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CERCLA at 25: A Retrospective, Introspective, and Prospective Look at the Comprehensive Environmental Response, Compensation and Liability Act on Its 25th Anniversary

Superfund: It's No Longer Super and It Isn't Much of a Fund*

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* *Superfund Program: Review of the EPA Inspector General's Report, Hearing Before the Subcomm. on Superfund, Toxics, Risk & Waste Mgmt. of the Comm. on Env't & Pub. Works, United States Senate*, 107th Cong. 17 (2002) [hereinafter *Superfund Hearing*] (Statement of Senator Robert Torricelli).

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> "The argument that the federal taxpayers and the chemical companies are equally responsible for cleaning up a mess that was created by decades of recklessness by the industry is unreasonable and unfair."[1]

I. INTRODUCTION

One in four Americans live near a toxic waste site.[2] These sites pose a significant risk to the population at large. Studies conducted by the Agency for Toxic Substances and Disease Registry (ATSDR) demonstrate that a variety of health problems are associated with these toxic sites, including but not limited to: birth defects, reduction in birth weight, lung and respiratory diseases, changes in neurobehavioral function, infertility, and several kinds of cancer.[3] Thus, it is imperative that programs such as the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Act)—that provide for the cleanup of abandoned, hazardous waste sites—be continued.[4]

The taxing authority of the Act expired on December 31, 1995, and the Trust (also known as Superfund)—the bedrock of support for the program's cleanups, which is generated from corporate taxes levied to

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1. Representative Albert Gore, Jr., H.R. REP. NO. 96-1016, pt. 1, at 63 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6141 (Additional Views for "Superfund" Report).

2. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-03-850, SUPERFUND PROGRAM: CURRENT STATUS AND FISCAL CHALLENGES 1 (2003), *available at* http://www.gao.gov/new.items/d03850.pdf.

3. *Superfund Program: Review of the EPA Inspector General's Report, Hearing Before the Subcomm. on Environment and Public Works*, 107th Cong. 1 (2002) (statement of Senator Boxer); *see also* Maureen Y. Lichtveld & Barry L. Johnson, *Public Health Implications of Hazardous Waste Sites in the United States*, Hazardous Waste Conference 1993, *available at* http://www.atsdr.cdc.gov/cxlc.html.

4. CERCLA §§ 101-405, 42 U.S.C. §§ 9601-9675 (2000).

fund the Act—ran out of money on September 30, 2003.[5] This recent development presents a number of problems for the program. First and foremost, a decrease in funding prohibits the Environmental Protection Agency (EPA) from meeting the goals of the Act—namely, the speedy cleanup of sites that pose a threat to human health and the environment. Second, the lack of funding to conduct cleanups at various sites removes a source of leverage from the EPA when it deals with recalcitrant potentially responsible parties (PRPs).[6] A host of penalties that could be assessed if cleanup is conducted by the EPA are no longer available—and at best, the EPA is forced to negotiate or encourage action on the part of PRPs.[7] Finally, the "polluter pays" principle—long the guiding theory of the Act—has been undermined by a paradigmatic shift of responsibility from certain industries to society at large.[8] Orphan sites—those sites where no PRP can be identified or where the PRP is bankrupt—are now the responsibility of the American taxpayer, where previously the costs of cleanups were provided by a tax on chemical and oil related industries.[9]

The purpose of this Article is to provide a cogent overview of the program from its inception to the present and to encapsulate the issues associated with the failure to reauthorize the Act's taxing authority.

This Article is divided into eight parts. Part II provides a brief history and background of the Act and describes the problems caused by abandoned hazardous waste sites and the solution provided through the enactment of CERCLA. Parts III through VII present a brief history of the administration of the Act through three presidents and discuss the successes and/or failures of each in meeting the goals and aims of the Act. Part VIII outlines potential concerns associated with the bankruptcy of the Trust and the threat this poses to the public health.

II. CERCLA: HISTORY AND BACKGROUND

A. Love Canal

The impetus for the passage of CERCLA was the discovery that a small residential community in Niagara Falls, New York had been built

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5. U.S PIRG Educ. Fund & Sierra Club, *The Truth About Toxic Waste Clean-ups: How EPA Is Misleading the Public About the Superfund Program* 9 (Feb. 2004), *available at* http://www.sierraclub.org/toxics/factsheets/cleanups.pdf; *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 2, at 23.

6. John J. Fialka, *Money Shortage Threatens Superfund*, WALL ST. J., Sept. 7, 2004, at A2.

7. *See id.*; *see also* discussion *infra* Part II.

8. *See* Mark Haggerty & Stephanie A. Welcomer, *Superfund: The Ascendance of Enabling Myths*, 37 J. ECON. ISSUES 451 (2003).

9. *See id.*

atop a chemical waste site.[10] Indeed, the community known as Love Canal was virtually contaminated—its water, air, and soil replete with toxic waste.[11] For a ten-year period commencing in the 1940s, the original site had been used to dispose of all manner of waste—solvents, caustics, and synthetic resins placed in barrels and then deposited in the soil or buried as liquid sludge.[12] Residents recalled acrid smells from the site, numerous fires, and, following rains or heavy snows, thick, black liquid seeping into homes.[13]

In the 1970s, complaints by residents led to a number of studies by state and federal authorities, which suggested that the community was at an increased risk of harm.[14] Following protracted negotiations by state and federal officials, and amid lobbying by an organized community, a state of emergency was ultimately declared, the entire community evacuated, and their properties purchased by the state.[15]

During the events of Love Canal, very little was known of the existence of other unregulated hazardous waste sites and the potential public health threat posed.[16] However, the discovery of other abandoned sites—and the realization that there was no mechanism to address future Love Canals—prompted federal action.[17] Unfortunately, as authorities

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10. *See* ADELINE GORDON LEVINE, LOVE CANAL: SCIENCE, POLITICS, AND PEOPLE 15-21 (1982). For a more comprehensive recitation of the events surrounding Love Canal, reference the articles and presentations published in the Spring 2001 issue of the *Buffalo Environmental Law Journal*, commemorating the twentieth anniversary of Love Canal. 8 BUFF. ENVTL. L.J. 173-329 (2001)

11. *See* LEVINE, *supra* note 10, at 16-21.

12. *Id.* at 10.

13. *Id.* at 10-11, 14-15.

14. *See id.* at 132-33, 138-40.

15. *See id.* at 152, 175-207, 213-14; *see also* Robert Emmet Hernan, *A State's Right to Recover Punitive Damages in a Public Nuisance Action: The Love Canal Case Study*, 1 TOURO ENVTL. L.J. 45, 54 (1994).

16. Sidney M. Wolf, *Hazardous Waste Trials and Tribulations*, 13 ENVTL. L. 367, 407-08 (1983).

17. *See generally* H.R. REP. NO. 96-1016, pt. 1, at 18-20 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6120-21. The report documented the "common characteristics of dump sites" and the "unsafe design and disposal methods." *Id.* For instance, the report noted that sites in New York, California, Tennessee, Michigan, and New Jersey contained large quantities of hazardous waste, disposed or placed in an unsafe manner, with the potential to threaten groundwater resources. *Id.* However, it was duly observed by the Committee that while there was a regulatory mechanism for the disposal of hazardous waste, i.e., the Resource Conservation and Recovery Act (RCRA), it did not address "the vast problems associated with abandoned and inactive waste disposal sites." *Id.* at 6125.

were to learn, Love Canal was not an isolated incident. Rather, it was typical of a "pervasive national problem."[18]

In 1979, the EPA estimated that there were some "30,000 to 50,000 [inactive and uncontrolled hazardous waste sites] . . . [with] between 1,200-2,000 present[ing] a serious risk to public health."[19] When Congress considered several bills to address this growing concern, there was no question of support for enacting legislation to combat problems associated with "inactive hazardous waste sites."[20] Indeed, for a remarkably expansive law with far reaching consequences, there was very little debate.[21] What debate there was focused extensively on funding the Act.

B. Who and How Much

Initially, the EPA estimated costs of $22 billion to $44 billion for future cleanup efforts.[22] However, the Chemical Manufacturers Association challenged this number, estimating that cleanup costs would not exceed $350 million.[23] Then, of course, the question remained who

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18. EPA, OIL & SPECIAL MATERIALS CONTROL DIV., 430/9/80-004, DAMAGES AND THREATS CAUSED BY HAZARDOUS MATERIAL SITES at xi (Jan. 1980); *see also* Cong. Q., Inc., *Congress Clears 'Superfund' Legislation*, *in* 36 CONG. Q. ALMANAC 584, 585-86 (1980).

19. H.R. REP. NO. 96-1016, pt. 1, at 18 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6120-21.

20. *Id.* at 17-18. *See generally* Frank P. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation, Liability (Superfund) Act of 1980*, 8 COLUM. J. ENVTL. L. 1 (1982). The article provides an excellent overview of the rather short and hurried deliberations of the 96th Congress in passing CERCLA, as provided in its legislative history. As noted by the author:

> The legislative history of a statute is always important in gathering the legislative intent for its implementation. In the instance of the 'Superfund' legislation, a hastily assembled bill and a fragmented legislative history add to the usual difficulty of discerning the meaning of the law. The legislation that did pass, with all of its inadequacies, was the best that could be done at the time.

Grad, *supra*, at 2.

21. Grad, *supra* note 20, at 1; *see, e.g.*, United States v. Md. Bank & Trust Co., 632 F. Supp. 573, 578 (D. Md. 1986) (referring to CERCLA as "a hastily conceived compromise statute"); United States v. Northeastern Pharm. & Chem. Co., 579 F. Supp. 823, 838 n.15 (W.D. Mo. 1984) ("CERCLA is in fact a hastily drawn piece of compromise legislation, marred by vague terminology and deleted provisions."); State *ex rel.* Brown v. Georgeoff, 562 F. Supp. 1300, 1310 n.12 (D.C. Ohio 1983). The *Georgeoff* court noted that "CERCLA was rushed through a lame duck session of Congress, and therefore, might not have received adequate drafting. In fact, during the final House debates, a number of Congressmen identified over forty drafting errors on the bill which became CERCLA." *Georgeoff*, 562 F. Supp. at 1310 n.12; *see also* United States v. Davis, 882 F. Supp. 1217, 1220 n.1 (D.R.I. 1995) (referring to CERCLA as "a hastily-drawn statute quickly passed through a lame-duck Congressional session").

22. Cong. Q., Inc., *supra* note 18, at 586.

23. *Id.* The Chemical Manufacturers Association figures were based on estimates that there were no more than 4,200 potentially hazardous dumpsites, with 174 potentially abandoned. *Id.* This number was far less than the 30,000 to 50,000 proffered by the EPA. *Id.*

would ultimately foot the bill for future cleanups. Environmentalists argued that the "polluter should pay for most of the cleanup because he benefited most from cheap disposal."[24] Industry, specifically the chemical industry, maintained that society as a whole had benefited from poor disposal methods "in the form of cheaper products"[25] and thus, society was ultimately responsible for cleanup costs.[26] Additionally, industry strenuously opposed "across-the-board" fees on industry in general, as it would "force companies that disposed of wastes properly to pay for cleanup by careless firms."[27] Congress duly considered these issues when deliberating the "fund" aspects of the Act.

In 1979, President Carter submitted to Congress a $1.6 billion legislative proposal to address the cleanup of releases from hazardous waste sites.[28] A year later, the House proposed a bill, comprised of two parts—House Bill 7020 and House Bill 85—that would have created a fund of almost $2 billion to remediate oil and chemical releases and spills.[29] The Senate Environment Committee's bill—Senate Bill 1480—exceeded that of the President and the House by $2.5 billion.[30] It was expected that more than $4 billion would be raised over a period of six years, with almost 90% of the funds coming from industry and the remaining coming from American taxpayers.[31] However, following numerous amendments, deletions, compromises, and threats to derail any

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24. *Id.* at 587.
25. *Id.*
26. *Id.*
27. *Id.*
28. Cong. Q., Inc., *Presidential Messages: President Carter's Second Session Agenda*, *in* 36 CONG. Q. ALMANAC 1-E, 21-E (1980).
29. Cong. Q., Inc., *supra* note 18, at 587. Due to restrictions on committee jurisdictions, the House's Superfund "package" was comprised of two parts: HR 7020—cleanup of abandoned chemical dumps and HR 85—cleanup of oil and chemicals spilled into navigable waterways. *Id.*
30. *Id.* at 591.
31. Grad, *supra* note 20, at 12. It had been argued that

> [f]inancing the Fund primarily from fees paid by industry is the most equitable and rational method of broadly spreading the costs of past, present, and future releases of hazardous substances among all those industrial sectors and consumers who benefit from such substances. . . . A largely appropriated fund establishes a precedent adverse to the public interest—it tells polluters that the longer a problem takes to appear, the less responsible they are for paying for the consequences of their actions, regardless of the severity of the impacts. Too often, the general taxpayer is asked to pick up the bill for problems he did not create; when costs can be more appropriately allocated to specific economic sectors and consumers, such costs should not be added to the public debt.

Id. at 12 (quoting S. REP. NO. 848, 96th Cong., 2d Sess., at 72 (1980)).

action on a bill, a substitute bill proposing $1.6 billion over five years was voted on and accepted by the Senate.[32]

The Senate then considered House Bill 7020.[33] All of the language after the enacting clause was stricken and language from the substitute Senate Bill 1480 was inserted.[34] House Bill 7020 was approved in this form and forwarded to the House with a letter from its Senate sponsors, warning that any attempts to return the bill to the Senate would result in its demise.[35]

Numerous legislators filed objections to the Senate amended bill, ranging from concerns regarding the lack of provisions dealing with midnight dumpers to fears that the bill would "create a huge pot of money which is either wasted or permits [the] EPA rather than Congress to use the money as it sees fit."[36]

In the end, despite small factions of opposition, debate on the bill was brought to a close and the bill was finally approved.[37] It was formally presented to President Carter on December 9, 1980 and he signed it on December 11, 1980.[38]

C. Liability, PRPs, and the Trust Fund

Under the newly enacted CERCLA, cleanups were essentially funded by one of two sources: a liability mechanism or the Act's taxing scheme.[39] Unlike other laws, CERCLA established broad liability for the

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32. *Id.* at 19-29. At the time, Senator Jennings Randolph (D-W.Va), Chairman of the Committee on Environment and Public Works declared: "I am a realist. At this time and in this place, S. 1480 cannot be enacted. But this final compromise can." Cong. Q., Inc., *supra* note 18, at 592. Senator Jesse Helms (R-NC) reportedly said that the Senate had "gone a long way toward making a bad bill better" by reducing the fund from $4.1 billion to $1.6 billion. *Id.* However, he still voted against the bill, claiming it had "too many bugs." *Id.* In the end, the Senate fixed the contribution to the Trust from industry taxes at 87.5% with the remaining 12.5% to come from general tax revenue. Grad, *supra* note 20, at 30.

33. Grad, *supra* note 20, at 29.

34. *Id.*

35. Cong. Q., Inc., *supra* note 18, at 593.

36. H.R. REP. NO. 96-1016, pt. 1, at 67 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6143 (quoting Congressman James T. Broyhill (R-NC), who voiced strenuous objections to the bill in its entirety). Indeed, Congressman Broyhill argued that the proposed bill would impose an "inflationary fee" on industry and that the fee would be "used to fund cleanup and abatement related to orphan and inactive dump sites raises very substantial constitutional questions under the due process clause of the Fifth Amendment." *Id.* at 6144-45.

37. *See* Grad, *supra* note 20, at 34.

38. *Id.* at 35.

39. Richard L. Revesz & Richard B. Stewart, *The Superfund Debate (1995)*, *in* FOUNDATIONS OF ENVIRONMENTAL LAW & POLICY 249, 279 (Richard L. Revesz ed., 1997); *see also* James J. Florio, *Congress as Reluctant Regulator: Hazardous Waste Policy in the 1980's*, 3 YALE J. ON REG. 351, 355-57 (1986) (discussing the two major components of the Act: a $1.6

cleanup of hazardous waste sites. The following classes of individuals or PRPs can be held liable for cleanup-related costs:[40]

1. Current owners or operators of a facility or vessel where hazardous substances were disposed;[41]
2. Previous owners or operators of a facility or vessel where hazardous substances were disposed;[42]
3. Transporters of hazardous substances for disposal at a site/facility that they selected;[43] and
4. Individuals that generated the hazardous substances ultimately disposed at the site/facility in question.[44]

The standard of liability is strict liability and all classes of PRPs may be held jointly and severally liable.[45] Thus, the government need not prove negligence, only that a party had some involvement at the site. Further, regardless of the degree of involvement, any party can be held liable for the entire cost of cleanup.[46] Fortunately, the Act's joint and several liability is coupled with the right to contribution.[47] Prior to the passage of the Superfund Amendment Reauthorization Act (SARA)—which codified the right to contribution—courts recognized this right as implied.[48]

While the majority of criticism directed at CERCLA pertains to the joint and several liability issue, as a practical matter, this mechanism eliminates the need for plaintiffs or the EPA to waste time and money in determining share and/or responsibility.[49] Indeed, it acts as an incentive for PRPs to fully and thoroughly investigate the potential responsibility of other parties—thus creating a larger pool of PRPs and significantly reducing the individual share of costs.

Defenses under the Act are fairly limited. Under section 107(b), a responsible party can avoid CERCLA liability only if the release of a

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billion trust fund and a liability scheme that provides for the cleanup of contaminated and abandoned waste sites).

40. CERCLA § 107(a), 42 U.S.C. § 9607(a) (2000).

41. CERCLA § 107(a)(1), 42 U.S.C. § 9607(a)(1).

42. CERCLA § 107(a)(2), 42 U.S.C. § 9607(a)(2).

43. CERCLA § 107(a)(4) 42 U.S.C. § 9607(a)(4).

44. CERCLA § 107(a)(3), 42 U.S.C. § 9607(a)(3).

45. *See* United States v. Chem-Dyne Corp., 572 F. Supp. 802 (S.D. Ohio 1983).

46. *See* United States v. Alcan Aluminum Corp., 990 F.2d 711 (2nd Cir. 1993).

47. CERCLA § 113(f)(1), 42 U.S.C. § 9613(f)(1). The right of contribution allows a party to recover costs associated with the cleanup from "any other person who is liable or potentially liable" under section 107. CERCLA § 107, 42 U.S.C. § 9607.

48. *See* Wehner v. Syntex Agribusiness, 616 F. Supp. 27, 31 (E.D. Mo. 1985); City of Phila. v. Stepan Chem. Co., 544 F. Supp. 1135, 1142 (E.D. Pa. 1982).

49. *See* Lynda J. Oswald, *New Directions in Joint and Several Liability Under CERCLA*, 28 U.C. DAVIS L. REV. 299, 302-04 (1995).

hazardous substances was caused solely by an act of God;[50] an act of war;[51] an act or omission of a third party (other than the defendant's agent or employee) not occurring in connection with a "contractual relationship" if the defendant exercised due care with respect to the hazardous substance and took precautions against foreseeable acts and omissions of a third party;[52] and/or a combination of any of the above-referenced reasons.[53]

Unfortunately for the PRPs, the first defense, "act of God," is narrowly defined in CERCLA as an "unanticipated grave natural disaster or other natural phenomenon of an exceptional, inevitable, and irresistible character, the effects of which could not have been prevented or avoided by the exercise of due care or foresight."[54] Further, neither the defense of "act of war" nor "act of God" is likely to prevent liability from attaching, if it can be demonstrated that the presence of hazardous substances is due in part to the actions of a PRP.[55]

More important and no less controversial, CERCLA applies retroactively, establishing liability prior to the existence of the Act.[56] Thus, a PRP could not evade liability by arguing that the activities in question complied with existing practices prior to the passage of the Act.

Pursuant to section 106 of the Act, the EPA may issue an administrative order or secure a court order to force PRPs to undertake cleanup measures necessary to abate any harm that may present "an imminent and substantial endangerment to the public health or welfare or the environment."[57] If the PRP fails to comply with the administrative

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50. CERCLA § 107(b)(1), 42 U.S.C. § 9607(b)(1).

51. CERCLA 107(b)(2), 42 U.S.C. § 9607(b)(2).

52. CERCLA § 107(b)(3), 42 U.S.C. § 9607(b)(3).

53. CERCLA § 107(b)(4), 42 U.S.C. § 9607(b)(4).

54. CERCLA § 101(1), 42 U.S.C. § 9601(1).

55. *See* Debra Baker Norris, *CERCLA and Real Estate Transactions: A Game of Chance*, HOUS. LAW., Mar./Apr. 1988, at 20.

56. *See* United States v. Olin Corp., 107 F.3d 1506, 1511-12 (11th Cir. 1997); United States v. Monsanto Co., 858 F.2d 160, 174 (4th Cir. 1988); Levin Metals Corp. v. Parr-Richmond Terminal Co., 817 F.2d 1448, 1450-51 (9th Cir. 1987); United States v. Northeastern Pharm. & Chem. Co., 579 F. Supp. 823, 839 (W.D. Mo. 1984); State *ex rel.* Brown v. Georgeoff, 562 F. Supp. 1300, 1302-03 (D.C. Ohio 1983). Interestingly though, while a majority of courts have recognized that there is no explicit statutory reference to or statement of retroactivity in the Act, they have continued to apply the provisions of CERCLA retroactively. *See* Karen S. Danahy, Comment, *CERCLA Retroactive Liability in the Aftermath of* Eastern Enterprises v. Apfal, 48 BUFF. L. REV. 509, 530-33 (2000) (providing a succinct overview of the history of the Supreme Court's "interpretation" of CERCLA's retroactive applicability).

57. CERCLA § 106(a), 42 U.S.C. § 9606(a) (2000). The first step to "cleanup" is being placed on the National Priority List (NPL). In deciding whether to include a site on the NPL, the EPA "uses a hazard ranking system to review available data on the site and determine whether its health or environmental risks are sufficient to qualify it for a Superfund cleanup." U.S. GOV'T

order, the Act allows the EPA to seek civil penalties of $25,000 per day[58] and treble damages for cleanup costs incurred if the PRP failed to take proper action pursuant to an administrative order.[59] In the alternative, pursuant to section 104, the EPA may undertake emergency cleanup measures, consistent with the national contingency plan, at a site it determines "may present an imminent and substantial danger to public health or welfare."[60] The EPA can then sue to recover costs and damages for emergency cleanup, removal, and containment actions carried out under section 104.[61] Recoverable costs include: all costs of removal or remedial action incurred,[62] health assessment or health effects studies,[63] indirect costs,[64] and interest.[65]

Funding for any emergency measures undertaken by the EPA was provided through the "Superfund" established by the Act. Essentially, CERCLA created three taxes to finance the trust: (1) an excise tax on crude oil of $0.013 per barrel, (2) an excise tax on primary petrochemicals of $1.18 per ton, and (3) an excise tax on certain inorganic substances at $0.31 per ton.[66]

In pursuing site cleanup, the EPA, or the responsible party assisted by the EPA, conducts an investigation of the risks posed by the site and the potential remedies to address those risks.[67] A preferred remedy is identified and plans are developed for the remedy.[68] Construction work is commenced as outlined in the development plan.[69] Once construction has concluded, and the EPA has inspected the site, it is then considered "construction complete."[70]

ACCOUNTABILITY OFFICE, GAO/RCED-99-245, SUPERFUND: HALF THE SITES HAVE ALL CLEANUP REMEDIES IN PLACE OR COMPLETED 2 (1999), *available at* http://www.gao.gov/archive/1999/rced-99-245/rc99245.pdf.

58. CERCLA § 106(b)(1), 42 U.S.C. § 9606(b)(1).

59. CERCLA § 107(c)(3), 42 U.S.C. § 9607(c)(3).

60. CERCLA § 104(a)(1), 42 U.S.C. § 9604(a)(1).

61. CERCLA § 107(c)(3), 42 U.S.C. § 9607(c)(3).

62. CERCLA § 107(a)(4)(A), 42 U.S.C. § 9607(a)(4)(A).

63. CERCLA § 107(a)(4)(D), 42 U.S.C. § 9607(a)(4)(D).

64. *See, e.g.*, Bruce P. Howard & Kevin E. Solliday, *CERCLA and Similar State Laws: Overview and Current Developments*, *in* 797 THE IMPACT OF ENVIRONMENTAL REGULATIONS ON BUSINESS TRANSACTIONS AND OPERATIONS 39, 55-56 (1992) (discussing the various costs recoverable under CERCLA).

65. CERCLA § 107(a)(4), 42 U.S.C. § 9607(a)(4).

66. Cong. Q., Inc., *supra* note 18, at 590.

67. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/RCED-00-25, SUPERFUND: INFORMATION ON THE PROGRAM'S FUNDING STATUS 4 (1999), *available at* http://www.gao.gov/new.items/rc00025.pdf.

68. *Id.*

69. *Id.*

70. *Id.*

III. EMERGING CONTROVERSY: SUPERFUND AND THE FIRST REAGAN ADMINISTRATION

In the first few years of operation, the program was severely handicapped by a number of scandals. The most notable involved Anne Gorsuch, the first Administrator of the EPA in the Reagan Administration.

Gorsuch represented all too well the conservative ideology of the Republican Party and the incoming Reagan Administration.[71] Many of the party stalwarts believed that the EPA should have been dissolved and "that the statutes that it implemented were senseless, and that the federal government had no business in environmental management." [72] Consequently, it was not farfetched for some to believe that there was a "deliberate plan" by Gorsuch and other Reagan appointees to "paralyze if not totally dismantle the enforcement program."[73]

On his first day in office, President Reagan instituted a hiring freeze for all federal employees throughout the Executive Branch.[74] This action prevented the EPA from replacing any mid-level or senior staff that resigned from the agency.[75]

Enforcement efforts of the EPA were further hampered by a series of reorganizations.[76] The Office of Enforcement and all its regional offices were dismantled and technical staff, tasks, and general responsibilities were redistributed to various media departments.[77] A new Office of Legal and Enforcement Counsel was created and all legal enforcement activities were coordinated from this division.[78] However, technical staff who had originally been housed with the legal staff was to remain segregated among the various media offices.[79] This pattern of segregating legal enforcement staff from technical staff was also duplicated throughout the regional offices.[80]

With a reduction in staff, funding, and a series of personnel reorganizations, it is little wonder that enforcement initiatives at the EPA

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71. *See* Joel A. Mintz, *Agencies, Congress, and Regulatory Enforcement: A Review of EPA's Hazardous Waste Enforcement Effort, 1970-1987*, 18 ENVTL. L. 683, 716 (1988). The author quotes one EPA staffer: "It was chaos. We'd move from one crisis to the next. We had no connection with the people setting policy." *Id.* at 716 n.93.

72. *Id.* at 717 (quoting Sheldon Novick, former regional counsel of EPA Region III).

73. *Id.* at 718.

74. *Id.* at 722.

75. *Id.*

76. *Id.* at 720.

77. *Id.*

78. *Id.* at 720-21

79. *Id.*

80. *Id.*

came to a near screeching halt.[81] Under Gorsuch, the EPA employed a nonconfrontational approach to enforcement.[82] The staff was expected to utilize an informal method, encouraging voluntary compliance with the various regulations.[83]

In the area of Superfund, the EPA employed a "strict conservation" approach to the $1.6 billion CERCLA Trust.[84] It was believed that the Superfund Act, and the corporate taxes levied to fund the Trust, would not be renewed after the Act expired on October 1, 1985.[85] Indeed, by the end of 1982, the EPA had only expended $88 million of the $452 million accumulated in the Trust.[86] As a result, a measure intended to ensure speedy, effective action in remediating sites that posed a legitimate threat to human health was instead used to ensure minimal disruption to industry and minimal expenditure of funds.[87]

In early 1982, the House Subcommittee on Investigations and Oversight of the Committee on Public Works and Transportation (Subcommittee) commenced a series of investigations to determine whether the EPA was enforcing federal laws pertaining to hazardous waste as it impacted water resources.[88] Following a number of hearings with citizen groups, state officials, and officials from the United States General Accounting Office (GAO), the Subcommittee concluded that cleanups at various waste sites were not being handled in an expeditious fashion and that the majority of PRPs were not being held liable for their full share of the costs.[89]

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81. *See generally* Wolf, *supra* note 16, at 379-89 (discussing the professional backgrounds of Reagan appointees to the EPA, in particular Anne Gorsuch, Frank Shepard, and Rita Lavelle, and the impact of the various agency reorganizations instituted by Administrator Gorsuch).

82. Mintz, *supra* note 71, at 719.

83. *Id.*

84. *Id.* at 729.

85. *Id.* at 729 (referring to interviews with William Hedeman, Lawrence Kyte, Gene Lucero, and Al Smith). According to the testimony of William Hedeman, Director of the Office of Emergency and Remedial Response, the primary purpose of the "go slow" tactics of the Administration was to ensure that the Act would not be reauthorized. Florio, *supra* note 39, at 363. Director Hedeman stated: "There was a hidden agenda . . . not to set into motion events that would lead to what is referred to as 'Son of Superfund' or the extension of the tax or re-enactment of the law beyond the 1985 cutoff." *Id.* at 363-64.

86. Mintz, *supra* note 71, at 729 n.138 (referencing James P. Lester, *The Process of Hazardous Waste Regulation: Severity, Complexity and Uncertainty*, *in* 71 THE POLITICS OF HAZARDOUS WASTE MANAGEMENT 12 (J. Lester & A. Bowman eds., 1983)).

87. Florio, *supra* note 39, at 363.

88. H.R. REP. NO. 97-968, at 7 (1982). Additionally, the Oversight and Investigations Subcommittee on Energy and Commerce was conducting its own investigations into the enforcement effectiveness of the agency.

89. *Id.* at 7-9.

The Subcommittee forwarded a number of informal requests to the EPA to review files on the administration of CERCLA, in particular, information regarding three sites in Region II.[90] After several rebuffs, the Subcommittee authorized the issuance of subpoenas.[91] The issue came to a head on October 29, 1982, when EPA enforcement staff refused the Subcommittee access to enforcement files on three waste sites.[92]

Immediately, the Subcommittee issued a subpoena to Administrator Gorsuch to appear and produce all documents related to ongoing investigations of Superfund cleanup sites.[93] Administrator Gorsuch refused based on instructions from President Reagan and, as a result, was held in contempt by the Subcommittee.[94] Similarly, a second subcommittee investigating the EPA's enforcement of Superfund issued its own subpoena when its request for information was refused.[95] A compromise some months later allowed members of the Subcommittee to review edited versions of the documents initially requested and unedited versions in closed sessions.[96]

However, "resolution" of the access to information standoff with the Subcommittee did not end Congress's intense scrutiny of the EPA.[97] There were subpoenas still pending from the Subcommittee on Investigations and Oversight of the Committee on Energy and Commerce.[98] Indeed, the focus had now shifted to allegations of misconduct by EPA officials.[99]

On February 7, 1983, amid allegations of perjury to Congress and improper administration of the Trust, President Reagan dismissed Rita Lavelle, the Superfund Administrator.[100] On March 9, 1983, Anne

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90. *Id.* at 11, 13. Region II of the EPA serves New Jersey, New York, Puerto Rico, the U.S. Virgin Islands, and even Tribal Nations. *See* EPA, Region 2 Home Page, *at* http://www.epa.gov/region2/ (last updated Mar. 30, 2005).

91. H.R. REP. NO. 97-968, at 13.

92. *Id.* at 14.

93. Ronald Claveloux, Note, *The Conflict Between Executive Privilege and Congressional Oversight: The Gorsuch Controversy*, 1983 DUKE L.J. 1333, 1333-37; *see also* United States v. House of Representatives of the United States, 556 F. Supp. 150, 151 (D.C. Cir. 1983).

94. Claveloux, *supra* note 93, at 1337.

95. *Id.*

96. *Id.*

97. Mintz, *supra* note 71, at 742.

98. *Id.* at 739-41.

99. Mintz, *supra* note 71, at 741-42.

100. Cass Peterson, *Superfund Manipulated, Probe Finds Panel Seeks White House-EPA Data*, WASH. POST, Aug. 13, 1984, at A17. Ultimately, Ms. Lavelle was tried and convicted of perjury and obstruction of justice in connection with testimony she provided to the Subcommittee. *See* United States v. Lavelle, 751 F.2d 1266 (D.C. Cir. 1985).

Gorsuch resigned from her position as EPA Administrator.[101] During her brief tenure at the EPA, approximately 418 sites of an estimated 14,000 sites nationwide were listed on the National Priorities List (NPL).[102] Additionally, only 5 sites were alleged to have been "cleaned."[103] For instance, at a site in Indiana, where the cleanup costs were estimated to be $23 million, the EPA allowed the PRP to spend only $8 million to remove surface refuse and guaranteed that it would not seek to enforce penalties or compel further remedial measures for waste buried beneath the site.[104]

The program fared somewhat better under Gorsuch's successor, William Ruckelshaus.[105] Ruckelshaus had previously served as EPA Administrator in the Nixon Administration.[106] Ruckelshaus transformed the program from a "public works" effort, financed by the Trust—as promoted by Rita Lavelle—to an "enforcement first" initiative, seeking the maximum amount of cleanup dollars from PRPs.[107]

Unfortunately, while the EPA placed an additional 400 sites on the NPL, by the end of 1985 only 10 had been "cleaned."[108] Thus, after $1.6 billion and five years' work, it appeared that the EPA had "done a pygmy's job on a Superman's labor."[109]

IV. SUPERFUND AMENDMENT AND REAUTHORIZATION ACT OF 1986

On September 30, 1985, taxing authority for the Act expired.[110] EPA Administrator Lee M. Thomas forwarded a letter to various congressional leaders, urging immediate action, as funds for the program had run out and the EPA would be forced to begin furloughing employees and ending contracts.[111] On September 6, 1985, the Senate

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101. Mintz, *supra* note 71, at 743.

102. Editorial Desk, *The Superfund Turned Upside Down*, N.Y. TIMES, Dec. 28, 1982, at A22.

103. *Id.*

104. *Id.*

105. ROBERT T. NAKAMURA & THOMAS W. CHURCH, TAMING REGULATION: SUPERFUND AND THE CHALLENGE OF REGULATORY REFORM 58-59 (2003).

106. *Id.* at 58.

107. *Id.*

108. Editorial Desk, *Mired in the Superfund Swamp*, N.Y. TIMES, Aug. 5, 1985, at A14.

109. *Id.*

110. Cong. Q., Inc., *Reagan Signs 'Superfund' Waste-Cleanup Bill*, *in* 42 CONG. Q. ALMANAC 111 (1986).

111. *Id.* EPA Administrator Lee M. Thomas wrote: "While it will take only a few months to dismantle the program, it will take years and many millions of dollars to rebuild it. We now face a situation, which threatens the very existence of the [S]uperfund program. Now, we have reached the end." *Id.*

approved a $7.5 billion funding bill.[112] Months later, the House followed with its own $10 billion funding bill.[113] President Reagan indicated that both bills were too expensive, and he vowed to veto any bill creating new taxes.[114]

Over a period of six months, Senate and House conferees met to work out differences between the two bills.[115] Despite pressure to meet an April 1 deadline, the conferees were unable to overcome strong disagreements on, among other things, the funding aspects of the bill.[116] In the interim, while discussions continued among the Superfund conferees, two stopgap resolutions were passed reauthorizing the Act and providing funding for continued operations by the EPA.[117] Finally, on October 3, a conference report was filed.[118]

Following fierce lobbying by a number of legislators, including Senate Majority Leader Robert Dole (R-Kan), President Reagan signed SARA into law on October 17, 1986.[119] SARA expanded or altered a number of definitions, established new goals and deadlines, addressed the issue of cleanup standards, and increased penalties for certain civil and criminal violations.[120] More importantly, it added significantly to the

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112. Cass Peterson, *Senate Votes Bigger Superfund, Including New Tax on Goods; Backers Predict Bill Will Survive Veto Threat*, WASH. POST, Sept. 27, 1985, at A2; *see also* Cong. Q., Inc., *supra* note 110, at 111.

113. Peterson, *supra* note 112, at A2.

114. Cong. Q., Inc., *supra* note 110, at 111.

115. *Id.*

116. *Id.* Coincidentally, the legislative history of SARA is far more thorough than its predecessor bill. *See* James Edward Enoch, Jr., *Environmental Liability for Lenders After* United States v. Fleet Factors, Corp.*: Deep Pockets or Deep Problems?*, 48 WASH. & LEE L. REV. 659, 670 (1991).

117. Cong. Q., Inc., *supra* note 110, at 111-12.

118. *Id.* Actually, the conferees had reached an agreement on all issues, except funding, by July 31. They were not able to settle disputes on increased funding or decide which parties would be taxed until October 2—one day before the conference report was filed. *Id.*

119. *Id.* at 113-20. President Reagan supported continued funding of the program, however, he balked at the amount in question. For instance, in 1985, he stated:

> In order to fund this threefold increase, we will ask the Congress to extend for another five years the existing tax imposed on the manufacture of certain chemicals and to enact a fee, which will go into a dedicated trust fund, on the disposal and treatment of hazardous waste. These taxes and fees will raise approximately $1 billion per year over the next five years. I strongly believe that the funds used to pay for the program should be generated entirely through these dedicated sources, not the general Treasury.

President Ronald Reagan, Statement on Proposed Superfund Reauthorization Legislation (Feb. 22, 1985), *at* http://www.reagan.utexas.edu/resource/speeches/1985/22285b.htm.

120. Cong. Q., Inc., *supra* note 110, at 113-19. SARA also specified certain particular cleanup standards for ensuring health. Clearly, Congress intended that EPA pursue permanent cleanups, rather than temporary measures.

tax base from which the Trust derived its funds—increasing it from $1.6 billion to $8.5 billion.[121]

Remarkably, there was an attempt to enact legislation to extend the taxes beyond their expiration date of December 31, 1995.[122] However, while the measure passed in the House, it died in the Senate.[123]

V. SUPERFUND AND THE "FIRST" BUSH ADMINISTRATION

Unfortunately, by the late 1980s, the program had made scant progress. Of the 1200 sites listed by the EPA as the nation's most contaminated, only sixty-four had been "cleaned."[124] Millions of dollars had been expended and there was little to show. The scandal du jour of President George H. W. Bush's Administration had less to do with the EPA and its staff and more to do with private contracting of Superfund activities. Approximately one third of almost $200 million spent on Superfund cleanups went to the "costs of paperwork and coordination efforts" rather than to actual cleanups.[125]

As charged by the Congressional Office of Technology and Assessment (OTA), private contractors had "virtually taken control of the Superfund toxic waste cleanup program, reaping hefty profits for work that is often sloppy and costs too much."[126] Indeed, OTA leveled sharp criticism at the EPA for promoting a network of private consultants and engineers who allegedly gained "considerable influence" over Superfund activities, while remaining outside the purview of official controls and the public scrutiny often applied to government employees.[127] In response, then-EPA Administrator William K. Reilly instituted

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121. *Id.* at 112-13, 119. Under the revised Internal Revenue Code, the following taxes were levied: (a) a $0.147 per barrel excise tax on domestic and exported crude oil or refined products; (b) an excise tax, ranging from $0.22 to $4.87 per ton, on certain hazardous chemicals; (c) an excise tax on imported substances, the manufacturing or production process of which contain one or more of the hazardous chemicals subject to tax for export; and (d) a corporate environmental income tax equal to 0.12% of the amount of modified alternative minimum taxable income above the first $2 million. Steven Felsenthal, Note, *Superfund Reauthorization: Program Funding, Dispute Resolution, Local Control and Tax Incentives*, 7 FORDHAM ENVTL. L.J. 515, 517-18 (1986).

122. Felsenthal, *supra* note 121, at 518.

123. *Id.*

124. Michael Weisskopf, *'Superfund' Spending Inquiries Set; Toxic Waste Cleanup Management Faulted*, WASH. POST, June 20, 1991, at A4.

125. Michael Weisskopf, *Superfund Firms' Role Criticized; Hill Agency Reports Shoddy Cleanup Work Yields Hefty Profits*, WASH. POST, Jan. 30, 1989, at A1.

126. *Id.*

127. *Id.*

substantial reforms at the agency, reducing payments to contractors and increasing contractor scrutiny and accountability.[128]

The taxing authority of the program expired in 1991.[129] However, the program was reauthorized for three years and the taxing authority was extended for an additional four years.[130]

VI. CLINTON, SUPERFUND, AND THE CONTRACT WITH AMERICA

In his 1993 State of the Union address, President William J. Clinton announced that the Superfund program was irretrievably broken.[131] Unfortunately, the leadership of the EPA and both political parties echoed this criticism.[132] Disapproval of the program reached its zenith following the 1994 elections.[133] The Republicans took control of both the House and Senate, and reform of the Superfund program was a tenet of the party's Contract with America.[134]

The Superfund tax expired on December 31, 1995, and in doing so ended the approximately $4 million per day generated for Superfund cleanups.[135] While a significant balance remained in the Trust and cleanups continued unabated, there were legitimate fears that as the funds dwindled, the pace of cleanups would be severely impacted—particularly, as it pertained to orphan sites.[136]

As with previous administrations, the Clinton Administration strongly advocated the reauthorization of the Superfund's taxing authority.[137] The Administration realized that significant reform was needed. Indeed, in its Superfund Legislative Reform Principles, the Administration outlined a number of goals for improving the program

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128. Michael Weisskopf, *EPA Plans to Cut Payments to Superfund Contractors*, WASH. POST, Oct. 3, 1991, at A.25. For example, a Washington Post investigation discovered that some of the charges reimbursed by the EPA, for one Midwestern law firm, retained for Superfund related activities, included: $650 for a Christmas party, $2730 for rental and maintenance of office plants; and an 80% increase for data processing services, resulting in an extra $35,000. Michael Weisskopf, *Administrative Costs Drain "Superfund"; Too Few Toxic Waste Sites Actually Cleaned Up*, WASH. POST, June 19, 1991, at A1.

129. Cong. Q., Inc., *Superfund Reauthorization*, *in* 46 CONG. Q. ALMANAC 5 (1990).

130. *Id.*

131. NAKAMURA & CHURCH, *supra* note 105, at 11.

132. *Id.*

133. *Id.*

134. *Id.*

135. EPA, THE FACTS SPEAK FOR THEMSELVES: A FUNDAMENTALLY DIFFERENT SUPERFUND PROGRAM 6 (Nov. 1996), *available at* http://www.epa.gov/superfund/whatissf/sf_fact4.pdf.

136. *Id.*

137. *Superfund Reform: Cleaning Up America's Toxic Waste Sites*, CONG. DIG., Mar. 1998, at 68.

without eviscerating the core aspects of the Act, i.e., the joint and several and strict liability provision and retroactive application.[138]

However, the Republican-led Congress resisted the President's call for renewing Superfund's taxing authority.[139] Instead, Congress attempted to pass a number of bills that would have eliminated CERCLA's retroactive application and other so-called onerous aspects of the Act.[140] President Clinton actively opposed these legislative "reforms."

Despite the legislative efforts to limit the Act's reach, cleanup efficiency was increased significantly during the Clinton Administration. Throughout the mid-to-late 1990s, the program cleanups averaged 86 sites per year.[141]

VII. SUPERFUND: FUTURE AND POTENTIAL IMPLICATIONS

A. "Super" Success or "Super" Failure?

Defining CERCLA's success has been a relatively difficult task. At the outset of the program, "success" was defined as the number of sites removed from the NPL.[142] Sites on the NPL are considered the nation's most contaminated and, generally, funds from the Trust can only be used for long-term, permanent cleanups.[143] Initially, it was believed that cleanups at these sites would be relatively simple and quick.[144] However, as the EPA would come to find, cleanups often take decades to complete.[145] By fiscal year 2003, only 18% or 274 of the 1523 final sites placed on the NPL were removed.

In March 1993, the EPA began defining success as achieving "construction complete" status.[146] "Construction complete" is defined as

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138. *Administration Position: Superfund Legislative Reform Principles*, CONG. DIG., Mar. 1998, at 74.

139. Sam Dealey, *Superfund Enters the Presidential Campaign, but Realities Are Unclear*, THE HILL, Mar. 31, 2004, at 4.

140. Gary Lee, *GOP Buffs Environmental Image; Compromise Bills Trigger Partisan Scramble for High Ground*, WASH. POST, June 17, 1996, at A4; *see also* Jessica Matthews, Editorial, *Prognosis for the Environment*, WASH. POST, Jan. 13, 1997, at A17; Dianne Rahm, *Controversial Cleanup: Superfund and the Implementation of U.S. Hazardous Waste Policy*, 26 POL'Y STUDIES J. 719 (1998) (discussing the number of bills regarding Superfund introduced in Congress since the 1980s).

141. Kara Sissell, *Boxer, Jeffords Push to Reinstate Superfund Tax*, CHEMICAL WK., Mar. 10, 2004, at 33.

142. KATHERINE N. PROBST & DIANE SHERMAN, SUCCESS FOR SUPERFUND: A NEW APPROACH FOR KEEPING SCORE (Apr. 2004), *available at* http://www.rff.org/rff/Documents/RFF-RPT-SuperfundSuccess.pdf.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*; *see also* Rahm, *supra* note 140, at 719.

"[t]he point in the cleanup process at which physical construction is complete for all remedial and removal work required at the entire site. There may still be a need for long-term, on-site activity before specified cleanup levels are met."[147] By the end of 1999, the EPA considered approximately 52% of the sites on the NPL "construction complete."[148] One year later, the number of "construction complete" sites had increased by 5%.[149]

Further, the program has seen an increase in the share of responsible parties paying the cost of cleanup. In 1987, the share of cleanup costs furnished by responsible parties was less than 40%, a decade later it was more than 70%.[150]

B. The Future of Superfund

The EPA is now grappling with a growing number of costlier and more complex sites involving multiple projects.[151] Indeed, more than 50% of the program's current budget is devoted to eight "complex" sites.[152]

In 2002, the George W. Bush Administration announced that it would not seek reauthorization of the Act's taxing authority.[153] In his budget proposal, President Bush requested only $1.3 billion for the program in fiscal year 2003—the same amount allocated for the program almost a decade ago.[154]

In 2003, the program cleaned up an average of forty sites per year, almost half the average reached during the Clinton Administration.[155] While the Bush Administration can boast that 87% of the costs for sites scheduled for cleanup in 2003 were borne by responsible parties, the same cannot be said for orphan sites.[156] In 1995, when the taxing

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147. *Superfund Overview: Hazardous Waste Management Programs*, CONG. DIG., Mar. 1998, at 69.

148. KATHERINE N. PROBST ET AL., SUPERFUND'S FUTURE: WHAT WILL IT COST? A REPORT TO CONGRESS 1-2 (2001).

149. *Id.* at 2.

150. KATHERINE N. PROBST ET AL., FOOTING THE BILL FOR SUPERFUND CLEANUPS: WHO PAYS AND HOW? 17 (1995).

151. *See* Andrea Cecil, *Md. Research Group and Sierra Club Accuse EPA of Misleading the Public About Toxic Waste Cleanups*, THE DAILY RECORD, Feb. 26, 2004.

152. Juliet Eilperin, *Senators Ask for Larger Superfund; Cleanup by Polluters Offsets Reduced Funding, EPA Says*, WASH. POST, Feb. 20, 2004, at A23.

153. Mary H. Cooper, *Are the President's Policies Working*, CQ RESEARCHER, Oct. 25, 2002, at 882.

154. *See id.* In fact, funding for the program has declined almost 35% since 1993. *See* Sissell, *supra* note 141, at 33.

155. Sissell, *supra* note 141, at 33.

156. Dealey, *supra* note 139, at 4.

authority for the Act expired, less than 20% of the annual appropriations for Superfund came from general revenues.[157] Now that the funds in the Trust have expired, 100% of the annual appropriations for the Trust come from general revenues, i.e., the taxpayers.[158]

At the end of 2004, the program faced a record budget deficit of a quarter of a billion dollars and approximately 475 sites were yet to be completed.[159] Unfortunately, the EPA has slowed cleanups and begun scaling down spending requests.[160] More frightening still is the growing backlog of cleanup projects that the EPA currently faces—two years and growing, by the last estimate.[161] Many of the sites include those that have been "studied and prepared for restoration."[162] Communities adjacent to these sites have waited as long as three years for work to recommence.[163]

1. Public Health Implications

Seventy million Americans, including ten million children, live within four miles of a toxic waste site.[164] Approximately three to four million children reside within one mile of a Superfund site—and due to their unique physical susceptibility—are at greater risk to the effects of exposure from environmental contaminants.[165]

Studies have demonstrated a causal relationship between certain toxic substances and a variety of adverse health conditions.[166] For instance, in the last decade, it has been shown that exposure to various environmental contaminants contributes to an increased risk of having low-birth-weight babies.[167] Low birth weight is considered a reliable predictor for infant mortality and morbidity, as low-birth-weight babies

157. SIERRA CLUB, COMMUNITIES AT RISK: HOW THE BUSH ADMINISTRATION IS FAILING TO PROTECT PEOPLE'S HEALTH AT SUPERFUND SITES 7 (2004), *available at* http://www.sierraclub.org/toxics/superfund/report04/.

158. *Id.*; *see also* Marty Coyne, *Hundreds of Toxic Waste Sites Pose Unacceptable Risk—Report*, GREENWIRE, July 28, 2004.

159. Juliet Eilperin, *Lack of Money Slows Cleanup of Hundreds of Superfund Sites; Federal Toxic Waste Program's Budget Is Stagnant*, WASH. POST, Nov. 25, 2004, at A1.

160. *Id.*

161. Fialka, *supra* note 6, at A2.

162. *Id.*

163. *Id.*

164. Lois J. Schiffer, Editorial, *Superfund, Super Star*, WASH. POST, Aug. 10, 1999, at A19.

165. Philip Landrigan et al., *Chemical Wastes, Children's Health, and the Superfund Basic Research Program*, 107 ENVTL. HEALTH PERSPECTIVES 423, 423 (1999).

166. Stephanie Ostrowski et al., *Latent Effects—Carcinogenesis, Neurotoxicology, and Developmental Deficits in Humans and Animals*, 15 TOXICOL. & INDUS. HEALTH 602 (1999).

167. Akerke Baibergenova et al., *Low Birth Weight and Residential Proximity to PCB-Contaminated Waste Sites*, 111 ENVTL. HEALTH PERSPECTIVES 1352, 1352 (2003).

are five to ten times more likely to die in their first year.[168] Moreover, there have been additional studies demonstrating even more devastating effects of low birth weight—an increase risk of hypertension,[169] cardiovascular disease,[170] Type 2 diabetes,[171] and renal failure.[172] Other ailments have also been associated with exposure to contaminants discovered at Superfund sites. In 1999, the ATSDR reported that of the top fifty substances on the 1997 Priority List of Substances, at least 76% caused cancer, 54% had neurotoxic effects, and 56% caused developmental problems in children.[173]

Thus, the EPA's existing backlog, combined with the emergence of additional sites, prolongs the health risks currently borne by communities adjacent to Superfund sites.[174] In 2004, the EPA proposed adding an additional eleven sites to the NPL, including several mines and former industrial facilities.[175] If these sites are not cleaned quickly, they will continue to pose a risk to "human and ecological communities." As the EPA recognizes: "Every time you come into contact with [hazardous substances at a Superfund site], you face some risk."[176]

2. Environmental Justice Implications

The conventional wisdom has been that pollution and its adverse effects are distributed equally among all members of society.[177] So, too, it was assumed that the implementation of environmental law and policy has benefited everyone, regardless of ascriptive criteria such as socioeconomic status and race.[178] However, that premise has been

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168. *Id.*

169. Catherine Law et al., *Body Size at Birth and Blood Pressure Among Children in Developing Countries*, 30 INT'L J. OF EPIDEMIOLOGY 52, 52-53, 56-57 (2001).

170. David Barker, In Utero *Programming of Cardiovascular Disease*, 53 THERIOGENOLOGY 555, 558-60, 569 (1997).

171. Tom Forsén et al., *The Fetal and Childhood Growth of Persons Who Develop Type 2 Diabetes*, 133 ANNALS OF INTERNAL MED. 176, 176, 179-81 (2000).

172. Daniel Lackland et al., *Low Birth Weights Contribute to the High Rates of Early-Onset Chronic Renal Failure in the Southeastern United States*, 160 ARCHIVES OF INTERNAL MED. 1472, 1472-75 (2000).

173. Ostrowski, *supra* note 166, at 604-05.

174. Fialka, *supra* note 6, at A2.

175. Bruce Geiselman, *Superfund List May Increase*, WASTE NEWS, Mar. 15, 2004, at 11.

176. U.S. Envtl. Prot. Agency, EPA 540-K-98-004, *Superfund Today—Focus on Risk Assessment: Involving the Community* 1 (Apr. 1999), *available at* http://www.epa.gov/superfund/tools/today/sf_com.pdf.

177. Robert M. Frye, *Environmental Injustice: The Failure of American Civil Rights and Environmental Law to Provide Equal Protection from Pollution*, 3 DICK. J. ENVTL. L. & POL'Y 53, 53 (1983).

178. *Id.*

challenged in recent years by a nascent movement that is combining civil rights activists and environmentalists.[179]

Bolstered by a number of studies demonstrating a correlation between race and the siting of unwanted land uses or the lax enforcement of environmental laws near and around communities of color,[180] an emerging issue—environmental inequity—has come to the fore in environmental policy.[181] For instance, a 1987 study on race and toxic waste conducted by the United Church of Christ found that three out of every five African-American and Latino residents lived in communities with uncontrolled toxic waste sites.[182] Additionally, a 1992 study published in the National Law Journal found that minority and poor communities have waited nearly 20% longer than nonminority communities to have abandoned toxic waste sites placed on the NPL.[183] Further, but no less shocking, it took the EPA an average of 10.4 years to commence cleanups in minority areas, compared to 9.9 years for nonminority communities.[184]

During the Clinton Administration, environmental justice precepts were integrated into the overarching policies of the EPA—beginning with the issuance of Executive Order 12,898. Executive Order 12,898 requires each federal agency to "make achieving environmental justice part of its mission by identifying and addressing, as appropriate, the disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States."[185] Additionally, the Office of Environmental Equity (now the Office of Environmental

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179. *See id.*

180. *See, e.g.*, Marianne Lavelle & Marcia Coyle, *Unequal Protection: The Racial Divide in Environmental Law*, NAT'L L.J., Sept. 21, 1992, at S1; Paul Mohai & Bunyan Bryant, *Environmental Racism: Reviewing the Evidence*, *in* RACE AND THE INCIDENCE OF ENVIRONMENTAL HAZARDS: A TIME FOR DISCOURSE (Paul Mohai & Bunyan Bryant eds., 1992); UNITED CHURCH OF CHRIST COMM'N FOR RACIAL JUSTICE, TOXIC WASTE AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON THE RACIAL AND SOCIO-ECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES (1987); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/RCED-83-168, SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING COMMUNITIES (1963), *available at* http://161.203.16.4/d48t13/121648.pdf.

181. Environmental justice is defined as "the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies." EPA, Definition of Environmental Justice, *at* http://www.epa.gov/compliance/environmentaljustice/ (last updated Apr. 1, 2005).

182. UNITED CHURCH OF CHRIST COMM'N FOR RACIAL JUSTICE, *supra* note 180, at xiv.

183. Lavelle & Coyle, *supra* note 180, at S4.

184. *Id.* at S6.

185. Exec. Order No. 12,898, § 1-101, 59 Fed. Reg. 7629 (Feb. 16, 1994).

Justice) was created within the EPA to monitor environmental justice concerns and to address environmental justice issues.[186]

However, despite the political advances of environmental justice and equity advocates, the fact remains that communities that bear the greatest burden in hosting abandoned waste sites are more likely to be impacted by slowed cleanups and scaling back of funding requests. There have been no follow-up studies to the *National Law Journal*'s initial assessment of EPA enforcement of various environmental laws, CERCLA in particular. Nonetheless, the potential still remains that the most vulnerable of society, particularly poor and disenfranchised communities, will be at greater risk than more affluent communities, who have the resources to obtain faster response times and superior remedies.

The most glaring factor in the discussion of environmental justice is the issue of health. Despite an increased awareness of environmental justice and equity claims, there remain significant disparities in health outcomes between minority and nonminority groups, including asthma, cancer, and mortality rates.[187] Environmental conditions often play a significant role in creating and maintaining health disparities.[188] Minority and disadvantaged communities often face greater exposure to "environmental contaminants such as air pollution, pesticides, and lead."[189] It is well recognized that minority and low-income communities trend towards higher rates of morbidity and mortality as compared with nonminority communities.[190] Only time will tell whether slower cleanup at Superfund sites will continue to exacerbate these health disparities.

VIII. CONCLUSION

From its inception, few envisioned CERCLA as a long-standing program. The approach adopted by the Reagan Administration reflected that outlook. The "go-slow" and "do all to prevent a 'Son of Superfund'" may have been jettisoned following the disastrous tenure of Anne Gorsuch. However, the same principles appear to have been resurrected by the current Bush Administration. Indeed, it may have experienced a form of rebirth during the "Gingrich Revolution."

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186. For basic information about the Office of Environmental Justice, see http://www.epa.gov/compliance/about/ej.html.

187. Gilbert Gee et al., *Environmental Health Disparities: A Framework Integrating Psychosocial and Environmental Concepts*, 112 ENVTL. HEALTH PERSPECTIVES 1645, 1645 (2004).

188. *Id.*

189. *Id.*

190. *Id.*

The theme of environmental devolution—reducing the role of the federal government in favor of greater state involvement and participation—has begun creeping into EPA policy and proposed legislation in Congress. And even in the era of recognizing "greater individual accountability," the idea that the taxpayer should bear the ultimate responsibility for paying the costs of cleanups for orphan sites and possibly those of recalcitrant PRPs, is—without question—nonsensical.

The "polluter pays" principle is a central tenet of CERCLA.[191] It recognizes that historically industry has employed unsafe disposal practices that have resulted in contaminated sites.[192] It also recognizes that a compensable benefit is inured to a segment of society enjoying goods or services that has created a hazard.[193] As such, a tax should be assessed against "groups with a closer relationship to the problem, namely industry, rather than individuals with a less-direct relationship—the general public."[194] Finally, the "polluter pays" principle recognizes the primacy of public health—regardless of so-called cost benefit analysis.[195] In recent years, however, that principle has been obscured in the debates on environmental policy. Instead, the focus has turned toward deregulation and devolution.

What is true is that CERCLA is a thriving program with no end in sight. Each year, the EPA continues to add new sites to the NPL. Previously, general revenues complemented the tax-generated revenues in the Trust. Today, general revenues comprise 100% of the total. Appropriations for this program must remain constant or continue to increase in the coming years. If Congress or the President fails to do so, we may see a repeat of Love Canal—and none too soon. The most ready solution to the problem is to reauthorize the program's taxing authority. Attempts have been made to do so in the last few years, but without success.[196]

It would be a shame to think that another environmental catastrophe would need to occur before Congress acts to save the program.

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191. Haggerty & Welcomer, *supra* note 8, at 454.
192. *See id.*
193. *Id.*
194. *Id.*
195. *Id.*
196. *Senate Votes Down Bill to Reinstate Superfund Tax*, CHEMICAL WK., Mar. 7, 2004, at 7.