

## The Reauthorization of Superfund: Can the Deal of the Century Be Saved?

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*ELR* — *The Environmental Law Reporter* plans to publish soon an article by Prof. Steinzor on the only clear alternative to the basic approach taken in the consensus legislation: The conversion of Superfund into a public works program through the repeal of retroactive liability in exchange for a significantly expanded fund, financed by the imposition of new taxes. This approach was supported in the 103d Congress by a coalition of stakeholders including the National Association for the Advancement of Colored People, several large insurers, and representatives of small business, as well as Rep. William Zeliff (R-N.H.).

### **[25 ELR 10016]**

The Clinton Administration and Congress did not have a good year environmentally. Efforts to elevate the U.S. Environmental Protection Agency (EPA) to a cabinet-level agency and to reauthorize the Clean Water Act (CWA)<sup>1</sup> and the Safe Drinking Water Act (SDWA)<sup>2</sup> were paralyzed by a powerful and unprecedented challenge from the so-called unholy trinity, a phrase coined by a despairing environmentalist.<sup>3</sup> The trinity combines the ferocious protests of agribusiness against takings and local governments against unfunded mandates with the dogged conviction of the chemical industry that case-specific risk assessments must determine environmental policy. During the last Congress, these disparate groups actually began to coordinate their efforts, creating an informal coalition with political strength orders of magnitude more powerful than the strength of each individual component.

The trinity has currency because it integrates and promotes recent trends in conservative environmental policy and, therefore, can provide the reasoning cited by Republicans and some Democrats for resisting environmental legislation. But more partisan considerations of denying the Democratic Administration any accomplishments in the area are undoubtedly another motivation for resisting many of the President's initiatives. The profound changes in congressional leadership produced by the 1994 election mean that the trinity's concerns will have even greater influence and may well dominate the debate in the 104th Congress, although the new Republican leadership must also remain sensitive to the inevitable charge that it cannot accomplish a proactive environmental agenda in cooperation with the President.

With a scant two years left, the Administration has little time to rescue its environmental agenda, and Congress has little time to demonstrate that it can break gridlock in an area that remains popular with the public.<sup>4</sup> Ironically, the potential savior of both institutions is the most controversial and disappointing program on EPA's agenda. **[25 ELR 10017]** Superfund,<sup>5</sup> accounting for one-fourth of the Agency's budget<sup>6</sup> and at least that portion of its negative political capital, is ready for reauthorization with a moderate compromise endorsed by a critical mass of the program's stakeholders. For the first time in Superfund's troubled history, the substance of the legislation was actually developed off Capitol Hill and outside the federal government, by the stakeholders themselves.

Organized under private auspices as the National Commission on Superfund (NCS), and assisted by a preliminary dry run of negotiations among members of an advisory group convened by EPA,<sup>7</sup> the stakeholders managed to negotiate a "global deal" that resolves the most contentious issues at stake in the reauthorization.<sup>8</sup> After much temporizing, and the negotiation of some significant,

additional changes, this consensus was translated into legislation embraced by the Clinton Administration and approved by the major committees of both houses of Congress.<sup>9</sup> The formation of this consensus was remarkable, in both historical and political terms, and it represents by far the strongest recent example of consensus-building in the environmental arena.

But the 103d Congress did not finish Superfund, instead bequeathing the debate to the 104th Congress, which will have only 11 months to reauthorize it before the program's taxes run out in December 1995.<sup>10</sup> If the clock runs out without final action, the fallout will damage all of Superfund's stakeholders and could cripple the program for years to come. Quite apart from the immediate and obvious effects reauthorization will have on the multibillion dollar national toxic waste cleanup effort, the outcome of the debate will determine the future viability of liability (or "regulation by risk") as a central weapon in the government's regulatory arsenal.

It is the thesis of this Dialogue that the 1990s mark the end of an era when pitched legislative battles can lead to either sound or timely public policy. Rather, the formulation of consensus by a critical mass of private-sector stakeholders is the only way to achieve the timely reauthorization of Superfund and may be the best (if not the only) way to break the gridlock that paralyzes other legislative debates. The Superfund consensus was achieved because of the despair over the current state of the program shared by the full spectrum of private-sector stakeholders and as a direct result of a negotiation process with attributes that should be duplicated in other contexts. Several forces are at work to destroy this consensus, and these forces must be curbed.

This Dialogue begins with an analysis of the political context in which the "deal of the century" was forged. It then turns to an examination of the NCS process and its implications for future consensus-building. It reviews how the consensus legislation would deal with the two most important issues in the reauthorization debate — Superfund's cleanup standards and liability system. Lastly, it discusses the options available to the 104th Congress as it faces the December 1995 deadline.

## Superfund Politics in the 1990s

Superfund reauthorization politics have been forged in two related, but distinct crucibles: The perceptions of the program's private-sector stakeholders and the over-wrought, partisan combat that characterized the end of the 103d Congress. Ironically, the foundation for consensus in 1994 was laid during the 1983-1986 reauthorization. In the House, Rep. John Dingell (D-Mich.), chairman of the Energy and Commerce Committee, and Rep. James Florio (D-N.J.), chairman of the Energy and Commerce Committee's Subcommittee on Commerce, Transportation, and Tourism, locked in combat at the inception of the 101st Congress, setting the course of a lengthy and destructive political brawl.<sup>11</sup> Memories of those exhausting battles and the Pyrrhic victories they produced were a major motivation for all of the key stakeholders who participated in the various consensus-building efforts during the current reauthorization.

For example, a primary goal of the last reauthorization was to establish national cleanup standards. The Conference Committee for the Superfund Amendments and Reauthorization Act of 1986 (SARA)<sup>12</sup> engaged in a vituperative debate about these admittedly complex and technical issues, in the end producing a bland report<sup>13</sup> that was virtually useless as a tool for interpreting congressional intent. Because they could not agree on a single, coherent interpretation of the law, the warring factions marched to the floor of the House and Senate, inserting lengthy, contradictory statements that left EPA considerable leeway to pick and choose among the disparate views.<sup>14</sup>

As the years wore on and EPA implemented SARA, environmentalists and industry recognized that while both had won crucial battles in 1986, the overall outcome of the war was, at best, a draw. EPA drove potentially responsible **[25 ELR 10018]** parties (PRPs)<sup>15</sup> to distraction by insisting on expensive remedies at some sites, while at the same time doing little to satisfy the environmental community by improving the pace and quality of cleanups.

The same pattern applies to the Superfund liability system. The statute imposes strict, joint and several liability of great strength and broad scope; behavior that was both legal and common practice at the time can trigger liability, forcing "deep pockets" to assume the burden of chasing recalcitrants and paying the share of those no longer in business.<sup>16</sup> During the 1983-1986 reauthorization debate, industry made several attempts to blunt the liability scheme's impact. But all of its proposals were ultimately coopted into exhortations that EPA should use its awesome power wisely by negotiating fair settlements as quickly as possible.<sup>17</sup> To the chagrin of Congress, EPA and U.S. Department of Justice (DOJ) career staff interpreted these changes as mere window dressing and, as the years wore on, did very little to soften the system's impact.

Although Congress was unwilling to trim EPA and DOJ's enforcement sails, industry pressure was felt acutely on Capitol Hill and, in a little-noticed concession, Congress created a statutory cause of action under Superfund for PRPs to bring contribution suits against each other.<sup>18</sup> At the time, this provision was seen as harmless because it would cost the government nothing and would mollify the "deep

pockets," who believed, as it turns out correctly, that if they could only manage to broaden the universe of people furious about the program, they might get relief. In retrospect, this change may have had a far more significant impact than all of the other reforms originally proposed by industry because PRPs used it to draw thousands of small businesses, local governments, and even individual citizens into the liability net, contributing to the massive litigation costs that have undermined Superfund's credibility in the media and on Capitol Hill.<sup>19</sup>

As the 1990s began, the site-specific fights over how to clean up and who should pay had proliferated at a far faster rate than projects were completed. The looming exposure to escalating cleanup costs had settled into the bowels of many companies' financial planning, and the frustration of their top executives over their inability to tackle and resolve this amorphous problem was acute. In private conversations, they repeatedly cited the uncertainties of the Superfund liability system as a drain on corporate resources and a major impediment to sensible planning for the future.

The companies most affected by Superfund instinctively and collectively understood that they had achieved a critical mass of momentum for significant changes to the program. But they had great difficulty translating this momentum into a concrete proposal that could be lobbied in a unified way. The greatest impediment to unified action was the incessant importunings of the insurance industry that its customers embrace the most radical proposal for reform: Conversion of Superfund into a public works program through the elimination of retroactive liability in exchange for tax increases to support a larger fund. Until the end of 1993 and the release of the NCS proposal, an epic battle for the hearts and minds of the largest players in the manufacturing sector raged behind the scenes. Ultimately, the largest and most influential corporate PRPs turned their backs on the public works alternative, setting the stage for the NCS compromise.

Industry flirtations with the public works approach, which smaller players continue to this day, had a great influence on the attitudes of the national environmental community. The environmentalists have never wavered in abhorring the public works approach because they are convinced that raising taxes is not a politically realistic quid pro quo for the abandonment of retroactive liability. Under no illusions about industry's political clout and Superfund's desperately bad reputation, the environmentalists recognized that stone-walling more moderate reforms could provoke an irresistible backlash in Congress.

The second reauthorization debate began in the winter of 1992-1993, as Washington came to grips with a new President, the first Democrat to hold the office in 12 years. The Administration took several months to fill its top environmental jobs, slowing most policy development to a crawl, and key leaders in Congress refused either to put forth or to consider reauthorization legislation until they received an Administration bill. Behind the scenes, the NCS started to define the basis for consensus and was joined that spring by the Clinton Administration's own consensus-building effort: A special Superfund subgroup of the National Advisory Council on Environmental Policy and Technology (NACEPT), with an institutional membership that in many cases overlapped with the NCS' membership.<sup>20</sup> In these and other contexts, key players in enemy camps began tentative conversations with one another, gradually realizing that however profound and apparently irreconcilable their substantive differences, they shared a deep despair over the program's current operation and an acute fear of another full-fledged reauthorization war.<sup>21</sup>

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The national environmental community worried that it lacked the political clout to fight off bad amendments, especially given the drubbing Superfund has taken in the mass media over the last several years.<sup>22</sup> When they feel weak on a vote-by-vote basis, the environmentalists fall back on the trustworthy tactic of blocking the progress of bad legislation. The problem with this strategy in the context of Superfund is that the taxes that support the program will run out in December 1995<sup>23</sup> and uncertain funding wreaks havoc on the program. The environmentalists were also reluctant to let Superfund reauthorization legislation linger on because they believed that matters would only get worse as the drumbeat of bad publicity continued.

Ironically, industry looked at the same political realities and drew very different conclusions, the first and foremost of which was that while its inside-the-Beltway political situation might be good, its *field* situation under the current law was very bad, if not intolerable. PRPs believe that they face an excessively expensive system for selecting remedial actions and must also spend unacceptably large sums navigating the liability system. Industry is convinced that this bad situation could become intolerable if the program is not reauthorized and EPA copes with funding shortfalls by issuing unilateral cleanup orders at most sites, giving PRPs the option of either doing the work at very high costs or risking treble damages in a subsequent enforcement action.<sup>24</sup>

The propitious alignment of these anxieties created the atmosphere that ultimately made consensus possible. The announcement of an NCS deal shortly before Christmas 1993 galvanized the Clinton Administration's efforts to draft reauthorization legislation, and the Administration finally forwarded a bill to Congress on February 3, 1994.<sup>25</sup> After a second round of negotiations sponsored by Rep. Al

Swift (D-Wash.), chairman of the House Energy and Commerce Committee's Subcommittee on Transportation and Hazardous Materials, the legislation won the endorsement of a broad coalition representing an overwhelming majority of the program's key stakeholders and was approved by the Committee by an unprecedented, bipartisan vote of 44 to 0.<sup>26</sup>

Indeed, in perhaps the most remarkable development of all, the full range of Superfund stakeholders institutionalized themselves into an integrated, highly effective lobbying coalition known as "Advocates for Prompt Reform of Superfund" (the Coalition). The Coalition held meetings and coordinated legislative strategy on virtually a daily basis, advising key legislators and the Administration on which amendments were acceptable to its members. The diversity of the Coalition was absolutely unprecedented for environmental legislation, if not for national policymaking in general, because it included everyone from Chrysler, ARCO, Monsanto, and Dupont, to the Sierra Club, the Environmental Defense Fund, and the Natural Resources Defense Council, to the National Federation of Independent Businesses and the U.S. Conference of Mayors. The vision of these historical enemies marching in unison from one congressional meeting to another did more than anything else — including the support of the Clinton Administration — to move the consensus bill through the process.

Galloping across a field littered with legislative hurdles, the Coalition and the Administration achieved approval of the bill by the House Public Works Committee,<sup>27</sup> the Senate Environment and Public Works Committee,<sup>28</sup> the House Ways and Means Committee,<sup>29</sup> and the Senate Finance Committee.<sup>30</sup> In the waning days of the 103d Congress, stymied by last-minute disputes over the wages paid to laborers at Superfund sites and threats by conservative Republicans to offer extraneous, cost-benefit amendments to the bill, the Democratic leadership, believing it had run out of time, pulled the bill from its agenda.<sup>31</sup>

In the aftermath, Washington launched its usual round of finger pointing. Despite frantic, last-minute appeals from the bill's Fortune 500 industry supporters to let the bill go through without extensive floor debate and consensus-shattering amendments, the Republican leadership refused to cooperate, blaming President Clinton and the Democratic leadership for fumbling the legislation and questioning the existence of a real consensus.<sup>32</sup> In turn, Democrats and their **[25 ELR 10020]** environmentalist allies blamed the Republican leadership for blocking the legislation, claiming that the Republicans were myopically intent on denying President Clinton a legislative victory before the 1994 mid-term congressional elections.<sup>33</sup> A disappointed Carol Browner vowed to resume the debate in the 104th Congress where the 103d Congress had left off.<sup>34</sup> In the meantime, elements of industry that opposed the legislation rejoiced in the possibility that potentially massive changes in Congress following the 1994 mid-term election would shove the consensus legislation off the table, beginning the debate again from scratch when Congress reconvenes in January 1995.

As usual, there are grains of truth in the recriminations of both sides. The Republicans are certainly correct that from the beginning of the reauthorization cycle, a flawed decisionmaking process crippled the Clinton Administration's effort to formulate legislation that could be carried quickly forward by its allies on Capitol Hill. Under the joint but strained auspices of the White House National Economic Council and the Environmental Advisor to the President, the Administration established a working group known informally as the "Interagency Taskforce." The Taskforce included 16 representatives from agencies, departments, and offices within the White House that have some interest in the Superfund program, including such entities as the U.S. Postal Service and the U.S. Department of Agriculture. This structure meant that the two federal organizations primarily charged with implementing the law — EPA and the DOJ — sat as equals with the two most prominent federal environmental defendants — the U.S. Departments of Defense and Energy. It also meant that the balance of power on the Taskforce was controlled by government units with relatively little at stake in successfully and expeditiously reauthorizing the program.

Eerily echoing the substantive concerns of another White House institution, former Vice President Dan Quayle's infamous Competitiveness Council, the White House economists on the Interagency Taskforce were generally supportive of the federal defendants' efforts to cheapen cleanup by diminishing cleanup standards. They eventually dominated the Taskforce's deliberations, which occurred behind closed doors with minimal and substantively insignificant consultation with outside stakeholders. When they were handed the NCS compromise shortly before Christmas 1993, the economists had no concept of its political or legislative implications and chose to ignore it, producing a first draft of reauthorization legislation in January 1994 that was significantly to the right of the global deal endorsed by Superfund's key stakeholders.

Faced with a revolt by the environmental community, the Administration eventually embraced a more moderate alternative, which was significantly closer to the original NCS proposal but nevertheless achieved the endorsement of a broad majority of Superfund's stakeholders. Although crucial time and political capital had been wasted, the reauthorization was back on track. Nevertheless, the Taskforce exists to this day, periodically tossing sand in the gears when consulted about the substantive progress of the reauthorization.<sup>35</sup>

When the House Energy and Commerce Committee voted unanimously to approve the consensus bill, the Administration fumbled

again, refusing for many weeks to make Superfund a priority in comparison to the two embattled water reauthorization bills, and opining instead that it wished to have them all completed in the few months remaining before Congress adjourned to face grueling mid-term elections, in the midst of the health care and other pressing national debates. Ultimately, the Administration did select Superfund as its top environmental priority, although the resurrection of the SDWA reauthorization in September 1994 once again distracted its political efforts and may well have contributed to the demise of efforts to reauthorize Superfund.

While the Clinton Administration's mistakes are easy to finger, the Republican leadership is not correct in deriding the absence of consensus as a justification for either bringing the bill down or for reinventing the wheel in the 104th Congress. The consensus among Superfund's private-sector stakeholders was admittedly *not* unanimous; it is inconceivable that such a feat could be accomplished with respect to a program that costs so much and affects so many disparate constituencies. But those who opposed the legislation not only were clearly and decisively out-numbered by those who supported it, the supporting Coalition contained a critical mass composed of virtually every major group that represents the stakeholders most directly affected by the program.<sup>36</sup>

Although opponents of the consensus legislation spent most of their time and energy trying to destroy the perception [\[25 ELR 10021\]](#) on Capitol Hill that a broad-based consensus existed their secondary, but in many ways more important, argument was that the bill should be rejected because they were excluded from the consensus-building process that occurred *before* the Administration forwarded its bill to Congress. If the consensus legislation dies in the 104th Congress, and this contention is in any way vindicated, Congress will have established an impossible threshold for future consensus building efforts. In essence, the message will be that in order to use a "consensus" strategy, proponents of legislation must engage in a negotiation process that achieves the support of every trade association, group, and individual company with some interest in the issues addressed by the legislation. Further, this support must be achieved *before* a bill is considered by congressional committees because those who are not satisfied by the initial consensus, but are unable to persuade Congress to fix their problems, will still cry foul. Not only would such a standard eliminate consensus as an effective strategy for any major legislative (or regulatory) debate, it would virtually ensure legislative gridlock in the current political atmosphere.

As explained further below, the consensus-building process used by the NCS occurred behind closed doors and involved only 24 stakeholder principals. Indeed, it is highly unlikely that such a diverse group could have achieved timely consensus in any other way. But this consensus was vindicated not within the admittedly closed culture of the NCS itself, but rather during the course of a harsh and open political free-for-all during which it won overwhelming, bipartisan approval of five congressional committees.

### The Lessons of the Process

As the 1990s continue, it may well prove impossible to move new environmental legislation without a consensus among a critical mass of nongovernmental stakeholders. For better or worse, Congress is unwilling to tinker incrementally with specific aspects of environmental statutes, instead pursuing big, complicated, and controversial reauthorizations of entire organic statutes. This approach puts enormous pressure on the authorizing committees, which increasingly seem unable to withstand the onslaught of interest groups and maintain any independent perspective on the issues. In the last seven years, the only major environmental statute to be reauthorized by Congress was the Clean Air Act,<sup>37</sup> which had last been rewritten in 1977.

Of course, as the 1990 Clean Air Act Amendments<sup>38</sup> illustrate, legislative gridlock can be broken by an Administration that makes the passage of major environmental legislation a top political priority. However, the Clinton Administration is clearly ambivalent about playing this role. In the President's last State of the Union Address, environmental legislation was mentioned in only two sentences, during a 63-minute speech.<sup>39</sup> Whether President Clinton is reelected, or is replaced by a more conservative, Republican President, this ambivalence is unlikely to change.

Given these conditions, stakeholders of any political persuasion who find an existing law intolerable will have no choice but to attempt to build a consensus for change. When presented with a true political and substantive consensus, Congress is able to overcome the paralysis caused by the stakeholders on the extremes of the political spectrum who launch continuous guerrilla attacks on moving legislation. The need to negotiate consensus applies equally to the environmental community and to industries seeking to avoid or moderate regulation, because neither group has sufficient power to "roll over" the other.

But citing the need for consensus and achieving it are two very different propositions. With apologies to George Santayana, it can be said that unless we understand good history, we are doomed by an inability to repeat it.<sup>40</sup> The NCS process deserves careful consideration as the best example of environmental consensus-building during the last two decades.

## Assumptions, Negotiating Conditions, and Ground Rules

Three threshold assumptions were critical to the success of the NCS: Federal government officials were excluded, the participants effectively represented all of the private-sector Superfund stakeholders, and only chief executive officers (or their equivalent) were allowed to participate. The decision to exclude representatives of the executive branch and Congress was controversial throughout the NCS deliberations. Critics argued that the failure to incorporate the views of those who ran and those who reauthorized the program would lead to a fatally flawed product, both substantively and politically. Although it is impossible to prove empirically, the conveners were undoubtedly correct that the addition of these players would have blocked consensus over the short- and long-term.

First, participation by federal officials might well have meant that the NCS would have been compelled to open its proceedings to the public, destroying the confidentiality that was crucial to its success.<sup>41</sup> Indeed, open NCS deliberations would have been indistinguishable from the public posturing and pointless wrangling that have characterized the Superfund debate for a decade and a half. The recognition that confidentiality was indispensable to the negotiation of a final deal is *not* intended as an endorsement of secret decisionmaking in any but this very limited context, nor does it imply that confidential deliberations should extend for any period beyond what it takes to formulate a consensus proposal. Once announced, the NCS deal was subject to blistering — and appropriate — public scrutiny by Congress, the Administration, the full range of interest groups, and the media. But there would not have been a deal to scrutinize had NCS members been forced to justify themselves in public at the same time that they were attempting to reach a delicately balanced, historically unprecedented compromise of issues that have crippled the Superfund program for a decade and a half.

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Timing was another reason for excluding federal representatives. The NCS was formed in the early winter of 1992, right after the election, and it took several months before sufficiently high-level political appointees were not only in place, but had sufficiently settled into their jobs to consider participating in such a project. Adding members to the NCS midstream would have destroyed the continuity of the bargaining process, turning the NCS into an ongoing debating club, rather than a cohesive group that traveled through a series of emotional states from frustration to weariness and eventually to hopefulness, generating momentum that allowed it to reach closure.

A third consideration was the sheer numbers of representatives that would have been involved had the federal government, in all its roles, won seats at the NCS table. Within the executive branch alone, EPA, the DOJ, the Department of Defense, and the Department of Energy would have had indisputable claims to seats at the table. Within Congress, bipartisan (that is, at least two) representatives from no fewer than five committees<sup>42</sup> would have had valid claims to seats, and excluding any of them might well have provoked more animosity than the decision to exclude all of them, creating additional roadblocks to efforts to sell the consensus on Capitol Hill. Adding up these numbers, had federal participation been permitted, the NCS would have doubled in size and close to half its complement would have been federal officials.

Apart from the numbers, there was the problem of maintaining CEO-level participation, an aspect of the NCS process that as we will discuss further below, was critical to its success. The Secretary of Defense, the Attorney General, and the EPA Administrator would not have made the time commitment that the members of the NCS made. But had they sent second- and third-level political appointees, the conveners would have had significantly more difficulty in holding the other CEOs to their commitment to attend meetings personally.

Allowing federal government participation would also have injected into the process the poisonous element of bureaucratic defensiveness, which in turn would have provoked other participants to either withhold or distort their own views. Virtually all of Superfund's nongovernmental stakeholders believe that mistakes by EPA and, to a lesser degree, by the DOJ have brought the program to its current sorry state. The presence of people who felt pressure to defend the bureaucracies they had recently been appointed to lead might well have destroyed a key strength of the NCS process: Unadulterated and freely expressed dissatisfaction with the current program and the current law, which led to an eventual realization that all had a mutual stake in reforming it.

The participation of government officials would have chilled the negotiations in another important way: NCS members could not be sure whether a global deal was possible until the very end of the process. If they had been compelled to state their positions in front of powerful federal officials whom they would need to lobby if the process fell apart, they would invariably have played their cards much closer to their vests, blocking the early horsetrading that was so crucial to building momentum for the final deal.

Once a decision had been made to eliminate the federal government, the selection of which categories of stakeholders to include was relatively straightforward, but the choice of which stakeholders to include from those categories was extremely difficult.

Representatives of national environmental organizations, community groups, large PRPs drawn from the manufacturing sector (especially the chemical industry), the insurance and banking industries, labor unions representing cleanup workers, small business, and state and local governments were the obvious, indeed the only possible, choices. But within each category, the conveners had to make a series of decisions that depended on such complex factors as the organization's reputation both inside Washington and within the larger stakeholder community it was supposed to represent (often two very different stories), as well as the CEOs' personal reputations in the same arenas.

Pick a company or group that is a minor player within its own constituency and any deal it negotiates will not have sufficient credibility to withstand the rigors of the legislative process. Pick a company or group that does not understand the issues and, therefore, cannot articulate the problems of the stakeholder group it is there to represent, and you run the risk that the deal will be marginally relevant, even if it is clinched. Pick an irascible and short-sighted CEO, who is widely perceived as such within his or her own constituency, and you have the potential for fatal disruption of a consensus before it is able to emerge. Pick a widely liked and respected CEO who is distracted with other issues, and you lack the affirmative help you need to close and sell the deal.

The decision to organize the NCS at the CEO level, and to insist on personal participation by each CEO, was made for three distinct reasons. First, CEOs were seen as far less knowledgeable about, and therefore not vested in, the minutiae of how the current program and law operate. The conveners believed that dragging the debate down to that level would quickly swamp it in details, precluding an innovative approach to the issues. This theory was strongly challenged in practice because each commissioner was allowed to appoint at least one senior staff member, and the vast majority of these crucial participants were nothing if not detail-oriented. However, the need to prepare their principals for NCS meetings did exert pressure on the senior staff and encouraged them to sidestep entanglements in relatively minor implementation issues, even when it came time for staff working groups to actually draft sections of the final NCS report.

Second, participation by CEOs immediately elevates the importance of the endeavor throughout the organizations that they represent, ensuring that it receives priority attention. If the NCS had accepted senior staff as members, many of whom are overloaded with inside-the-Beltway meetings and conferences, it might well have languished in the enervating netherworld of poorly attended, inconclusive, policy dialogue groups.

Third, CEOs have the obvious and unquestioned authority to make commitments on behalf of their organizations, cutting through layers of decisionmaking that could slow down the deliberative process to the point where it falls of its own weight.

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With a very few exceptions, the individual CEOs invited to join the Commission abided by their commitment to participate personally and extensively in its deliberations. Their participation vindicated the conveners' insistence on this threshold ground rule: The CEOs were willing to think expansively about changes to the program, they made the NCS a priority for their organizations, and they exercised the full range of their authority by signing off on the final deal.

Beyond these threshold assumptions, the NCS lived by four other rules that were important predicates to its success.<sup>43</sup> As mentioned above, its proceedings were confidential, and members agreed not to discuss what went on behind closed doors with the press, Congress, or executive branch decisionmakers either during or after the NCS' deliberations. Any other approach to this issue simply was not conceivable, because a public debate would have exposed NCS' members to unrelenting, outside criticism, which would have destroyed the trust and momentum that were essential to the negotiation of a final deal.

Second, NCS members were asked to participate as "individuals," who, acting "in their personal capacities," would determine its direction.<sup>44</sup> However, "because of their positions as leaders in their respective sectors and interest groups, Commission members are encouraged to solicit advice and input from other[s] . . . who are not participating."<sup>45</sup> This ground rule was designed to give members the freedom and autonomy to conduct the negotiations as individuals representing only their own organizations, while maintaining the expectation that they would serve as effective missionaries to their constituencies, both during the negotiations and after the deal was made.

The issue of how much to expect members of a blue ribbon group to deliver the support of the larger stakeholder communities they represent within the confines of a confidential negotiating process is a very difficult one. If, for example, the commissioners from the chemical industry had tried to win a commitment from the Chemical Manufacturers Association (CMA) to support a potential deal before agreeing to the deal themselves, the deliberations of the NCS would have reached political and procedural meltdown very

quickly. The advantage of CEO-level decisionmaking by a relatively small group would have been sacrificed, enmeshing the NCS in the ponderous deliberations of this and other trade associations. If, on the other hand, chemical industry members had been unable to predict through constant, informal consultations what would sell to the CMA, the deal they negotiated could well have been stillborn.

Third, NCS members were given an explicit opportunity to reject the deal once the entire package of recommendations was placed before them. As a practical matter, members of the Commission did make decisions about various pieces of the package on an incremental basis, deciding whether or not they could live with a proposal in a single-issue area on its own merits. These decisions were influenced subtly by their perceptions of what they were likely to get in other areas, but this kind of pragmatic balancing was rarely articulated. Still, in the absence of a ground rule explicitly allowing them to pull out at the end, incremental progress would have been far more difficult, and a sense of momentum might never have materialized.

Fourth, the ground rules contained a carefully crafted definition of "consensus":

Policy recommendations can be considered to have achieved consensus when there is no dissent by any member of the Commission. The Chair and staff will rely on members to voice their dissent if they cannot "live with" a particular policy recommendation that is advocated for inclusion in the Commission's final report. . . . If consensus is not possible, the final report may: identify a limited number of agreed upon policy options, include language that adequately conveys the concerns of all members, or simply remain silent on the issue, as determined by consensus of the Commission. None of these options are as desirable as a consensus recommendation. . . .

As the recommendations of the Commission become final, Commission members agree to discuss how the recommendations can most effectively be carried forward into the legislative debate. . . . Where consensus agreements have been reached, at the very least, Commission members agree to refrain from undermining the implementation of those agreements.<sup>46</sup>

By establishing consensus as the overriding goal of the NCS, while at the same time stating explicitly that the absence of total consensus would *not* cause a breakdown in the entire process, the ground rules inoculated the NCS against an effort by a minority of stakeholders to prevent the majority from reaching a deal. However, the ground rules asked individual members to use a high standard for opposing recommendations endorsed by other commissioners; the question was not whether they liked or disliked a proposal, but whether they could "live with" it or not.

The NCS definition of consensus also incorporated an absolutely essential principle: Once members had made their deal, they were not permitted to depart from it in any significant respect, either in public statements or in the context of private lobbying efforts. The commitment to stick with the whole deal and work jointly for its implementation, without trying to regain from Congress any advantages they had sacrificed, was the only protection the commissioners had against the dual threats of having their deal unravel at the same time that the appearance of a consensus by a blue ribbon panel is used to pass a law that hurts them.

## Substance of the Global Deal

In all of the withering criticism heaped on Superfund in the past five years, cleanup standards and liability are the most frequently cited reasons for its many failures.<sup>47</sup> EPA's interpretation [**25 ELR 10024**] of these provisions provokes the most controversy, costs the most money, and has the most impact on human health and the natural environment. Astronomical legal bills, the glacial pace of cleanups, cost overruns, and community frustration are correctly attributed to the program's problems in these two areas, resulting in an irresistible urge to reform current law.

The following analysis explains why the cleanup standard and liability provisions of the consensus legislation represent a lasting compromise that is substantively fair to a critical mass of Superfund stakeholders. Attempts in the 104th Congress to modify the legislation in a way that tilts the balance to the point of unfairness from any key constituency's point of view would destroy the consensus. It is, therefore, crucial to understand the reasons for the stakeholders' decision to sign off on the NCS global deal, to explore the additional compromises they were asked to make when Congress considered legislation, and to define the boundaries of their continued participation in the consensus. The analysis compares the final NCS report<sup>48</sup> with the consensus legislation that was pending for floor action in the House and Senate when the 103d Congress ran out of time.<sup>49</sup>

## *Cleanup Standards*

Negotiations over cleanup standards have revolved around the following central questions:

1. Should cleanup standards be consistent from site-to-site or dependent on individual site characteristics? How should we make a judgment that a site is "clean"?
2. What factors should be considered when identifying a viable remedy?
3. When should permanent treatment (as opposed to containment) be required?
4. If either effective and/or permanent treatment technologies are not available, what should be done?

\* *The Stakeholders.* Key players entered the negotiations over cleanup standards with the following historical positions.<sup>50</sup> Members of the national environmental community believe that the current process is a fiasco and are bitter about EPA's refusal to correctly and aggressively interpret its statutory mandate, which, as they interpret it, requires a uniformly high level of public health protection at all sites. The environmentalists think that Superfund sites pose a serious risk to human health and the environment and that the chemical and insurance industries are engaged in a nefarious effort to confuse the public about the nature and scope of this risk. They believe that the Superfund standard-setting process must be reformed to establish clearer, simpler, and unavoidable national, health-based standards that result in returning the land to productive use wherever possible. Such standards should establish maximum levels of contamination of air, soil, and water that would pose no more than a one in one-million cancer risk and a hazard index of 1 for noncancer health effects<sup>51</sup> with respect to potentially exposed populations after the cleanup is completed.

This approach would mark a sharp departure from EPA's current practice of determining cleanup goals on the basis of a "risk range" that allows anywhere from a one in 10,000 to a one in one-million cancer risk. The determination of whether a cleanup will assure a level of protection falling within the risk range is a mysterious and confusing process that in turn involves the calculation of site-specific risk assessments. Such assessments depend on complex and highly variable assumptions about human and environmental exposure and site conditions to justify certain cleanup levels and technologies. Compounding EPA's problems in administering this risk-range approach is the separate statutory requirement that "applicable or relevant and appropriate requirements" (or ARARs) developed under other environmental programs must be met.<sup>52</sup>

The environmentalists believe that EPA's use of risk ranges, risk assessments, and ARARS results in a morass of standards, which produces cleanups that vary significantly in quality and degree. They are convinced that the factors determining the outcome in such a system are a highly offensive combination of PRP lobbying for a cheaper deal and the political vulnerability of the low-income, often minority communities where the sites are located.<sup>53</sup>

The environmentalists recognize that technologies are often not available to achieve health-based standards, but believe that sites should remain on the Superfund national **[25 ELR 10025]** priorities list (NPL)<sup>54</sup> until an effective technology has been developed and implemented. They believe that the law should require the implementation of permanent treatment wherever it is technologically feasible, without any demonstration that people or the environment are currently exposed as a result of the contamination. They assert that this principle should extend to groundwater, which should be remediated regardless of current or projected usage unless it is naturally unfit to drink, e.g., briney.

Citizen activists from communities around Superfund sites agree with national environmentalists on all but perhaps the most important, threshold point. They distrust the process of establishing national, uniform, health-based standards and believe that site cleanups should instead involve returning contamination to "background" levels, with background defined as the levels that existed before the Superfund site contaminated the air, soil, and water.<sup>55</sup>

Industrial PRPs are equally dissatisfied with the status quo and are committed to eliminating all vestiges of an irrational process that they believe is costing their companies unnecessary billions of dollars to address extremely remote risks to public health and the environment. They believe that a new Superfund standard-setting process must rely exclusively on the preparation of risk assessments that would depend on the consideration of site-specific factors, as opposed to the current morass of borrowed federal and state ARAR standards. They acknowledge that the performance of site-specific risk assessments is a complex science, but they reject the environmentalists' contention that such assessments are inappropriate or unreliable. They are opposed to any effort to establish uniform national standards and they strongly endorse the use of a risk range, arguing that an effort to impose a single, presumably very conservative, risk number will only lead to wasteful overkill in the selection of site remedies.

Industrial PRPs believe that in most situations, containment should be the remedy of choice and, in nonresidential areas, containment should mean the use of institutional controls, e.g., restricted land use and prohibitions on access, wherever possible. Permanent

treatment should be used where it is not disproportionately expensive, or where it is clear that containment is unreliable. Once containment has been implemented, treatment technologies should be reconsidered only if the containment remedy fails. Contaminated groundwater should not be remediated unless it is currently used or projected for use in the foreseeable future.

\* *The NCS Deal.* The nub of the compromise negotiated by the NCS is the establishment of national health-based standards that can be adjusted in response to a narrow number of site-specific characteristics and the acknowledgment that the availability of technology and future land use can be key factors in determining what remedy to implement.<sup>56</sup> Put another way, uniform, national, health-based standards remain the backdrop for evaluating when a site is "clean," but the methodology for selecting the remedy is to identify the best available technology that will clean the site to the point where it can be used for its intended purpose.

The NCS recommends that the statute should be amended to specify that no site will be considered "clean" until levels of contamination have been reduced to the point where exposed populations face no greater than a one in one-million cancer risk and a noncancer hazard index of 1. To determine when these standards have been met, the NCS supports the development of a "formula" for the 100 most frequently occurring contaminants at Superfund sites. The formula would be developed in a negotiated rulemaking by all Superfund stakeholders, to be convened by EPA shortly after the statute is reauthorized.

The formula would combine an evaluation of the concentration at which chemical pollutants are toxic (these numbers would stay constant) with information about human health and environmental exposure at either the typical or the specific site (these numbers could vary depending on site-specific factors if such factors could be measured and were scientifically well-understood). For example, a concentration of benzene threatening groundwater used for drinking water would need to be cleaned up to stricter levels where the depth to groundwater was shallow than at a similar site where groundwater was deep, because PRPs would be allowed to consider the site-specific depth to groundwater in calculating the cleanup level. By the same token, if no groundwater exists at the site, no further remediation would be warranted.

These aspects of the compromise keep alive industry's hopes of persuading environmentalists and citizen groups to accept reasonable cleanup goals. At the same time, it reassures the environmentalists that the goals could not fall below an acceptable level and that they would have veto power in the negotiated rulemaking process used to derive these new standards.

As for the second half of the equation — identifying a viable remedy — the NCS adopts the concept of "hot spots" as its central vehicle for implementing the common sense notions that expensive technologies are most beneficially applied to highly contaminated areas, that only available technologies can be required as a practical matter, and that permanent treatment technologies are less available than containment technologies. A hot spot is defined as an area where highly toxic or mobile chemicals are concentrated that may pose a significant risk to human health.

Under the NCS proposal, permanent treatment of hot spots is required, permanent treatment of "warm spots" is preferred and, in all other areas, either long-term containment or permanent treatment is acceptable, so long as the uniform national health-based standards, determined through the formulaic approach, are "reliably" met. If "reasonably" priced long-term treatment technologies do not exist, an "interim" containment remedy can be implemented, but the site must remain on the NPL and must be reevaluated every five years to see if a suitable treatment technology has become available.

#### **[25 ELR 10026]**

The NCS compromise further recommends the remediation of groundwater contamination unless the aquifer is "unusable," with this crucial term defined as either naturally unusable, e.g., briney, or as contaminated by *non-Superfund* sources to the degree that no steps will be taken by entities outside the Superfund process to clean it up for the foreseeable future. Once again, the availability of technology would be considered in determining when — if not how much — to clean up.

These aspects of the compromise, which represent major movement by the environmental and citizen activist communities off their historical positions, reassures industry that the drive to permanent treatment will only be applicable to areas of the sites that are heavily contaminated. It also gives industry reasonable confidence that PRPs will not be compelled to undertake outlandishly expensive remedies using experimental technologies if less expensive technologies would do the job — if not permanently, then at least for the foreseeable future.

Last but not least, the NCS proposal acknowledges that future land use should be a factor in determining the level or permanency of cleanup. Industry has long argued that it does not make sense to clean up a site that will be used, for example, as a railroad yard, to the

same level as a site located in the midst of a residential neighborhood that will be used for a community center. Since many Superfund sites are in areas where the most obvious future use of the property is industrial, and current law does not acknowledge the role of land use in cleanup decisions, this approach could mark a sea change in the program.

But environmentalists and community activists fear that any acknowledgment in the law that land use is an appropriate consideration could put remedial decisions on a slippery slope where virtually all sites are written off for any but future industrial use. This result could have disturbing consequences in urban areas where residential neighborhoods are adjacent to sites previously used for industrial purposes, a condition which prevails at 984 of 1,245 NPL sites.<sup>57</sup> The NCS, therefore, recommends that in cases where the site is adjacent to residential neighborhoods, future site use cannot be presumed to be industrial unless and until residents of such neighborhoods agree to this assumption.

\* *The Consensus Legislation.* Consensus reauthorization legislation, as it emerged from the key committees in the House and Senate, adopts the fundamental framework of the NCS deal. But the legislation occupies a point on the political spectrum that is definitively to the right of the NCS proposal.

Both H.R. 4916 and S. 1834 provide for the promulgation of national "goals" to be expressed as a "single numerical level" for chemical carcinogens and noncarcinogens, but do not specify the levels of one in one-million cancer risk and a noncancer hazard index of 1.<sup>58</sup> The requirement that a single numerical level be chosen forestalls EPA's continued use of a risk range to determine appropriate levels of cleanup, and the environmentalists clearly hope that if EPA is forced to choose a single number, it will use a conservative and consequently more protective figure. The House bill further requires that the goals be established in a negotiated rulemaking, thereby adopting the process considered critical by environmental and community stakeholders.<sup>59</sup>

Both the House and Senate bills mandate the development of a "national risk protocol" to be used when conducting site-specific risk assessments, when establishing the concentration levels of various chemicals, and when evaluating alternative remedial actions.<sup>60</sup> As recommended by the NCS, this protocol would establish a "formula" for evaluating risk and determining concentration levels for (at least) the 100 contaminants most commonly found at Superfund sites.<sup>61</sup>

The House and Senate bills adopt the hot-spot method for determining when permanent treatment will be preferred, but state unequivocally that treatment is preferred *only* for hot spots, with containment a clearly acceptable method for all other areas.<sup>62</sup> This approach is more restrictive than the NCS proposal, which urges consideration of whether permanent treatment technologies might be available when remediating non-hot spots, but it probably does not change the bottom line result: Permanent treatment will only be chosen for non-hot spot areas if PRPs agree with its selection.

In a significant departure from the NCS approach, the consensus legislation fails to distinguish between "interim" and "long-term" containment remedies in any remedial situation other than hot spots. Further, the legislation does not require systematic site reviews to evaluate the continued efficacy of interim remedies even in hot-spot situations. Instead, the legislation instructs EPA to select an appropriate remedy by considering a variety of amorphous factors such as effectiveness, long-term reliability, acceptability to the community, and "reasonableness" of cost.<sup>63</sup> This bouquet of factors sends a strong message that cost is as important as reliability, but leaves the final balance up to EPA's discretion.

In a second significant departure from the NCS compromise, both the House and Senate bills eliminate the specific mandate that groundwater must always be remediated unless it is irrevocably contaminated by non-Superfund sources. However, the two bills differ significantly in the standards they would apply to groundwater cleanups, with the Senate occupying a point on the political spectrum to the left of the House. These differences will be a focal point of strenuous debate if and when the legislation reaches a conference committee.

The House bill establishes as an overall "goal" the "restoration" of ground and surface water that "may" be used for drinking water to prevailing SDWA standards, but allows EPA to depart from those goals if compliance is "technically impracticable" or "unreasonably costly."<sup>64</sup> The House bill [**25 ELR 10027**] further instructs EPA to select remedies for contaminated groundwater using the same amorphous factors cited above, with the additional wrinkle that any actual human exposure must be either prevented or eliminated, although this protection can be accomplished through the provision of alternative drinking water supplies.<sup>65</sup>

The Senate bill states flatly that cleanups of contaminated ground and surface water that "may" be used for drinking water must meet either SDWA standards or "more stringent" levels necessary to protect wildlife or aquatic life under the CWA, unless such remedies are "technically impracticable."<sup>66</sup> Where effective technologies have not yet been developed, the bill would require PRPs to pay a premium

on normal response costs, with the money to be used for ongoing monitoring of groundwater and research into new technologies.<sup>67</sup> The Senate bill instructs EPA to apply the same factors to the selection of groundwater remedial actions as the House bill does.<sup>68</sup> But it contains a definition of "ground water that may be used for drinking water," which could significantly expand the scope of cleanup because it would exclude *only* those aquifers that were unusable in their natural state or that were "physically incapable of yielding a quantity of 150 gallons per day . . . without adverse environmental effects."<sup>69</sup>

Finally, in perhaps its most important departure from the NCS proposal, neither the House bill nor the Senate bill requires community approval when the proposed remedy depends on future industrial use and the site is adjacent to a residential neighborhood. Instead, EPA is directed to determine future land use through the consideration of another series of relatively amorphous factors, including any recommendations of community groups around the site, land use history, local government zoning plans, the proximity of the contamination to residences and sensitive populations or ecosystems, and the potential for future economic redevelopment.<sup>70</sup>

Taken as a whole, these provisions push the envelope of environmental and community tolerance, teetering close to the edge of provoking those stakeholders to walk away from the process. Ever mindful of the consequences of not reauthorizing Superfund by the December 1995 deadline, environmental and community representatives have decided to swallow hard and accept this second compromise, warning loudly that any further erosion of the substance of the cleanup standard provisions would provoke them into active opposition to the bill.<sup>71</sup> The willingness of groups on the left of the political spectrum to support the consensus legislation bill was born at least as much out of a belief that matters could only get worse in the next Congress as out of an affirmative commitment to reauthorizing Superfund before its money runs out. If, however, industry and its allies in the 104th Congress attempt to push the legislation still further to the right, a subtle boomerang in perception will occur, and the left will believe it has nothing to lose from reverting to a "scorched earth," "stop-the-process" approach. Cleanups have been so slow, and the benefits of the program so attenuated, that it is tempting for community groups and environmentalists to discount the damage a funding gap would do to the program, especially in comparison to the sacrifice of such principles as permanent remediation of the contamination that afflicts them.

Apart from its political viability, there is the ultimately far more important question of whether the approach contained in the consensus bill will make Superfund a more protective, cost-effective, predictable, and expeditious cleanup effort. The answer is that the new standards will be very susceptible to the inappropriate influences that have undermined the current system, but that a concerted effort by a shrewd and principled EPA, controlled carefully by a strong central management, could make the system work for all concerned. Unfortunately, the history of the Superfund program suggests that the EPA bureaucracy is not up to such a task, and Superfund may continue to flounder, to the disadvantage of all concerned.

There are two good reasons why national environmentalists and community activists demand national, health-based standards. The first is to ensure that cleanups end up being adequately protective of human health and the environment. The second is to prevent each remedial decision from being determined by political forces, defined broadly to include the advocacy skills and the technological and financial superiority that large industrial PRPs bring to the table during their negotiations with EPA. The consensus legislation establishes several — arguably too many — "off-ramps" in the remedy selection process, leaving excessive maneuvering room for those same political forces to come into play.

Thus, if EPA interprets the land use offramp broadly, allowing PRPs to cut back on the application of national standards in industrial areas that border residential neighborhoods, cleanups under the new system will be ineffective, more money will be wasted, and too many affected communities will continue to view the program as a cruel joke. Similarly, the legislation's dilution of the requirement that EPA periodically reevaluate interim containment hot spots could result in ineffective cleanups that permit contamination to spread to the point where the remedy fails completely and must be redone at significantly greater expense. If the Senate bill's expansive approach to groundwater cleanups is not adopted, a widespread writing off of aquifers could plague the nation's drinking water supplies in future decades.

Ultimately, these outcomes would not be in the best interests of industrial PRPs. If the Superfund remedy selection process remains erratic and ineffective, not only do industrial PRPs run the risk of wasting money on bad cleanups, but the system's failures could provoke a tightening of standards during the next reauthorization. Even if Congress gives up in frustration on its efforts to instruct EPA and PRPs on how to conduct cleanups, the backdrop of legal liability for the sites will plague those who take undue advantage of the loopholes in the system. Superfund's own **[25 ELR 10028]** powerful liability system is likely to remain fundamentally intact, and PRPs also face liability under state tort law if Superfund cleanups leave people and the environment exposed to high levels of residual contamination.

### *Liability*

Consensus negotiations over liability reform have revolved around the following central questions:

1. Which aspects of the current strict, joint and several liability system should be maintained and which discarded?
2. If joint and several liability is abandoned in certain contexts, what procedures and standards should govern the allocation system that replaces it?
3. What enforcement authority should the government retain to police PRP outliers and ensure that cleanup proceeds at a reasonable pace?
4. Who should pay the so-called orphan share of PRPs who are no longer viable?
5. What should and can be done to address the concerns of the insurance industry?

\* *The Stakeholders.* Key players entered the negotiations over liability reform with the following historical positions.<sup>72</sup> While the proliferation of contribution lawsuits has clearly helped large, manufacturing sector PRPs in their political battle to demonstrate that Superfund liability is intrinsically unfair, the growing irrationality of the process has greatly increased the financial and psychic pain they experience. The larger, more sophisticated companies can control the pace of cleanup by dominating site-specific steering committees and running circles around EPA regional office staff. In the process, however, they pay very large legal bills and live with the constant sword of open-ended, potential liability dangling ominously over their heads. To be sure, they mind spending the money. But they mind at least as much the fact that they cannot be sure how much money they will need to spend over the long term.

Once they understood that the outright repeal of retroactive liability was not achievable without large tax increases, the top priority of large, manufacturing sector PRPs was to replace joint and several liability with a several liability system that would allocate cleanup costs on the basis of each PRP's specific behavior at a site. Allocations would be based on such technical factors as the volume and relative toxicity of the waste, as well as on more amorphous criteria such as whether PRPs cooperate with the government. Bankrupt companies; small businesses; and federal, state, and local governments should be allocated a fair share under the same standards as apply to the large industrial PRPs. If municipalities and small businesses cannot pay the amounts they are allocated, the Superfund should cover these orphan shares. The system should punish PRPs who try to avoid liability by sitting out the allocation process, but those who do participate should have their future exposure limited to their allocated shares.

Environmentalists are willing to mandate the initiation of an allocation process at most sites, as long as the government does not bear any financial or enforcement risk if some PRPs resist the system. The environmentalists are adamant that the federal government must retain authority to compel "deep-pocket" PRPs to implement upfront cleanups, whatever reallocations of cost occur later in the process. Recognizing that once costs are allocated some orphan share will exist, they are willing to entertain suggestions that Superfund cover these amounts, provided that paying the orphan share does not affect the funding that is available for cleanup. The environmentalists are sensitive to the damage Superfund suffers when local governments, small businesses, and nonprofit entities are sucked into the liability vortex by third-, fourth-, and fifth-party contribution suits, and they have adopted a conscious strategy of supporting the efforts by those groups to obtain special relief within the context of the new allocation system.

The small business community is the most diverse and complex of Superfund stakeholders, and small businesses have a wide range of views on how to reform the program. Not only are its sheer numbers higher than any other stakeholder group, its methods of doing business are widely variable. The most obvious category of small business PRPs includes such entities as dry cleaners, metal refinishing shops, and specialty paint manufacturers who routinely generate hazardous wastes comparable in quality if not quantity to the wastes generated by much larger corporations. But Superfund's rule that liability applies without regard to the degree or level of toxicity of the waste has also ensnared many less obvious categories, including small businesses that process or serve food and other small retail outlets.

Most small business owners are stunned when they first receive notice of potential Superfund liability. When informed by their lawyers that they must prepare to pay significant sums both to defend themselves and to settle their liability, they become even more agitated. But the crowning blow is the news from their local bank that pending Superfund liability will be a factor in deciding whether to grant them the lifeblood of ongoing business loans.

Throughout the reauthorization debate, small business was wooed in turn by the large corporate PRPs and advocates of a public works alternative. Although this contest for the affections of small business continues to this day, the large corporate PRPs, assisted by the

environmental community, have ended up with a discernible edge. Once an outright repeal of liability is ruled out, small business advocates endorse allocation, but demand special help in the form of early opportunities to settle liability and relief [\[25 ELR 10029\]](#) from paying amounts that would drive small business PRPs into bankruptcy.

Counties, cities, and towns did not participate actively in the Superfund debate until they were swept up in one of the first and most intense waves of third-party contribution lawsuits. According to the national coalition they formed to secure legislative relief, some 650 counties, cities, and towns in 12 states were ultimately affected by such cases.<sup>73</sup> The suits share a common profile: They were brought by well-known, national corporations that EPA had named as PRPs because they sent liquid hazardous waste to a site that was also used by surrounding communities for the disposal of ordinary garbage and sewage sludge.

Local governments sought to limit the liability of anyone who sent garbage to a Superfund site on the basis of the actual toxicity of the garbage and sewage sludge, as opposed to its volume. As the debate matured, they broadened their agenda to include relief for the counties, cities, and towns that actually owned and operated these sites and faced staggering liability they could not afford without diverting funds from essential public services.

Last but not least is the insurance industry, which has been badly split throughout the debate. The gist of the industry's problem with Superfund is that most companies did not underwrite the risk of cleanup costs in policies issued years, even decades, ago. A series of court decisions has found coverage or a duty to defend under such policies, however, and the resulting exposure must be paid out of reserves, which were not designed to cover it. For a decade, insurers have cast about desperately for relief from this expensive exposure and from the punishing litigation wars they are fighting with customers across the country.<sup>74</sup>

Significant elements of the industry support proposals to convert Superfund into a public works program, an approach that would repeal retroactive liability in exchange for a significantly expanded fund, financed through the imposition of new taxes. But the largest companies that wrote most of the policies now implicated in Superfund cases concluded in the winter of 1993-1994 that a public works approach simply was not in the cards and instead drew their chairs up to the table to negotiate the best deal they could. In essence, these insurers want to achieve as broad a repeal of past policy coverage as they can in exchange for payment of an annual insurance tax that would be used to pay limited compensation to their customers. This approach is often referred to as the "hybrid" because it combines the creation of a mini-trust fund with targeted liability relief.

Superfund cognoscenti will note the omission from this discussion of the banking industry's concerns with the current program.<sup>75</sup> Throughout much of the consensus-building process, the banking community believed its problems had been solved by a rule EPA issued in April 1992.<sup>76</sup> But to the surprise of many observers, a subsequent court challenge was successful, and the rule was remanded to EPA "to take whatever steps it thinks appropriate."<sup>77</sup> Congress immediately responded by inserting provisions in the consensus legislation to provide comparable relief.<sup>78</sup> A more detailed discussion of these proposals is beyond the scope of this Dialogue.

\* *The NCS Deal.* The NCS proposal<sup>79</sup> retains the scope of Superfund's current liability scheme, including the developing caselaw in such areas as the liability of successor corporations — that is, liability would apply to the same parties and behavior as before. The proposal also retains strict liability as it has developed under current law — that is, the government need not prove that PRPs have been negligent and does not have to trace specific waste deposits back to the individual entity that generated them (commonly known as "fingerprinting" the wastes).<sup>80</sup> The proposal preserves the government's authority to order PRPs to conduct a cleanup,<sup>81</sup> but gives the PRPs doing the work the explicit right to reimbursement from all other PRPs pursuant to the allocation.

As for the delicate subject of joint and several liability, the NCS proposal would require the initiation of a mandatory, binding allocation process — called a "Binding Allocation of Responsibility" (or BAR) — at every NPL site, suspending pending litigation once this process began. Allocations would be based on the so-called Gore factors, first set forth in an unsuccessful amendment to the original Superfund bill offered by then-Congressman Al Gore in order to provide a statutory basis for allocating joint and several liability.<sup>82</sup> The BAR would include an allocation of [\[25 ELR 10030\]](#) an orphan share to cover the contribution of entities that are no longer viable. Those who resist the BAR would be subject to the full weight of joint and several liability for the orphan share and for the costs they were allocated.

Allocations would be made by a neutral government official, probably an EPA administrative law judge (ALJ). In addition to PRP representatives, an EPA "prosecutor" and an independent "guardian" charged with responsibility for protecting the Superfund from excessive orphan share allocations would participate. PRPs would pay the costs of conducting the BAR. The allocated shares produced by the BAR process would create a "pay as you go" financing mechanism for cleanup costs. Thus, a PRP assigned a 10-percent share would owe \$ 100,000 in the year that cleanup costs totaled \$ 1 million.

Allocators at individual sites would not be subject to any limitations in allocating the orphan shares to be paid by the Superfund, although the total amount of all the orphan shares allocated in a given year is capped at \$ 500 million. The \$ 500 million to pay the orphan shares is to be paid by money from one of two sources: (1) any measurable savings in EPA enforcement costs as a result of the new system or (2) any unanticipated surplus in the taxes that support the Superfund. If neither of these anticipated sources of money materializes, the NCS proposes an automatic increase in the current Superfund broad-based corporate tax<sup>83</sup> sufficient to fund the shortfall.

The NCS proposal contains two types of relief inspired by small business concerns, one keyed to behavior and the other to a PRP's identity as a small business. First, so-called *de minimis* and *de micromis* parties would be given a special, early opportunity to settle their liability, with the *de minimis* category including *any* entity that sent less than 1 percent of the total volume of waste to the site and the *de micromis* category including those who sent less than .05 percent of total volume.<sup>84</sup> Because this special relief is defined by behavior and, therefore, includes many large corporations that made only *de minimis* contributions at many sites, it is popular throughout the PRP community.

Second, a "small business party," to be defined by reference to Small Business Administration guidelines, would be allocated a share under the same rules as apply to all other PRPs. But following allocation, such parties would be given an opportunity to demonstrate that they lack the "ability to pay" their shares, with this test defined as the ability to maintain basic business operations, taking into consideration overall financial condition and ability to raise revenue. Any allocated amounts that are found to exceed a small business party's ability to pay would be allocated to the orphan share.

The NCS also proposes two types of relief for local governments, once again keying the first to behavior and the second to a PRP's identity as a local government. First, the liability of *all* public and private parties that sent municipal solid waste and sewage sludge to a Superfund site would be capped at 10 percent of total cleanup costs. The 10-percent cap applies *after* shares are otherwise allocated to such parties, using the Gore factors. Thus, if total allocated shares exceed 10 percent, the overage would be assigned to the orphan share.

The NCS also proposes two types of relief for local governments, once again keying the first to behavior and the second to a PRP's identity as a local government. First, the liability of *all* public and private parties that sent municipal solid waste and sewage sludge to a Superfund site would be capped at 10 percent of total cleanup costs. The 10-percent cap applies *after* shares are otherwise allocated to such parties, using the Gore factors. Thus, if total allocated shares exceed 10 percent, the overage would be assigned to the orphan share.

The insurance industry's problems with Superfund were explained at great length throughout NCS deliberations. But, until the very end of its deliberations, the only solution supported by insurer members of the NCS was the repeal of retroactive liability in exchange for a public works program supported by new taxes. Because this approach was unacceptable to all the other members, the NCS was unable to satisfy the insurers. As the NCS completed its negotiations in December 1993, the possibility of a "hybrid" solution to insurance problems had just emerged. This solution, which was ultimately incorporated into the consensus legislation, would protect the insurance industry from some liability in exchange for the creation of an industry-financed fund providing reimbursement to its customers. The NCS did not have time to debate and develop this proposal, settling instead for a statement urging Congress and the Administration to continue efforts to develop it.<sup>85</sup>

\* *The Consensus Legislation.* Consensus Superfund legislation, as it emerged from the key House and Senate committees, adopts both the framework and the substance of the NCS liability proposal, with a few notable exceptions, by far the most significant of which are the legislation's restrictions on the scope of allocation and orphan funding. Like the NCS proposal, the consensus legislation does not change the scope of current law and does not modify the operation of strict liability. The legislation also does not change the government's authority to order PRPs to conduct cleanup,<sup>86</sup> although it does provide for reimbursement of those doing the work pursuant to an allocation.<sup>87</sup> The allocation process under the legislation would produce a "nonbinding equitable allocation," as opposed to the binding approach suggested by the NCS, and would be conducted by a neutral third party selected by a vote [25 ELR 10031] of the PRPs, as opposed to an ALJ.<sup>88</sup> In operation, however the two systems would present equally intolerable risks for recalcitrants because the consensus legislation also subjects such parties to the full range of joint and several liability, including the possibility that they will be assessed all orphan share costs.<sup>89</sup>

Allocations would be based on the Gore factors, as well as any other factors developed by EPA in a guidance issued after notice and an opportunity for comment.<sup>90</sup> While this approach puts off for another day the inevitable fight over additional allocation factors, it removes a major source of controversy from the legislative process, helping to expedite congressional action. PRPs would pay the costs of the allocation process.<sup>91</sup>

The consensus legislation further provides that the United States must accept an allocator's determinations and settle with PRPs on the basis of such determinations, unless there is "no rational interpretation of the facts" that would provide a "reasonable basis" for the decision, the allocation was affected by "bias, fraud, or unlawful conduct," or the allocation was "substantially and directly affected by procedural error."<sup>92</sup> The formulation of these limited grounds for the government to override an allocation was the subject of much arm wrestling behind-the-scenes because DOJ attorneys resisted this perceived incursion on their enforcement discretion.

As for the critical issue of orphan share funding, neither the Clinton Administration nor Congress could accept the notion of raising industry taxes to provide new money for the orphan share, as recommended by the NCS. Instead, the Administration convinced key legislators that current surpluses in the Superfund would pay the orphan share. To ensure that a drain on the fund does not develop, the legislation caps expenditures on the orphan share at \$ 300 million annually, \$ 200 million less than the NCS proposal.<sup>93</sup> As a result, the consensus legislation is significantly more restrictive than the NCS proposal in providing allocation and — even more significantly — orphan funding.

The legislation would absolutely deny the benefits of allocation and orphan funding to sites where the only PRPs are owners and operators.<sup>94</sup> It does mandate allocation and orphan share funding at all sites involving two or more PRPs where the remedy is selected after February 3, 1994 — so-called post-introduction ROD sites.<sup>95</sup> At sites where the remedy was selected prior to that date — so called preintroduction ROD sites, allocation would only be provided if requested by PRPs who have already settled their liability to the government, unless EPA decides, in its discretion to initiate an allocation.<sup>96</sup> Further, orphan funding is not guaranteed at preintroduction records of decision (ROD) sites unless EPA decides to allow it.<sup>97</sup> These limitations could significantly reduce the benefits of orphan share funding to thousands of PRPs involved at Superfund sites where RODs have already been issued — some 885 sites — and Superfund sites where only owners and operators are involved — some 41 percent of sites.<sup>98</sup>

The consensus legislation closely tracks all of the special relief proposed by the NCS for small businesses and local governments: It contains expedited settlements for de minimis and de micromis parties, it limits the liability of municipal solid waste and sewage sludge generators and transporters, and it establishes an ability to pay test for small businesses and for municipal owners and operators.<sup>99</sup> Both the House and Senate bills also include an exemption from liability for anyone who is a homeowner, a lessee of residential property, a small nonprofit organization, or a small business and sent or transported garbage to a Superfund site.<sup>100</sup> Further, in a provision likely to provoke sharp controversy if and when the legislation reaches conference, the Senate bill provides a 10-percent cap on the aggregate liability of municipal owners or operators with a population of less than 100,000.<sup>101</sup>

Efforts to reform the current system for resolving past insurance claims were volatile and controversial throughout the 103d Congress' consideration of the consensus legislation, raising the distinct possibility that if reauthorization gets bogged down in the 104th Congress, significant elements of the insurance industry will be tempted once again to embrace the public works alternative. The consensus legislation would set up a special fund, called the "Environmental Insurance Resolution Fund" (or EIRF), which would be used to settle the coverage claims of its policyholders,<sup>102</sup> potentially eliminating the extremely expensive coverage litigation that now rages in many states.<sup>103</sup>

The central premise of the proposal is that the EIRF would only pay a portion of outstanding claims, but that **[25 ELR 10032]** acceptance of such payment would extinguish the policy holder's rights against its insurer.<sup>104</sup> Acceptance or rejection of EIRF payments would be at the option of the policy holder, who would make a calculation whether certain, partial payment now is better than bearing the future risks of litigation.<sup>105</sup> As an incentive to resolve claims through the fund, the Senate version of the consensus legislation would require a policyholder to pay 40 percent of its insurers' litigation expenses if the policyholder rejects compensation from the EIRF and litigates, but ultimately obtains a final judgement less favorable than the settlement originally offered by the fund.<sup>106</sup>

As it emerged from the House Ways and Means and the Senate Finance Committees, the consensus legislation would fund the EIRF at \$ 8.1 billion over a 10-year period.<sup>107</sup> The two bills adopt somewhat different formulas for imposing the taxes that would support the fund, provoking bitter controversy within the insurance industry.<sup>108</sup> In essence, the dispute over taxes, which has the potential to reignite and cause disruption of the reauthorization in the 104th Congress, revolved around three issues: (1) whether the tax is assessed "retrospectively," i.e., the tax would fall most heavily on those who wrote the largest number of policies during the period when Superfund coverage was effective, versus "prospectively," i.e., the tax would fall most heavily on those currently doing the largest volume of property and casualty business; (2) how much the reinsurance industry should pay; and (3) how much small insurance companies should pay.

Politically, the liability provisions of the consensus legislation are the mirror image of its cleanup standards: They occupy a point on the

political spectrum to the left of the NCS proposal, largely as a result of tough bargaining by DOJ attorneys, who resisted relinquishing any of the government's leverage and authority over PRPs. Basically satisfied with their gains under the bill's cleanup standards provisions, and mindful of the consequences of not reauthorizing Superfund, industry accepted the compromise.

The beauty of the liability compromise is that it is based on the strong desires of the environmental community and industry to appear reasonable to Congress. The environmentalists assert that they do not care how industry divides up the costs, as long as cleanup is well-funded and the government retains adequate enforcement leverage to both deter and punish recalcitrants. In fact, at this stage in the program's history, they could not take any other position and retain their credibility. If industry thinks it has invented a better mousetrap to achieve the goal of joint and several liability — forcing PRPs to assume the burden of allocating cleanup costs rather than imposing that burden on the government — then how can the environmentalists legitimately object?

As for the large industrial PRPs who dominate the reauthorization debate, there is no question that they would like an explicit repeal of joint and several liability. But they recognize that the only reasonable alternative to a strong liability system is a public works program funded by massive new taxes, an approach that is absolutely unacceptable to them. Having accepted the inevitability of retaining joint and several liability as the punishment for those who resist the system, the large PRPs have found a way to achieve the equally important goal of giving everyone defined as potentially liable an irresistible incentive to come to the table at the outset to share cleanup costs.

Beyond its political viability is the more important question whether the compromise will work, rescuing Superfund's credibility and restoring stability to the program. The new allocation process preserves the two central goals of Superfund liability: Establishing a stable source of funding for the program and deterring future pollution. Upfront allocation should expedite the resolution of liability disputes, ensuring a steady flow of revenue for cleanup. At the same time, the prospect of becoming enmeshed in the reformed liability system will still be sufficiently expensive and unpleasant that rational waste producers and site owner/operators will still work hard to avoid it.

But, if enacted, the new allocation system will remain vulnerable on four fronts. The legislation's stinginess with orphan share funding is understandable given the widespread aversion to new taxes, but the potential exclusion of two-thirds of pre- 1994 ROD sites and an unclear number of owner/operator sites could deprive so many PRPs of this popular source of relief that pressure could once again build up for more radical reform. If \$ 300 million annually in surplus funding is really available, then the money should arguably be spread across all sites, as opposed to those that are relatively new.

Second, it is far from clear whether the new system will be applied to the tens of thousands of non-NPL sites, the vast majority of which will be addressed at the state level.<sup>109</sup> If state-level liability and cleanup standards are **[25 ELR 10033]** unremittingly harsh, and the federal Superfund program becomes much more reasonable from the PRP point of view, a push to place sites on the federal list could develop, swamping the federal program. By the same token, if state liability systems and cleanup standards are overly weakened, PRPs will migrate to state programs for relief, placing intolerable pressure on underfunded state bureaucracies. In sum, the best result for Superfund and for effective cleanup in general would be an integration of reforms at the federal and state levels.

The third front of vulnerability for the new allocation system is the site-specific decisions that will be made regarding the orphan share. The orphan share is designed to capture the "fair" allocated shares of four categories of PRPs: (1) "nonviable" PRPs; (2) small businesses to the extent that they lack the ability to pay their allocated shares; (3) municipal owners and operators to the extent that they lack the ability to pay their allocated shares; and (4) municipal solid waste and sewage sludge generators and transporters to the extent that their allocated shares exceed 10 percent. If neutral "allocators" succumb to the inevitable demands of viable PRPs that shares be allocated to these four categories with excessive liberality, and the orphan share, therefore, becomes far larger than anticipated, the system could be stressed to the point that it loses its credibility.

The fourth potential weakness is the possibility of a widespread failure by EPA to use the mechanisms the new system provides to eliminate collateral parties from the process, especially the "early settlement" opportunities provided for de minimis and de micromis parties. The continued involvement of such parties will mean continuing pressure on the political viability of the Superfund liability scheme, with potentially dire consequences in the next reauthorization cycle.

#### Options for the 104th Congress

The 104th Congress has two basic alternatives. It can pick up where the 103d Congress left off, moving the consensus legislation rapidly through the relevant committees in time to make the December 31, 1995, deadline.<sup>110</sup> Or it could begin the reauthorization

debate from scratch, declaring a legislative "open season" on what will then become the deal of 1994, as opposed to the century. If open season is declared, Congress is unlikely to complete its work before the December deadline, and the reauthorization may not even be completed by the end of the 104th term. Even if short-term funding extensions are enacted, an extended delay could have catastrophic results for the program and damage every one of its stakeholder groups.

Unfortunately, speculation about the consequences of a Superfund funding gap is informed by bitter experience. Congress ran over its deadline for extending Superfund taxes by one year in 1985-1986, and the program was thrown into bureaucratic chaos, despite a series of short-term extensions, which provided reduced funding throughout the period. The reasons for the chaos despite the extensions was a combination of politics, fiscal imperatives, and bureaucratic caution.

At the time, EPA Administrator Lee M. Thomas was trying to spur Congress into passing reauthorization legislation as quickly as possible, and was facing resistance from the environmental community and its allies in Congress. In August 1985, two months before the deadline, Thomas announced that he was withdrawing \$ 125 million earmarked for long-term site cleanups in order to create a reserve that could be used for emergencies and enforcement.<sup>111</sup> EPA spokespeople explained that interim extensions of the Superfund tax did not obviate the need for hoarding money and reordering priorities because the extensions covered a short planning horizon, were subject to the vagaries of the legislative process and, therefore, did not give the Agency the certainty it needed to continue spending as usual. Eventually, of course, funding was restored to those sites and the work resumed, but not without a high cost in financial and administrative terms.

Throughout the following year, as Congress struggled to complete its work, Thomas kept up the pressure. He stopped awarding cleanup contracts, cut emergency response funds in half, and threatened to furlough hundreds of EPA employees.<sup>112</sup> EPA officials hinted darkly to the press that the Agency's most valuable employees might quit the federal workforce and move into the private sector if the situation was not stabilized soon. By September 1986, one month before final congressional action, Thomas threatened to begin laying off EPA employees.<sup>113</sup> EPA explained that the consequences of such a move would not be confined to the Superfund program alone, which at the time employed 1,500 of the Agency's 11,000 employees. Federal "reduction in force" rules would compel EPA to institute an Agency-wide process with the most senior employees "bumping" each other down the bureaucratic ladder until enough employees at the bottom had been fired. EPA estimated that some 4,000 people could be displaced from their jobs before the process was complete. Fortunately, congressional action a few weeks later forestalled this destructive development.<sup>114</sup>

As she approaches a new Congress dominated by conservative Republicans, EPA's current Administrator must decide whether to repeat the strategy used so effectively by her predecessor. The choice is not an easy one. If the reauthorization debate rejects the consensus approach and begins from scratch, it could quickly degenerate into a pitched political battle that would make the December 1995 deadline all but impossible to meet. In an effort to forestall this development, Browner, who strongly supported the consensus bill, could choose to play hardball with Congress, predicting great turmoil and funding problems if it does not quickly pass legislation that is broadly acceptable.

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But there is also a risk to this approach if the conservative Republican leadership in the U.S. House of Representatives decides to respond to such a strategy by passing a bill that repeals retroactive liability and underfunds the program. Assuming the Republican leadership is able to send such a bill to the President before or close to the December 1995 deadline, Browner's threats of dire consequences could be used to browbeat him into signing the legislation.

And, of course, there is always the objective truth of the matter. According to some estimates, Superfund enjoyed a \$ 2.5 billion surplus as of October 1994, and this figure could approach \$ 3.0 billion over the next year if projected economic activity levels are maintained.<sup>115</sup> This money may be enough to fund the program through 1996 without significant hardship. Further, appropriations committees in both houses could make a decision to continue to fund the program out of general revenues despite the termination of the taxes that support it.<sup>116</sup> Browner could, therefore, make a rational choice not to threaten funding shortages immediately and instead to wait and see how Congress responds. Of course, if she chooses this route, and the December 1995 deadline comes and goes without definitive legislative action, she may find herself presiding over an agency increasingly undermined by uncertainty as well as lack of funds. However, Browner chooses to play this crucial hand, if defeat is snatched from the jaws of victory and the second reauthorization of Superfund follows the course of the first, the fallout will be widespread.

## **Conclusion**

America may well have reached the point where we cannot deliver on our national promise to restore and protect the environment at an acceptable cost without finding new ways to deter pollution, regulate ongoing conduct, and clean up the legacy of past industrial production. Gone are the days when expanding federal budgets can support the initiation of aggressive government "command and control" regulatory programs. With all of its flaws, Superfund remains at the heart of a bold strategy to deal with one of our most intractable and pervasive environmental problems. By motivating industry to develop and implement effective cleanup technologies while simultaneously regulating toxic waste disposal by risk, Superfund represents an alternative we cannot afford to lose without repercussions that extend far beyond the program's current scope.

At the same time, it is clear that the current program not only wastes precious time and scarce resources, but has lost the confidence of virtually all of its key stakeholders. Without effective and timely reform, this confidence — and the program's political viability over the long term — cannot be restored. Regardless of Superfund's influence on prospective behavior, industry acceptance is a key component of this restoration because a system that appears grossly unfair, irrational, and exorbitantly expensive inspires resistance on a scale that quickly outmatches the government's efforts to enforce the law.

The environmental legacy of the Clinton Administration is also at stake. Seasoned by its failures in the 103d Congress, the Administration hopefully will learn to set limited priorities, establish a legislative strategy capable of achieving those priorities, and designate Superfund as its highest priority for the second half of its term. If it does not achieve such discipline, its legacy will be an EPA crippled by the defunding of its largest program and an historic opportunity missed.

There is also the 104th Congress to consider. It will arrive in Washington dedicated — at least rhetorically — to changing the old ways of doing things. If Congress does not have the wisdom to understand and embrace the deal of the century, and instead returns to its old habits of gridlock and partisan warfare, it will have reneged on this commitment and begun yet another cycle of voter discontent.

Finally, and perhaps most important of all over the long term, there is the question of how to negotiate and implement consensus in the arena of environmental policymaking. Degeneration in the Superfund reauthorization debate and, with it, a tacit rejection of the NCS process, will discourage stakeholders on both ends of the political spectrum from undertaking similar projects and will send a very negative message to participants in future environmental debates. Put plainly, that message is that the only way to be heard in Washington is to muster the financial resources to both endure and prevail in a lobbying marathon that rewards the strident, the unreasonable, and the wealthy and penalizes just about everyone else. In the end, the victories won in this atmosphere, like those ostensibly gained by Superfund combatants a decade ago, may prove just as illusory.

[1.](#) 33 U.S.C. §§ 1251-1387, ELR STAT. FWPCA §§ 101-607.

[2.](#) 42 U.S.C. §§ 300f-300j-26, ELR STAT. SDWA §§ 1401-1465.

[3.](#) In February 1994, the House Rules Committee barred floor debate of an amendment to the EPA cabinet bill that would have required risk assessment and cost-benefit analysis of all new EPA regulations. The bill was withdrawn after a 227 to 191 vote defeated the rule. See John H. Cushman Jr., *EPA Critics Get Boost in Congress*, N.Y. TIMES, Feb. 7, 1994, at A1; *General Policy: Future of EPA Cabinet Bill Uncertain Following House Vote on Amendment Rule*, 24 Env't Rep. (BNA) 1719 (Feb. 4, 1994). Similar amendments blocked action on the reauthorization of the SDWA during the waning days of the Congress. See *Safe Drinking Water Bill Stalls, Puts Cities on the Spot*, 52 CONG. Q. 2869 (1994). A "takings" provision in the House version of the Clean Water Act reauthorization bill — which also includes provisions for risk assessment and unfunded mandates — raised objections from the Clinton Administration and members of Congress. See *12 House Leaders Oppose Takings Legislation*, 25 Env't Rep. (BNA) 1165 (Oct. 7, 1994); *Water Pollution: Administration Official Tells of Concerns With Proposals on Private Property Rights*, 25 Env't Rep. (BNA) 234 (June, 3 1994). A draft memo of a meeting of environmental lobbyists in early March, written by Eric Olson of the Natural Resources Defense Council, emphasized the need to kill any legislation that might be weakened by "unholy trinity" style amendments. See *General Policy: Draft Memo Outlines Groups' Strategy for Superfund, CWA, Drinking Water Bills*, 24 Env't Rep. (BNA) 1967 (Mar. 18, 1994); *Green Groups Weigh Killing Key Bills*, NAT'L J., CONG. DAILY, Mar. 16, 1994. The environmental community later decided not to use the "unholy trinity" phrase because some thought it blasphemous, and this political phenomenon is now referred to as the "triple threat," a blander and less descriptive label. See *General Policy: 15 Environmental Groups Urge Members to Lobby Clinton, Congress on Legislation*, 25 Env't Rep. (BNA) 506 (July 15, 1994).

[4.](#) While a moratorium on new legislation might not be the worst thing that could happen either to the Administration or to modern environmentalism, paralyzing controversy has also infected existing programs. Many initiatives have become battlegrounds that eventually lead to political compromises of a "least common denominator" variety, fully satisfying no constituency and leaving many

participants infuriated by the process. See Michael Kranish, *Environmentalists Feel a Presidential Letdown; Gore Defends Administration Record*, BOSTON GLOBE, Apr. 21, 1994, at 1.

Public opinion polling consistently demonstrates that the public supports by wide margins strong environmental protection. A poll conducted by the Wirthlin group in the summer of 1992 found that 80 percent of those questioned agreed that "protecting the environment is so important that requirements and standards cannot be made too high, and continuing environmental improvement must be made regardless of cost." *Poll Shows Four Out of Five Americans Support the Environment, Even Over Economy*, 23 Env't Rep. (BNA) 1155 (Aug. 7, 1992). The poll also found that the public favored environmental protection by a two-to-one margin if asked to choose between economic growth and a clean environment. *Id.* A survey of 1,200 adults conducted by the Roper Organization for the Times Mirror Magazines in the summer of 1992 found that 63 percent said they believed environmental laws and regulations "have not gone far enough," and 64 percent would choose environmental protection over economic development if they had to choose between the two. Brad Knickerbocker, *Voters Rank Importance of Environment*, CHRISTIAN SCI. MONITOR, Oct. 1, 1992, at 10. However, 6 out of 10 of those polled by Roper also said that they would oppose increased taxes to pay for environmental programs. *Id.*

5. Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675, ELR STAT. CERCLA §§ 101-405.

6. Superfund appropriations represented approximately 23 percent of the total EPA budget in 1993, 24 percent in 1992, and 27 percent in 1991. See H.R. REP. NO. 150, 103d Cong., 1st Sess. 44, 58 (1993); S. REP. NO. 356, 102d Cong., 2d Sess. 89, 111 (1992); S. REP. NO. 107, 102d Cong., 1st Sess. 84, 106 (1991).

7. The NCS was convened by the Keystone Center and the Vermont Law School and was chaired by Jonathan Lash, President of the World Resources Institute. The EPA advisory group was convened as a subgroup of the National Advisory Council on Environmental Policy and Technology (NACEPT).

8. KEYSTONE CTR. & ENVTL. LAW CTR., VERMONT LAW SCH., FINAL CONSENSUS REPORT OF THE NATIONAL COMMISSION ON SUPERFUND (1994) [hereinafter NCS REPORT].

9. H.R. 4916, 103d Cong., 2d Sess. (1994); S. 1834, 103d Cong., 2d Sess. (1994); see also Timothy Noah, *Disputes End Revision Effort for Superfund*, WALL ST. J., Oct. 6, 1994, at B8; Margaret Kriz, *How the Twain Met*, 26 NAT'L J. 1291, 1291, 1294 (1994); Gary Lee, *Groups Endorse Superfund Plan, Lawmakers Call Measure a Priority*, WASH. POST, May 4, 1994, at A20.

10. In 1990, Congress enacted a five-year extension of the taxes that support the program and reauthorized the Superfund statute without amending any of its substantive provisions. The taxing authority will therefore expire on December 31, 1995. Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, §§ 6301, 11231, 104 Stat. 1388, 1388-319, -444, -445 (1990) (1988 & Supp. IV 1992).

11. See Matthew Purdy, *Wasting Away: Superfund Mired in Congressional Wrangling*, PHILA. INQUIRER, July 3, 1986, at A6; Rochelle L. Stanfield, *Superfund Politics or Dirty Pool?*, 18 NAT'L J. 1265, 1265-66 (1986).

12. Pub. L. No. 99-499, 100 Stat. 1613 (1986).

13. H.R. CONF. REP. NO. 962, 99th Cong., 2d Sess. (1986), reprinted in 1986 U.S.C.C.A.N. 3276.

14. See, e.g., 132 CONG. REC. S14913-17 (daily ed. Oct. 3, 1986) (statement of Sen. Mitchell); 132 CONG. REC. H9562-64 (daily ed. Oct. 8, 1986) (statement of Rep. Dingell).

15. This term of art refers to parties who are strictly, jointly, and severally liable under CERCLA §§ 106 and 107. 42 U.S.C. §§ 9606, 9607, ELR STAT. CERCLA §§ 106, 107 (authorizing unilateral cleanup orders and the recovery of response costs).

16. The law applies to pollution of the land, soil, or air by any source of waste that contains only trace amounts of 700-800 ubiquitous "hazardous substances." See, e.g., 42 U.S.C. § 9607, ELR STAT. CERCLA § 107 (defining basic liability); *id.* § 9601(8), (9), (14), (22), ELR STAT. CERCLA § 101(8), (9), (14), (22) (defining "environment," "facility," "hazardous substance," "release," respectively).

- [17.](#) See generally *id.* § 9622, ELR STAT. CERCLA § 122. For example, the section authorizes EPA to use the Superfund to supplement partial settlements offered by potentially responsible parties (so-called mixed funding), *id.* § 9622(b)(1), ELR STAT. CERCLA § 122(b)(1), and also urges the government to settle small parties out early, *id.* § 9622(g), ELR STAT. CERCLA § 122(g).
- [18.](#) *Id.* § 9613(f), ELR. STAT. CERCLA § 113(f). Some courts had already found a common-law right to contribution. See, e.g., *Mardan Corp. v. C.G.C. Music, Ltd.*, [804 F.2d 1454](#), [17 ELR 20209](#) (9th Cir. 1986).
- [19.](#) See Robert Tomsho, *Pollution Ploy, Big Corporations Hit by Superfund Cases Find Way to Share Bill*, WALL ST. J., Apr. 2, 1991, at A1.
- [20.](#) Because the NACEPT group finished its work in the early fall of 1994, the NCS report, issued in late December 1994, ultimately overtook and superseded NACEPT's efforts. But the two consensus-building projects clearly cross-fertilized and strengthened each other, producing a single compromise vehicle that a strong majority of stakeholders could support.
- [21.](#) Much of the literature on consensus-building in the area of environmental policymaking identifies one critical element that must be present for consensus to materialize: The participants must believe that it is strongly in their interests to strike a deal. See GAIL BINGHAM, *RESOLVING ENVIRONMENTAL DISPUTES: A DECADE OF EXPERIENCE* 108 (1986) ("Experienced mediators emphasize that parties to a voluntary dispute resolution process must have sufficient incentives to negotiate an agreement with each other. . . . [T]he incentives may come from opportunities for mutual gains that would be unavailable except through cooperation.").
- [22.](#) When the first reauthorization began in 1983, the media characterized the Superfund program as a complete failure — mostly due to mismanagement at the EPA. See Joseph A. Davis, *Superfund Contaminated by Partisan Politics*, 42 CONG. Q. 615, 617 (1984). In four years, only six sites had been cleaned up, and the NPL was growing rapidly. *Id.* at 615. These problems inspired an almost unanimous call for more money, stricter standards, and less EPA discretion over the program's implementation. See *A Strong Superfund Is a Wise Investment*, PHIL. INQUIRER, Apr. 29, 1985, at A10; Rochelle L. Stanfield, *Superfund Backers Push Big Expansion of Program to Clean Up Toxic Wastes*, 16 NAT'L J. 1762 (1984). Complaints that the Superfund program has again failed and needs overhauling to survive have also dominated the current reauthorization debate. See *Time to Reform Superfund*, WASH. POST, Sept. 2, 1993, at A26. As in 1984, editorials criticize EPA's cleanup rate, but unlike 10 years earlier, blame the problem on the lengthy and expensive legal battles between insurance companies and PRPs. See *Cleanup Gets Little of Superfund Settlements*, N.Y. TIMES, Apr. 26, 1992, at A27. Also, the program's image has suffered as a result of widespread arguments by industry that environmental regulations have shown little benefit, impede economic growth, and are imposed without regard to any standard of reasonableness. See *EPA Regulations a Step Back Could Take Environmental Battle Forward*, DET. FREE PRESS, Dec. 6, 1993, at A10; Keith Schneider, *New View Calls Environmental Policy Misguided*, N.Y. TIMES, Mar. 20 1993, at A1.
- [23.](#) See 26 U.S.C. § 4611(e) (1988 & Supp. IV 1992); *supra* text accompanying note 10.
- [24.](#) 42 U.S.C. § 9606, ELR STAT. CERCLA § 106 (authorizing unilateral cleanup orders and the imposition of treble damages).
- [25.](#) See *Administration Releases Reform Proposal; Significant Liability Relief Sought in Cleanups*, 24 Env't Rep. (BNA) 1715 (Feb. 4, 1994); Timothy Noah, *Details of Plan to Revise Superfund Spelled Out, Draw Mixed Reviews*, WALL ST. J., Feb. 4, 1994, at A12.
- [26.](#) See Timothy Noah, *House Panel Clears Proposed Changes in Superfund Law*, WALL ST. J., May 19, 1994, at A16.
- [27.](#) See *Second House Committee Approves Legislation; Only Ways and Means Left*, 25 Env't Rep. (BNA) 117 (May 20, 1994).
- [28.](#) See *Senate Committee Approves Reform Bill; National Risk Level Set in Legislation*, 25 Env't Rep. (BNA) 619 (Aug. 5, 1994).
- [29.](#) See *Reform Bill's Funding Provisions Approved After Changes Adopted, Tax Rates Provided*, 25 Env't Rep. (BNA) 771 (Aug. 26, 1994).
- [30.](#) See *Reform Bill Approved by Finance Committee Would Eliminate Prospective Tax on Insurers*, 25 Env't Rep. (BNA) 1117 (Sept. 30, 1994).

[31.](#) See *Time Restraints, Wrangling Kill Reform Bill; New Effort to Change CERCLA Next Year*, 25 Env't Rep. (BNA) 1172 (Oct. 14, 1994).

[32.](#) See John H. Cushman, *Congress Forgoes It's Bid to Speed Cleanup of Dumps, Superfund Revision Off, Administration's Attempts at Environmental Consensus Are Dealt a Setback*, N.Y. TIMES, Oct. 6, 1994, at A1, A22.

[33.](#) See Gary Lee, *Superfund Reform Bites the Dust: Hill GOP Leaders Promised to Oppose Environmental Legislation*, WASH. POST, Oct. 6, 1994, at A15.

[34.](#) See *supra* note 30; Gary Lee, *EPA's Browner Remains Resilient in Face of Legislative Failures*, WASH. POST, Oct. 17, 1994, at A17.

[35.](#) For a description of the Taskforce's deliberations, see *Interagency Group Seeks Major Superfund Remedy Selection Changes*, INSIDE EPA WKLY. REP., SPECIAL REPORT, Oct. 27, 1993, at 1.

[36.](#) The Coalition that worked in support of the consensus bill included the following trade associations and organizations, as well as individual companies too numerous to list: (1) from industry, the Chemical Manufacturers Association, the American Automobile Manufacturers Association, the Association of American Railroads, the American Bankers Association, the American Insurance Association, the National Association of Home Builders, the National Paint and Coating Association, Printing Industries of America, the National Federation of Independent Business, and the Small Business Legislative Council; (2) from the environmental community, the Environmental Defense Fund, the Natural Resource Defense Council, the National Wildlife Federation, and the Sierra Club; and (3) from the municipal community, American Communities for Cleanup Equity, the National Association of Counties, the National Association of Towns and Townships, the National League of Cities, the National School Boards Association, and the U.S. Conference of Mayors.

Opponents of the legislation include the following trade associations and organizations: (1) from industry, the American Furniture Manufacturers Association, the American Iron & Steel Institute, the Grocery Manufacturers of America, the National Food Processors Association, the National Association of Mutual Insurance Companies, the National Association of Independent Insurers, the Alliance of American Insurers, and the Council of Insurance Agents and Brokers; (2) from the civil rights community, the National Association for the Advancement of Colored People; and (3) from the municipal community, Local Governments for Superfund Reform.

The insurance industry was the most badly split during the debate. The American Insurance Association, which represents most of the large property and casualty insurers enmeshed in Superfund cases, supported the legislation. However, the legislation was opposed by trade associations representing smaller companies that are less involved in Superfund cases but would nevertheless pay some taxes to support the Environmental Insurance Resolution Fund.

[37.](#) 42 U.S.C. §§ 7401-7671q, ELR STAT. CAA §§ 101-618.

[38.](#) Pub. L. No. 101-549, 104 Stat. 2399.

[39.](#) President Clinton said, "As we protect our environment, we must invest in the environmental technologies of the future which will create jobs. This year, we will fight for a revitalized Clean Water Act and a Safe Drinking Water Act and a reformed Superfund program." President's Address Before a Joint Session of the Congress on the State of the Union, 30 WKLY. COMP. PRES. DOC. 148, 150 (1994).

[40.](#) 1 GEORGE SANTAYANA, THE LIFE OF REASON 284 (1905).

[41.](#) See generally James T. O'Reilly, *Advisers and Secrets: The Role of Agency Confidentiality in the Federal Advisory Committee Act*, 13 N. KY. L. REV. 27 (1986).

[42.](#) Included in this number are the Senate Environment and Public Works and Finance Committees and the House Energy and Commerce, Public Works and Transportation, and Ways and Means Committees.

[43.](#) NCS REPORT, *supra* note 8, at 65-67 (explaining the ground rules).

[44.](#) NCS REPORT, *supra* note 8, at 66.

[45.](#) NCS REPORT, *supra* note 8.

[46.](#) NCS REPORT, *supra* note 8, at 65-67.

[47.](#) For criticisms of cleanup standards, *see generally* HAZARDOUS WASTE CLEANUP PROJECT, TECHNOLOGICAL REALITY, STICKER SHOCK, EXAGGERATING RISK (1993); U.S. GEN. ACCT. OFF., SUPERFUND: PROBLEMS WITH THE COMPLETENESS AND CONSISTENCY OF SITE CLEANUP PLANS, Pub. No. GAO/RCED-92-138 (1992); ENVIRONMENTAL DEFENSE FUND ET AL., TRACKING SUPERFUND: WHERE THE PROGRAM STANDS (1990); U.S. OFF. OF TECH. ASSESSMENT, COMING CLEAN: SUPERFUND PROBLEMS CAN BE SOLVED, Pub. No. OTA-ITE-433 (1989) [hereinafter OTA, COMING CLEAN]; U.S. OFF. OF TECH. ASSESSMENT, ARE WE CLEANING UP: 10 SUPERFUND CASE STUDIES-SPECIAL REPORT, PUB. NO. OTA-ITE-362 (1988); ENVIRONMENTAL DEFENSE FUND ET AL., RIGHT TRAIN, WRONG TRACK: FAILED LEADERSHIP IN THE SUPERFUND CLEANUP PROGRAM (1988). For criticisms of Superfund's liability scheme, *see generally* KATHERINE N. PROBST & PAUL R. PORTNEY, RESOURCES FOR THE FUTURE, ASSIGNING LIABILITY FOR SUPERFUND CLEANUPS: AN ANALYSIS OF POLICY OPTIONS (1992); JAN P. ACTION & LLOYD S. DIXON, RAND INSTITUTE FOR CIVIL JUSTICE, SUPERFUND AND TRANSACTION COSTS: THE EXPERIENCES OF INSURERS AND VERY LARGE INDUSTRIAL FIRMS (1992); MILTON RUSSELL ET AL., HAZARDOUS WASTE REMEDIATIONS: THE TASK AHEAD (1991); Tom Tietenberg, *Indivisible Toxic Torts: The Economics of Joint and Several Liability*, 65 LAND ECON. 305 (1989); HENRY DIAMOND, A LAWYER'S VIEW OF SUPERFUND PROBLEMS (1992).

[48.](#) NCS REPORT, *supra* note 8.

[49.](#) H.R. 4916, 103d Cong., 2d Sess. (1994); S. 1834, 103d Cong., 2d Sess. (1994).

[50.](#) These descriptions of historic positions are based on conversations the author has had with a broad cross-section of key players since 1983, when she began work on the 1986 reauthorization of Superfund. For documentary examples of Superfund stakeholders taking these positions, *see generally* *Superfund Remedy Selection Reform: Hearings Before the Subcomm. on Transp. and Hazardous Materials of the House Comm. on Energy and Commerce*, 103d Cong., 2d Sess. (1994) (statement of J. Roger Hirl, President and CEO, Occidental Chem. Corp., on behalf of the Chemical Mfrs. Assoc.); *Issues Relevant to Remedy Selection in the Superfund Program: Hearings Before the Subcomm. on Transp. and Hazardous Materials of the House Comm. on Energy and Commerce*, 103d Cong., 1st Sess. (1993) (statement of Linda E. Greer, Ph.D., Senior Scientist, Natural Resources Defense Council); *Public Involvement in the Superfund Program: Hearings Before the Subcomm. on Transp. and Hazardous Materials of the House Comm. on Energy and Commerce*, 103d Cong., 1st Sess. (1993) (statement of the Hon. Susan M. Thornton, Mayor of Littleton, Colo.); *Superfund Liability: Hearings Before the Subcomm. on Env't, Energy, and Natural Resources of the Senate Comm. on Gov't Operations*, 103d Cong., 1st Sess. (1993) (statement of David E. Gibbs, P.E., Director, Corporate Env'tl. Affairs, Webco Indus., Inc.).

[51.](#) A "hazard index" is a number that establishes the level of exposure for a certain chemical over which noncancer health effects, e.g., neurological and reproductive damage, can be expected to be manifested.

[52.](#) 42 U.S.C. § 9621(d), ELR STAT. CERCLA § 121(d).

[53.](#) For a study identifying the disproportionate impact of toxic waste sites on minority and low-income communities, *see* COMMISSION FOR RACIAL JUSTICE, TOXIC WASTES AND RACE IN THE U.S. (1987).

[54.](#) 42 U.S.C. § 9605(a)(8)(B), ELR STAT. CERCLA § 105(a)(8)(B). For a list of sites that appear on the NPL, *see* 40 C.F.R. § 300, App. B (1993), *revised in* 59 Fed. Reg. 8724 (Feb. 23, 1994).

[55.](#) While this concept sounds logical in theory, in practice it has two important problems. First, it is often very difficult to isolate the contamination caused by the Superfund site from all other sources of contamination. Second, at many sites located in industrial areas, background levels, even if they could be determined, are still unacceptably high from a public health perspective. Ironically, some members of industry have privately wished that the background approach would prevail in the negotiations, believing that at many

sites, it would lead to less expensive cleanups.

[56.](#) NCS REPORT, *supra* note 8, at 5-12. The NCS compromise on cleanup standards is presented in its entirety on the cited pages; consequently, only direct quotations will be specifically footnoted.

[57.](#) See Letter from Elliott Laws, Assistant Administrator, EPA, to Rep. Al Swift, Question 10 (Jan. 28, 1994) (on file with EPA) [hereinafter EPA Letter].

[58.](#) H.R. 4916, 103d Cong., 2d Sess. § 501 (1994); S. 1834, 103d Cong., 2d Sess. § 501 (1994).

[59.](#) H.R. 4916, 103d Cong., 2d Sess. § 501 (1994).

[60.](#) H.R. 4916, 103d Cong., 2d Sess. § 501 (1994); S. 1834, 103d Cong., 2d Sess. § 501 (1994).

[61.](#) H.R. 4916, 103d Cong., 2d Sess. § 501 (1994); S. 1834, 103d Cong., 2d Sess. § 501 (1994).

[62.](#) H.R. 4916, 103d Cong., 2d Sess. § 501 (1994); S. 1834, 103d Cong., 2d Sess. § 502 (1994).

[63.](#) H.R. 4916, 103d Cong., 2d Sess. § 501 (1994); S. 1834, 103d Cong., 2d Sess. § 502 (1994).

[64.](#) H.R. 4916, 103d Cong., 2d Sess. § 501 (1994).

[65.](#) *Id.* § 502.

[66.](#) S. 1834, 103d Cong., 2d Sess. § 501 (1994).

[67.](#) *Id.*

[68.](#) *Id.*

[69.](#) *Id.*

[70.](#) H.R. 4916, 103d Cong., 2d Sess. § 502 (1994); S. 1834, 103d Cong., 2d Sess. § 502 (1994).

[71.](#) See, e.g., letter from William Roberts, Legislative Director, Environmental Defense Fund, Patricia Williams, Legislative Representative, National Wildlife Federation, Martin McCrory, Senior Attorney, Natural Resources Defense Council, A. Blakeman Early, Washington Director for Environmental Quality Team, Sierra Club, to Senators and Representatives, U.S. Congress (June 5, 1994) (copy on file with the author).

[72.](#) Once again, these descriptions of historic positions are based on conversations the author has had with a broad cross-section of key players since 1983. For documentary examples of Superfund stakeholders taking these positions, see generally *Environmental Insurance Resolution Fund: Hearings on Title VIII H.R. 3800 Before the Subcomm. on Transp. and Hazardous Materials of the House Comm. on Energy & Commerce*, 103d Cong., 2d Sess. (1994) (joint statement of Elliott Laws, Assistant Administrator for Solid Waste and Emergency Response, EPA, and Alicia H. Munnell, Assistant Secretary for Economic Policy, Dep't of Treasury); *Issues Relevant to Superfund Liability: Hearings Before the Subcomm. on Env't, Energy, and Natural Resources of the House Comm. on Gov't Operations*, 103d Cong., 1st Sess. (1993) (statement of Martin A. McCrory, J.D., Natural Resources Defense Council); *Superfund Liability Scheme: Hearings Before the Subcomm. on Superfund, Recycling, and Solid Waste Management of the Senate Comm. on Env't and Public Works*, 103d Cong., 1st Sess. (1993) (statements of Carl Pope, Executive Director, Sierra Club; Benjamin Y. Cooper, Senior Vice-President, Printing Indus. of Am.; Bernard J. Reilly, Corporate Counsel, DuPont Co., on behalf of the Chemical Mfrs. Ass'n; and Michael S. McGavick, Spokesperson, Superfund Improvement Project, American Ins. Ass'n).

[73.](#) For a description of this litigation and the local government campaign to secure relief during the Superfund reauthorization, see

Rena I. Steinzor & David Kolker, *To Pay or Not to Pay: Local Governments' Stake in Legislation to Reauthorize Superfund*, 25 URB. LAW. 627 (1993); Rena I. Steinzor & Matthew F. Lintner, *Local Governments and Superfund, 1992 Update: Who Is Paying the Tab?*, 24 URB. LAW. 51 (1992); Rena I. Steinzor, *Local Governments and Superfund: Who Will Pay the Tab?*, 22 URB. LAW. 79 (1990).

[74.](#) For a discussion of how transaction costs affect insurers and PRPs, see ACTON & DIXON, *supra* note 47. This study defined transaction costs as those costs not directly related to cleanup, such as allocating costs among PRPs and litigating legal issues, and concluded that transaction costs were 88 percent of total insurer outlays — consistently higher than those for PRPs, which averaged 21 percent of total expenditures. ACTON & DIXON, *supra* note 47, at 15, 25.

[75.](#) See *EPA's Lender Liability Rule: A Sweetheart Deal for Bankers?*, 22 Env't Rep. (BNA) 1158 (Aug. 23, 1991) (addressing concerns of banking industry that led to EPA's proposed lender liability rule).

[76.](#) See 40 C.F.R. § 300.1100 (1994). For further information on EPA's lender liability rule, see Edward B. Sears & Laurie P. Sears, *Lender Liability Under CERCLA: Uncertain Times for Lenders*, [24 ELR 10320](#) (June 1994).

[77.](#) *Kelley v. U.S. Environmental Protection Agency*, [15 F.3d 1100](#), 1109, [24 ELR 20511](#), [20514](#) (D.C. Cir. 1994).

[78.](#) The House bill would merely have codified the EPA rule, while the Senate bill contained a series of provisions designed to give somewhat broader relief to the banking industry. See H.R. 4916, 103d Cong., 2d Sess. § 407(a) (1994); S. 1834, 103d Cong., 2d Sess. § 411 (1994).

[79.](#) See NCS REPORT, *supra* note 8, at 13-21. Once again, the NCS compromise on liability is presented in its entirety on the cited pages; consequently, only direct quotations will be footnoted.

[80.](#) See, e.g., *Tanglewood East Homeowners v. Charles-Thomas, Inc.*, [849 F.2d 1568](#), [18 ELR 21348](#) (5th Cir. 1988); *United States v. Bliss*, [667 F. Supp. 1298](#), 1309-10, [18 ELR 20055](#), [20059](#) (E.D. Mo. 1987).

[81.](#) See 42 U.S.C. § 9606, ELR STAT. CERCLA § 106 (authorizing unilateral cleanup orders).

[82.](#) The Gore factors, as modified to fit the NCS proposal, include: (1) the ability of the parties to demonstrate that their contribution to a discharge, release, or disposal of a hazardous substance can be distinguished; (2) the amount of hazardous substance involved; (3) the degree of toxicity of the hazardous substance involved; (4) the degree of involvement by the parties in the generation, transportation, treatment, storage, or disposal of the hazardous substance; (5) the degree of care exercised by the parties with respect to the hazardous substance concerned, taking into account the characteristics of the hazardous substance; (6) the degree of cooperation by the parties with federal, state, tribal, or local officials (including the allocator) in the allocation process, e.g., prompt and accurate submission of relevant documents, and in preventing any harm to the public health or the environment. NCS REPORT, *supra* note 8, at 16.

The NCS recognizes that these factors may not cover all of the decisions an allocator needs to make, and recognizes that Congress may wish to develop additional factors. For example, the Gore factors do not address how to allocate the share of a site owner or operator who directly contributed to the contamination of the site by permitting indiscriminate dumping, but who did not do any dumping in its own right.

[83.](#) See 26 U.S.C. § 59A (1988 and Supp. IV 1992) (imposing the Superfund broad-based tax).

[84.](#) The de minimis category would also include so-called innocent landowners who bought property without any reason to know it was contaminated. See 42 U.S.C. § 9622(g)(1)(B), ELR STAT. CERCLA § 122(g)(1)(B) (defining innocent landowners eligible for special settlements).

[85.](#) NCS REPORT, *supra* note 8, at 21.

[86.](#) See 42 U.S.C. § 9606, ELR STAT. CERCLA § 106 (authorizing unilateral cleanup orders).

[87.](#) See H.R. 4916, 103d Cong., 2d Sess. § 413 (1994); S. 1834, 103d Cong., 2d Sess. § 409 (1994).

[88.](#) H.R. 4916, 103d Cong., 2d Sess. § 413 (1994); S. 1834, 103d Cong., 2d Sess. § 409 (1994).

[89.](#) *See* H.R. 4916, 103d Cong., 2d Sess. § 413 (1994); S. 1834, 103d Cong., 2d Sess. § 409 (1994).

[90.](#) *See* H.R. 4916, 103d Cong., 2d Sess. § 413 (1994); S. 1834, 103d Cong., 2d Sess. § 409 (1994).

[91.](#) *See* H.R. 4916, 103d Cong., 2d Sess. § 413 (1994); S. 1834, 103d Cong., 2d Sess. § 409 (1994).

[92.](#) H.R. 4916, 103d Cong., 2d Sess. § 413 (1994); S. 1834, 103d Cong., 2d Sess. § 409 (1994).

[93.](#) *See* H.R. 4916, 103d Cong., 2d Sess. § 413 (1994); S. 1834, 103d Cong., 2d Sess. § 409 (1994).

[94.](#) *See* H.R. 4916, 103d Cong., 2d Sess. § 413 (1994); S. 1834, 103d Cong., 2d Sess. § 409 (1994).

[95.](#) H.R. 4916, 103d Cong., 2d Sess. § 413 (1994); S. 1834, 103d Cong., 2d Sess. § 409 (1994).

[96.](#) H.R. 4916, 103d Cong., 2d Sess. § 413 (1994); S. 1834, 103d Cong., 2d Sess. § 409 (1994).

[97.](#) *See* H.R. 4916, 103d Cong., 2d Sess. § 413 (1994); S. 1834, 103d Cong., 2d Sess. § 409 (1994).

[98.](#) EPA Letter, *supra* note 57, Questions 3, 15. The owner/operator limitation should not be confused with the far more circumscribed concept that sites where only a single corporate entity remains as a PRP should be excluded from the allocation (and therefore the orphan share) process. An as-yet indeterminate number of sites involves several corporate entities that passed ownership and operation responsibility between each other.

[99.](#) *See* H.R. 4916, 103d Cong., 2d Sess. §§ 403, 412 (1994); S. 1834, 103d Cong., 2d Sess. §§ 403, 408 (1994).

[100.](#) *See* H.R. 4916, 103d Cong., 2d Sess. § 403 (1994); S. 1834, 103d Cong., 2d Sess. § 403 (1994).

[101.](#) *See* S. 1834, 103d Cong., 2d Sess. § 408 (1994).

[102.](#) H.R. 4916, 103d Cong., 2d Sess., § 803 (1994); S. 1834, 103d Cong., 2d Sess. § 803 (1994). The EIRF covers claims under "qualified insurance," which it defines as comprehensive general liability or multiperil policies covering any period before January 1, 1986, but excluding environmental impairment policies. "Eligible costs" include (1) response costs, natural resource damages, and defense costs incurred at NPL sites, so long as hazardous substances were disposed of at the site before December 31, 1985, and (2) response costs and defense costs incurred at sites where a short-term Superfund removal action occurred, so long as hazardous substances were disposed of at the site before December 31, 1985. *Id.* § 802.

[103.](#) For a description of such litigation, see ACTON & DIXON, *supra* note 47.

[104.](#) The legislation would establish an extremely complex system for determining the amount of settlement offers from the EIRF. *See* H.R. 4916, 103d Cong., 2d Sess. § 806 (1994); S. 1834, 103d Cong., 2d Sess. § 806 (1994). Such offers would be calculated as the lesser of (1) the "eligible" response costs, natural resource damages, or defense costs actually incurred by the policyholder and (2) the insurance coverage deemed to be "available" to the policyholder under the legislation. Offers would reflect *all* covered insurance claims. In the cases of a large, national corporation involved in numerous Superfund sites located in several states, the calculation of offers could take considerable resources.

The first step in defining "available" insurance under the legislation is to determine the states where the sites triggering the costs are located. The legislation divides the states into three groups, assigning each a percentage that is intended to constitute a crude approximation of the insurance coverage that would be provided if the claim is litigated. The three groups are: (1) Florida, Maine, Maryland, Massachusetts, Michigan, New York, North Carolina, and Ohio, which receive 20 percent; (2) California, Colorado,

Georgia, Illinois, New Jersey, Washington, West Virginia, and Wisconsin, which receive 60 percent; and (3) all other states, which receive 40 percent. Where litigation has already been filed, its venue is also considered in determining the availability of insurance.

[105.](#) H.R. 4916, 103d Cong., 2d Sess. § 807 (1994); S. 1834, 103d Cong., 2d Sess. § 807 (1994).

[106.](#) See S. 1834, 103d Cong., 2d Sess. § 809.

[107.](#) See *Reform Bill's Funding Provisions Approved After Changes Adopted, Tax Rates Provided*, 25 Env't Rep. (BNA) 771 (Aug. 26, 1994) (describing the House Ways and Means Committee bill); *Reform Bill Approved by Finance Committee Would Eliminate Prospective Tax on Insurers*, 25 Env't Rep. (BNA) 1117 (Sept. 30, 1994) (describing the Senate Finance Committee bill).

[108.](#) See *House Ways & Means Hears of "Bitter Division" Within Industry*, FED. & STATE INS. WK., Aug. 1, 1994, available in LEXIS, Nexis Library, CURNWS File.

[109.](#) In 1987, the General Accounting Office estimated that potential hazardous waste sites ranged from 130,000 to 425,000. U.S. GEN. ACCT. OFF., SUPERFUND: EXTENT OF NATION'S POTENTIAL HAZARDOUS WASTE PROBLEM STILL UNKNOWN, Pub. No. GAO/RCED-88-44, at 3 (1987). Previous reports had estimates ranging from 25,000 to 378,000. OTA, COMING CLEAN, *supra* note 47, at 27. If these sites are not ultimately listed on the NPL the states will bear the brunt of cleanup costs. See U.S. GEN. ACCT. OFF., CLEANING UP HAZARDOUS WASTES: AN OVERVIEW OF SUPERFUND REAUTHORIZATION ISSUES, Pub. No. GAO/RCED-85-69, at ii (1985).

[110.](#) See 26 U.S.C. § 4611(e) (1988 & Supp. IV 1992); *supra* text accompanying note 10.

[111.](#) See Jerry Ackerman, *Work Goes On at Waste Sites Despite Fund Freeze*, BOSTON GLOBE, Aug. 25, 1985, at 8.

[112.](#) See Casey Bukro, *Superfund Phaseout in Works*, CHI. TRIB., Jan 25, 1986, at 2.

[113.](#) See Casey Bukro, *Stalemate Stalls Toxic Clean-up*, CHI. TRIB., Sept. 29, 1986, at 1.

[114.](#) *Id.*

[115.](#) David Gibbons, *Funding Available to Implement Superfund If the Law Is Not Reauthorized in 1995*, at 1 (Nov. 1, 1994) (on file with the author). David Gibbons, who prepared this analysis for the FMC Corporation, is a former official of the Office of Management and Budget and an expert in budget and tax issues.

[116.](#) *Budget Rules May Extend Superfund Through 1998 Without New Bill*, INSIDE EPA WKLY. REP., Nov. 18, 1994, at 1.