

REFORMING SUPERFUND: ADDING ECONOMIC HARM RECOVERY TO THE SUPERFUND REAUTHORIZATION DEBATE

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The M/V Santa Clara was en route from New York to Baltimore, Maryland, when it began to founder in one of the worst Atlantic storms of 1992.¹ At the height of the tempest, a number of shipping containers loaded with drums of arsenic trioxide were lost overboard in 130 feet of water approximately 30 miles off the coast of Cape May, New Jersey.² In spite of this and in flagrant disregard for the safety of the coastal residents along its route, the Santa Clara continued on its voyage docking in Baltimore and proceeding onto Charleston, South Carolina, before authorities arrested the vessel.³

While in port in Charleston, the ship was finally quarantined after an additional spill of 600 pounds of magnesium phosphate was discovered in one of the ship's holds.⁴ A number of longshoremen were

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1. The storm raged out of the Northeast throughout the night of January 3, 1992, and the early morning hours of January 4, 1992. See *United States of America v. M/V Santa Clara I*, 819 F. Supp. 507, 508 (Dist. S.C. 1993).

2. The four containers lost overboard plus additional drums lost from deck storage totaled 441 drums. See R. Degener, *Arsenic Shipper is Sued by U.S.*, THE ATLANTIC CITY PRESS, February 8, 1992, at A1. In all, 21 cargo containers were lost from the Santa Clara during the nor'easter but only four of the containers were loaded with arsenic trioxide drums. *Id.* Had all of the containers lost overboard contained arsenic, the accident could have been much worse than it was. Instead of the 164,934 pounds of arsenic dumped into the ocean, the ship could have released five times as much. *Cf. id.* at A9. Thus, this incident had the potential to discharge nearly a million pounds of arsenic within 30 miles of the Southern New Jersey coast in one of the most densely populated and environmentally sensitive areas of the United States.

3. *Id.*

4. The Magnesium phosphate spill was discovered after a number of longshoremen unloading the Santa Clara were overcome by the fumes. *Id.* The magnesium phosphate spill is particularly troubling in light of the Coast Guard's discovery that the extremely toxic and explosive material was not included in the Santa Clara's hazardous material manifest. *Id.*

injured by the magnesium phosphate spill.⁵ Had the ship not been quarantined, it probably would have continued on its voyage carrying its toxic cargo to its ultimate destination in Miami, Florida,⁶ endangering the population and ecosystems in its path.

Arsenic trioxide is a highly toxic chemical.⁷ A dose the size of two aspirin tablets is lethal to humans and a minimal amount of airborne fumes are fatal.⁸

The threat posed by the presence of the arsenic drums near population centers in Delaware and New Jersey, in the center of the Mid-Atlantic fishing grounds and adjacent to sensitive Delaware Bay estuaries, was not lost on the United States Environmental Protection Agency (EPA). Responding to the Santa Clara's accident, the EPA immediately surveyed the damage, evaluated the risk, located the containers and commenced salvage operations.⁹ The National Marine Fisheries Service responded to the emergency by warning local fishermen of the danger posed by the arsenic drums and closed the coastal fishing grounds completely.¹⁰

An amount of 2.7 million dollars in Superfund money was immediately authorized to fund the EPA's search and salvage operations.¹¹ Through Herculean efforts by the United States Coast Guard and a private salvage contractor, by April 15, 1992, nearly all of the 441 drums of arsenic had been located in a debris pile on the ocean floor.¹²

The Subsea 278, a salvage barge, hoisted the drums from the ocean floor after they were sealed in concrete and maneuvered into special hoisting racks.¹³ According to a National Oceanic and Atmospheric Administration (NOAA) hazardous waste specialist, the precautions were dictated by the deadly nature of the material being

5. *Id.*

6. *Id.*

7. Degener, *supra* note 2, at A9.

8. *Id.*; see also W. Sokolic, *Recovery of Arsenic in Sea Starts*, THE PHILADELPHIA INQUIRER, April 15, 1992, at B1, B7.

9. See Sokolic, *supra* note 8, at B1.

10. See Degener, *supra* note 2, at A9.

11. *Id.* at A1.

12. See Sokolic, *supra* note 8, at B7.

13. The 25-gallon drums were placed in 79-gallon overpack containers into which concrete was injected in an effort to reduce the possibility of salvage crew exposure. *Id.*

recovered.¹⁴ Once aboard the barge, the containers were washed down and transferred to a facility in Salem, New Jersey, where they were stored pending disposal.¹⁵

Fortunately for the residents of nearby coastal communities and the marine life dependent upon the Delaware Bay estuaries, the EPA's innovative response was able to avert a catastrophe. The unique salvage operations, never attempted before, recovered all of the drums before they could leak their deadly contents.¹⁶ Apparently, there was little or no significant impact on the marine environment or the coastal residents.¹⁷

Fortunate too was South Jersey's tourism industry. Had the cargo loss occurred at the height of the tourist season instead of mid-winter, the summer coastal tourism industry would likely have been devastated. Even if there had been no actual release of arsenic, the negative publicity and the uncertainty over water and beach quality during the three months that the drums remained on the sea floor would have likely affected the coast's primary attractions.¹⁸ It was obvious that the livelihoods of the nearly 350,000 coastal residents were at stake.¹⁹ Thus, the EPA and Coast Guard's swift response prevented not only a profound ecological disaster; it prevented an economic disaster as well.

Ironically, the EPA and the Coast Guard may have been too effective. Since disaster was averted, there was little public outcry or media pressure to deal with the type of danger posed by the Santa Clara incident. Since the jettisoned cargo was successfully recovered, there has been little regulatory or legislative response to such an environmental time bomb like the Santa Clara. Today, no new laws prevent a tramp freighter from recklessly plying the shipping lanes adjacent to the Atlantic coast carrying a deadly cargo, placing the population and entire ecosystem at risk. Surprisingly, the same may be true of hazardous material shippers plying the nation's interstate highways and rails.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. See, e.g., D. Coombe, B. Ganwon, & A. Frank, *Tarballs From Spill Again Shut a Stretch of Ocean Beaches*, THE STAR-LEDGER, June 15, 1990, at 40 (vacations likely canceled because of environmental problems at the Jersey shore).

19. It was estimated in 1973 that a spill off the coast of Long Island during the tourist season would cost beach and resort operators thirty million dollars. *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 333-34 (1973). The loss in 1994 dollars would be substantially higher.

A similar accident could occur at any time, wreaking havoc upon the natural and economic resources of the nation.²⁰ Foreign flagged, owned, operated and crewed vessels are permitted to ply the coast within miles of the shoreline. These vessels, deemed to travel in international waters, are effectively beyond the control of local and state governments whose shorelines are constantly placed in jeopardy.²¹ This is true despite the fact that the international shipping lanes are adjacent to some of the most environmentally sensitive estuaries in America.²² The shipping lanes also traverse valuable fishing grounds within the Exclusive Economic and Fishery Conservation Zone of the United States.²³ Since local and state governments are unable to prevent such an accident in the future, coastal residents, fragile coastal ecosystems and migratory marine life must rely upon the federal government's ability to effectively respond to such spills or releases of toxic chemicals, compel polluters to restore any natural resource damage and compensate residents for economic losses related to the spill or discharge.

The potential for devastation holds true whether the discharge is water-borne or land based. Although land based spills do not arise in the context of unregulated international marine traffic, state and local governments are still often unable to control the flow of hazardous materials through their community due to the preclusive effect of the Commerce Clause of the Federal Constitution.²⁴ On any given day, the transport of hazardous waste or products on the interstate highway system or by rail could spark an economic as well as environmental catastrophe. In light of this, Congress has seen fit to establish uniformity of

20. Cf. U.S. Congress, Office of Technology Assessment, *Coping with an Oiled Sea: An Analysis of Oil Spill Response Technologies*, OTA-BP-0-63 (Washington, D.C.: U.S. Government Printing Office, Mar. 1990) at 1 [hereinafter *Oil Spill Response*] (in the context of seaborne transportation of oil, the Office of Technology Assessment (OTA) concluded that, short of eliminating transport by sea entirely, there is no solution to offshore spills. The OTA expressed no doubt that "spills will occur again."). There is no reason why this rationale would not apply to hazardous material transport as well.

21. See Degener, *supra* note 2, at A9. It should be noted that, under certain circumstances, States may regulate coastal shippers but such regulation is only effective when vessels are no longer in international waters. *Askew v. American Waterways*, 411 U.S. at 325. Admiralty preemption is not a foregone conclusion once a vessel enters the territorial waters of the state. *Id.* at 329.

22. Cf. *id.* at 328-29.

23. See *Oil Spill Response*, *supra* note 20, at 2; see also *Santa Clara I*, *supra* note 1 (Complaint at 3, ¶ 10).

24. See *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978) (waste transportation is interstate commerce which states or local governments may not regulate so as to place a burden on interstate transfer or disposal).

environmental regulation throughout the country in order to assure proper clean up of environmental spills.²⁵ Unfortunately, Congress has failed to act with regard to the economic harm which is also likely to result from such a spill.

Thus, when environmental damage results from a hazardous material spill, not all of the affected parties are likely to recover adequate compensation for the economic harm suffered.²⁶ Due to the relationship between state and federal laws regulating maritime commerce, when environmental damage is the result of a vessel chemical spill, not all of the coastal residents will be permitted to recover compensation for economic harm.²⁷ If the pollution originated from a coastal facility, it is likely that federal law would not bar common law state remedies which would permit affected residents to recover economic harm.²⁸ That is not so if the chemical spill originates from a vessel in international waters.²⁹ In such a situation, only claims recognized under federal admiralty law would be permitted to supplement a statutory recovery.³⁰ A land based

25. See, e.g., Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-75 (1988).

26. Discharges from vessels in international waters are covered either by federal statutes such as CERCLA or by general maritime law. Even where a complainant elects to abandon its federal statutory recovery, waive federal jurisdiction and proceed in a purely state forum, the plaintiff is limited to those remedies authorized by federal maritime law. See Stoltz, *Pleasure Boating and Admiralty: Erie at Sea*, 51 CAL. L. REV. 661, 664 (1963); see also *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 864 (1986); *In re Oswego Barge Corp.*, 664 F.2d 327, 334 (2d Cir. 1981). Such remedies do not generally include recovery for economic harm. *Benefiel v. Exxon Corp.*, No. C.A. 90-2184, 1990 U.S. Dist. LEXIS 13251; 1991 AMC 749 (C.D. Ca. 1990) (order dated July 27, 1990). Land based discharges are controlled by a patchwork of regulation both state and federal. However, economic harm is typically recovered, if at all, under state tort theories, which may or may not authorize such recovery. This area cries out for uniformity at the state level due to the fact that land based discharges may ignore political borders as easily as marine discharges.

27. See *Benefiel*, 1990 U.S. Dist. LEXIS 13251, at *1.

28. A coastal discharge from a land-based facility would lack a maritime nexus sufficient to invoke federal admiralty jurisdiction. See *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 253 (1972) ("Determination of the question whether a tort is 'maritime' and thus within the admiralty jurisdiction of the federal courts has traditionally depended upon the locality of the wrong. If the wrong occurred on navigable waters, the action is within admiralty jurisdiction; if the wrong occurred on land, it is not.") (emphasis supplied). While federal maritime law may not permit recovery in tort for economic harm, many states do. See, e.g., *Peoples Express Airlines, Inc. v. Consolidated Rail Corporation*, 495 A.2d 107, 118 (N.J. 1985).

29. See *Benefiel*, 1990 U.S. Dist. LEXIS 13251, at *1.

30. See *id.* The problem only exists because there is a gap in federal environmental statutes which do not generally address the recovery of economic harm. When the United States Congress addressed this problem in the context of oil pollution, it decided to include authorization for economic recovery directly in the statute. See the Oil Pollution Act of 1990, 33 U.S.C. §§ 2701,

discharge may likewise be difficult to be compensated for because of gaps in the state and federal rubric of environmental regulation.

One needs only look to the grounding of the M/V Exxon Valdez or any number of environmental disasters since the Valdez accident to understand the degree of damage that a hazardous cargo can wreak on the environment and surrounding communities.³¹ Valdez also teaches us the degree to which a community's economic health is tied directly to the environment.³² The economy and the environment suffered equally devastating blows in the Prince William Sound catastrophe.³³ The spill was so large and the damage so severe that Congress was moved by the national public outcry to deal with both the economic and environmental problems suffered in the wake of the Exxon Valdez supertanker.³⁴ After the Valdez accident, it became abundantly clear that the hodgepodge of environmental laws and regulations dealing with the transport of oil were insufficient to insure the level of coordinated effort needed to avert such disasters.³⁵ It was also apparent that these same laws failed to adequately compensate those economically impacted by such spills.³⁶

Compensation for the Valdez spill, which originated from a tanker traversing navigable waters, was governed by federal environmental and maritime law.³⁷ Under maritime law, recovery in tort for economic damages is generally unavailable.³⁸ Only a small class of plaintiffs as defined by the United States Supreme Court in the *Robins Dry Dock* decision and its progeny³⁹ are permitted economic recovery in tort. The *Robins Dry Dock* line of cases premise their bright line rule upon the fiction that fishermen and primary fish handlers draw their

2702(b)(2)(E) (Supp. 1995). Such a provision solves the admiralty/state law dilemma and is the solution this author recommends in Superfund reauthorization.

31. See, e.g., *Oil Spill Response*, *supra* note 20, at 2.

32. *Id.*

33. *Id.*

34. See J. Orr, *House-Senate Panel Approves Bill to Help Prevent, Clean Up Oil Spills*, THE STAR-LEDGER, July 27, 1990, at 11.

35. Because of the petroleum product exclusion in the Superfund law, the effective response coordination mandated by CERCLA was unavailable to victims of oil spills. See 42 U.S.C.A. § 9601(14). Thus, all of the lessons learned in the Superfund program and the advantages present in Superfund cleanups were unavailable for victims of oil discharges.

36. See Straub, *Is Full Compensation Possible for the Damages Resulting From the Exxon Valdez Spill?* ENVIRONMENTAL LAW REPORTER 38, 48 (August, 1989).

37. See *Benefiel*, 1990 U.S. Dist. LEXIS 13251, at *1.

38. *Id.*

39. *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927); *State of Louisiana ex rel Guste v. MIV Testbank*, 752 F.2d 1019, 1023 (5th Cir. 1985) (en banc).

income directly from the local fishing grounds⁴⁰ and somehow are affected in a way that no other victim is. Only those who are thus “impacted” directly by the spill should be entitled to recover economic losses.⁴¹ Valdez and subsequent spills show that such reasoning and line drawing is irrational. As the Exxon Valdez sat grounded in the mouth of Prince William Sound, its escaping cargo strangled not only the fishing industries but *every* business in the Sound. Recovery can not be justified for a small privileged class of spill victims while businesses such as tourism, equally dependent on the natural resources and environment and equally devastated by a catastrophe, are left uncompensated.⁴²

The same rationale applies to land based discharges as well, and Congress included such land based spills when it addressed the problem in the Oil Pollution Act (OPA).⁴³ Still, with regard to hazardous material other than oil waste, economic harm recovery governed by inconsistent state laws also creates a paradox where recovery of economic harm is barred by one state and yet permitted by its neighbor. Even where a land based spill devastates an entire watershed, residents are treated differently under various state laws even though they have suffered identical harm. Catastrophic hazardous material spills rarely respect political borders. Yet an inconsistent patchwork of state law assures that complete compensation is not available to all of the victims of a catastrophic land based spill and creates a windfall for the polluter who would otherwise be required to compensate all of its victims.

Congress responded to the problem of economic devastation by oil spills by passing OPA.⁴⁴ OPA drew its legislative skeleton from the Superfund Act or CERCLA.⁴⁵ It adopted the fund concept and much of the procedural framework of the Superfund law.⁴⁶ However, Congress

40. Thus, the ocean’s natural resources.

41. See *Benefiel*, U.S. Dist. LEXIS 13251, at *1; see also A. Rodriguez & P. Jaffe, *The Oil Pollution Act of 1990*, 15 TUL. MAR. L.J. 1, 14-15 (Fall 1990).

42. Most of the residents of Prince William Sound may eventually recover completely for their economic losses in spite of federal maritime law. *Straub*, *supra* note 36, at 49. A federal statute, the Trans-Alaska Pipeline Act, 43 U.S.C. §§ 1651, 1653 (1988) [hereinafter TAPA], provides compensation for economic losses sustained by non-*Robins Dry Dock* plaintiffs. However, this protection is not available to residents of coastal communities outside Alaska. See *Straub*, *supra* note 36, at 39.

43. 33 U.S.C. § 2701-61 (Supp. 1995).

44. *Id.*

45. Compare CERCLA, 42 U.S.C. § 9601-57 (1988) with OPA 33 U.S.C. § 2701-61 (Supp. 1995).

46. See, e.g., OPA, 33 U.S.C. § 2712.

added an innovation authorizing the recovery of economic damages, effectively overruling the *Robins Dry Dock* decision and a host of state laws when the economic losses are related to an oil spill.⁴⁷ The problem has yet to be addressed for spills of other hazardous materials.

The same reasoning that compelled Congress to authorize economic recovery under OPA now compels CERCLA's amendment to include a similar provision to cover spills of all hazardous materials. To fail to amend CERCLA would lead to the anomalous result of permitting citizens to recover economic losses when they are victims of an oil spill but denying those same residents recovery when they are faced with discharges of more lethal and devastating chemicals.⁴⁸ Moreover, the failure to so amend CERCLA would ignore the compelling problem addressed by OPA and confirm that residents of neighboring states are granted or denied rights with no rationale other than fortuitous geographic location.

With the ascendancy of the Republican Congress, Superfund is likely to come under fierce attack. Instead of expanding Superfund as is logically indicated by the practical problems faced by economic victims of pollution, the statute is likely to be restricted instead.

If the principal complaint with Superfund has been its expense and difficulty to administer,⁴⁹ Congress' failure to amend Superfund as suggested will actually exacerbate the problems, making Superfund litigation more expensive and inefficient.

Superfund cost recovery actions are rarely litigated alone. Typically, a PRP⁵⁰ defendant conducts extensive third-party practice and seeks contribution from other PRPs under a number of legal theories, including state law claims. As a result, CERCLA litigation, which would

47. *Id.* § 2702(b)(2)(E).

48. The government's own report recognizes the greater danger posed by toxic chemicals.

[O]il spills are not the worst type of pollution with which Federal and State authorities have to deal. In terms of threats to human health and persistence in the environment, spills of hazardous chemicals or radioactive wastes can be far larger problems, and accidents involving dangerous materials can cause significant loss of life.

Oil Spill Response, *supra* note 20, at 2.

49. See, e.g., *Brower Says She'll Try Agency Fixes Before Making Legislative Recommendations*, 7 TOX. L. REP. 1506 (May 19, 1993); see also *Program Management by EPA Must Improve For Funding To Continue, Panel Chairman Says*, 7 TOX. L. REP. 115 (June 24, 1992).

50. Potentially Responsible Party.

require little evidence of liability because of its strict liability scheme, is drawn out, while the liability aspect of the state law claims are litigated.⁵¹ Such a result was probably not intended by Congress who prepared an otherwise comprehensive environmental regulatory scheme.

The purpose of this article is to suggest that during the upcoming Superfund reauthorization debate,⁵² Congress will introduce and hopefully enact into CERCLA a companion provision to OPA's economic recovery provision.⁵³ The recovery of economic damages should be directly authorized under CERCLA and should not depend on pendent state laws or federal statutes that have limited application or geographic reach. Environmental disasters do not necessarily follow political divisions or jurisdictional boundaries. The practical effect of including economic recovery in the Superfund law will be to ensure adequate compensation for affected communities without further complicating already complex Superfund litigation.⁵⁴ In fact, the proposed legislative amendment could actually enhance the Superfund law and help to simplify related litigation by obviating the need for pendent state law claims to recover economic losses. With the implementation of such a provision, all of the damage associated with an environmental catastrophe can be addressed in one proceeding applying a single federal statute and is sure to greatly streamline the process. The savings in judicial resources and litigation costs alone will aid the stated goal of reforming Superfund to make it more cost effective.

51. Few judges would squander their scarce judicial resources by allowing defendants found liable under CERCLA (often a subject for summary judgment) to proceed immediately to an allocation/damages portion of trial until all state law claims have been adjudicated as well and can be joined to the same allocation/damages phase as the CERCLA claims. Thus, the state law claims are a hindrance, slowing down the Superfund litigation and greatly complicating the process.

52. Congress is currently debating sweeping changes to the Superfund laws. *See, e.g.*, Congress Considers Plans to Reform Superfund Liability, NAT'L L.J. at p. 17, col. 2 (November 22, 1993).

53. *See* OPA, 33 U.S.C. § 2702(b)(2)(E).

54. In land-based discharges of hazardous chemicals, pendant state law claims for economic harm can be joined to CERCLA claims and tried in the same proceeding. *See, e.g.*, Arawana Mills Co. v. United Technologies Corp., 795 F. Supp. 1238, 1249 (D. Conn. 1992). However, state law is far from uniform on this issue.