastructure May 16 and from Energy and Commerce May 17; debate completed in the House May 21; passed May 22 by 419-0; see P.L. 107-118 for further action. S. 1064 introduced June 14, 2001; referred to the Committee on Environment and Public Works.

### **H.R. 2016 (DeGette)**

Makes all federal agencies subject to CERCLA requirements and related federal, state, interstate, and local requirements. Introduced May 25, 2001; referred to Committees on Energy and Commerce, and Transportation and Infrastructure.

**H.R. 2064 (Quinn)**

Authorizes brownfield programs and activities in Department of Housing and Urban Development, Economic Development Administration (EDA), and Small Business Administration, and authorizes \$60 million per year for 5 years for the EDA program; and provides various tax incentives. Introduced June 5, 2001; referred to Committees on Financial Services, Small Business, Transportation and Infrastructure, and Ways and Means.

**H.R. 2941 (Gary Miller)**

Facilitates HUD assistance for redeveloping brownfields. Introduced September 21, 2001; referred to Committee on Financial Services. Hearing held March 6, 2002; forwarded by subcommittee to full committee, amended, March 14; reported, amended (H.Rept. 107-448), May 8; passed House under suspension June 5.

**H.R. 4060 (Pallone)**

Reinstates the taxes funding the Hazardous Substance Superfund and the Oil Spill Liability Trust Fund, and extends the taxes funding the Leaking Underground Storage Tank Trust Fund. Introduced March 20, 2002; referred to Committee on Ways and Means.

**S. 23 (Specter)**

Title IV of the bill authorizes funds for EPA's brownfields program, and releases from liability persons who fulfill cleanup requirements of State and local law. Introduced January 22, 2001; referred to the Committee on Finance.

**S. 350 (Chafee)**

Brownfields Revitalization and Environmental Restoration Act of 2001. See text. Introduced February 15, 2001; referred to Committee on Environment and Public Works. Hearing held February 27, 2001; reported March 12, 2001 (S.Rept. 107-2); passed the Senate (99-0), amended, April 25, 2001; received in the House and referred to the Committees on Energy and Commerce, and on Transportation and Infrastructure, April 26, 2001; see P.L. 107-118 for further action.

**S. 606 (Crapo)**

Ombudsman Reauthorization Act of 2001. Reauthorizes the Office of the Ombudsman for 10 years and authorizes associate ombudsmen in each EPA region. Provides investigative powers, and authorizes ombudsman to request Inspector General to subpoena persons and evidence. Introduced March 23, 2001; referred to Committee on Environment and Public Works.

**S. 1078 (Levin)**

Allows Department of Housing and Urban Development to make brownfield grants independent of economic development loan guarantees. Introduced June 21, 2001; referred to Committee on Banking, Housing, and Urban Affairs.

**S. 1079 (Levin)**

Creates a brownfield program in the Economic Development Administration, and authorizes \$60 million per year for 5 years. Introduced June 21, 2001; referred to Committee on Environment and Public Works; ordered reported, amended, April 25, 2002.

**S.Amdt. 3037 (Torricelli)**

Extends the Superfund, Oil Spill Liability, and Leaking Underground Storage Tank taxes; to amend the energy bill (S.Amdt. 2917 to S. 517). See text. Submitted March 19, 2002. (Cong. Rec. p. S2091)

**FOR ADDITIONAL READING**

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**CRS Reports**

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CRS Report 97-312. *Superfund Fact Book* (Updated January 27, 1999). 46 p.

CRS Report 97-731. *Superfund and the Brownfields Issue*. (Updated January 16, 2001). 18p.

CRS Report RS20869. *The Liability Exemptions in the Senate Brownfields Bill (S. 350)*. 6p.

CRS Report RL30242. *Natural Resources: Assessing Nonmarket Values through Contingent Valuation.* 21 p.

CRS Report RS20772. *Superfund and Natural Resource Damages.* 6 p.

CRS Report RL30972. *The Brownfields Program Authorization: Cleanup of Contaminated Sites.* (Updated August 22, 2001.) 15 p.