



COVER STORY

Will Superfund Rise Again?

The federal hazardous waste cleanup program and its state progeny have been in decline for more than a decade, victims to a campaign of sabotage waged by industry and neglected by the Bush administration. Meanwhile, stakeholders do their best to ignore the program's sorry state. A sad story, but there may be a surprise ending in store

RENA STEINZOR

In the dog days of last summer, New Jersey environmental officials showed up to inspect what they thought was an abandoned brownfields site to test local air quality. They were startled to discover a day care center operating in the former thermometer plant. A quick air sampling showed that infants and toddlers were being exposed to mercury vapors 27 times the acceptable level. Officials immediately cleared the building, and the finger-pointing began. The most prominent charge was that the state had previously ignored the site to benefit former Governor James McGreevey's developer cronies, a perhaps understandable but nonetheless misleading explanation masking the real reason such episodes will occur with growing frequency in the years ahead: the systematic failure of federal and state toxic waste cleanup programs across the country. Because New Jersey's "Little Superfund" program is among the most effective in the nation, the discovery of this nightmarish scenario shocked even Superfund cognoscenti.

It's not possible to pinpoint the exact date, but sometime in the early 1990s it became disreputable to advocate cleaning up contaminated sites in anything approaching a thorough manner. The federal Superfund program was branded an embarrassment that threw

good money after bad. The industry taxes that support it expired in 1995 and have never been renewed. Efforts to drastically reform Little Super-

fund statutes, all proposed under the rubric of reclaiming abandoned urban sites through "voluntary cleanups," took statehouses by storm. The result was a slew of programs that pressured state agencies to get sites off cleanup lists by implementing inexpensive "institutional controls" like deed restrictions or perimeter fencing in lieu of removing or physically containing the wastes.

The culture changing aspect of these developments cannot be understated. These days, savvy Washington insiders would rather light up a cigarette at their desks than admit that the entire multi-billion-dollar Superfund effort has any redeeming social value. Environmentalists have walked away from cleanup programs at both the federal and state level, concluding that reviving Superfund and fighting off state reforms are fool's errands. Only the environmental justice movement continues to denounce this retreat from the toxic waste cleanup wars, occasionally pricking the conscience of government officials or foundation staffers, who fund conferences where tiny circles of veterans can come together to remember and regret.

All of this is small comfort to the parents who sent their children to



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the Kiddie Kollege day care center in Franklin Township, New Jersey, and, after the scandal broke, trudged to meetings with state and local officials where they screamed until they were hoarse. Within days, the parents had a toxic tort lawyer and a fistful of apologies, along with the particularly idiotic pronouncement of one state public health official who was quoted in a local newspaper as advising that even if children were exposed to dangerous levels of mercury, they would not suffer long-term effects.

As unimportant as the big picture may seem in the heat of such moments, this group and all the other groups that will face similar crises — as well as the one American in four who lives within three miles of a site on Superfund's National Priorities List — deserve to know the truth. Federal and state hazardous waste cleanup programs have become the victims of sabotage — an extraordinarily effective public relations campaign by the insurance industry to discredit the program and the statute and, more recently, the audacious use of doublespeak by senior Bush administration officials to fool Congress and the public. Meanwhile, a profound case of compassion fatigue has gripped the thousands of regulators, environmentalists, and politicians who otherwise would have turned back this assault.

For the foreseeable future, federal Superfund sites seem destined to remain no man's lands, seeping chemicals into the ground while cleanup remains at a halt. As for ostensibly less serious state sites, developers will recycle those that are delisted but still contaminated into day care centers, schools, shopping malls, and apartment houses. Some people will get sick at these locations without knowing why. Inevitably, though, natural processes, human activities, and time will take their toll and scandals like the one in New Jersey will emerge at a growing number of locations. A few big Superfund NPL sites will catch on fire and others will overflow, spilling nasty chemicals into the street and landing our nation's quarter-century-old effort to clean up hazardous waste sites once again on the front pages.

It is hard to envision a happy ending to Superfund's saga, a story that began with Times Beach and Love Canal, and the resulting bipartisan effort in Congress to pass the Comprehensive Environmental Response, Compensation, and Liability Act of 1980. CERCLA established a dual track

program to address a nationwide problem. It created the Superfund, a trust fund fed by a broad tax on industry to allow jump starting cleanups with federal funds. And it imposed stringent liability on companies for improperly disposed hazardous waste, which would both replenish the fund and compel a broad array of voluntary cleanups.

These days, the program feels like a bad adaptation of the Bill Murray movie *Groundhog Day* — the same sites, both federal and state, keep popping up, their issues unresolved, sometimes for decades. But sooner or later some form of phoenix must rise from this morass in the form of public demands for effective cleanup, triggering a costly and time-consuming effort to invent new programs at the federal, state, and local level.

If the world's smartest strategists were focusing on the problem, they would advise all of the program's stakeholders to take bold action now to control their fate. The oil and chemical industry could try to kill the federal program, laying responsibility for the entire problem at the doorsteps of the states. Environmentalists could agree to live without ample federal funding in exchange for strong citizen suit enforcement that shifts the burden of proof on cleanup to responsible parties, awarding a bounty to the groups that brought the cases to court. Or insurers could renew their fight to repeal the law's stringent liability, turning Superfund into a multi-billion-dollar public works program.

Locked in an iron triangle of their own making, however, industry, environmentalists, and insurers are so deeply committed to ignoring Superfund's death throes that these scenarios seem remote to the point of being fanciful. Instead, an even greater surprise may be in the making. The proverbial phoenix could well resemble the imperfect compromise Congress adopted a quarter century ago.

Symptoms of Sabotage

Neglect. The Superfund National Priorities List includes 1,244 sites awaiting cleanup; many have languished on the NPL for more than twenty years. Early on it became clear that, to do the job right, the program would continue for decades. Cleanup is extremely difficult from a technical perspective. The sites typically contain noxious mixtures of solid and liquid wastes that infiltrate soil, surface water, and groundwater. Many

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are too large to allow excavation, leaving physical containment as the only option. But stakeholders across the political spectrum have consistently overlooked this reality, instead focusing almost exclusively on the management problems that have dogged Superfund since its inception.

To be sure, the program is not easy to administer, blending an extraordinarily stringent, perpetually controversial strict, joint, and several liability scheme designed to extract cleanup funding from the parties responsible for creating the sites with a corporate-tax-supported, multi-billion-dollar bank account — the Superfund — that allows EPA to jump start cleanups, bring lawsuits imposing liability, and pay for orphan sites where no viable responsible parties can be located. In addition, when Superfund was barely five years old, midway through the Reagan administration, mismanagement and scandal at EPA had already provoked its first rescue mission.

The Bush I and Clinton administrations did relatively well by the program, deploying trained professionals to implement a series of administrative reforms that raised the number of sites where construction was deemed complete into the range of 85 annually. But the 1995 expiration of the program's stable "polluter pays" tax base soon began to take a toll. When the Bush II administration took office, the new principle that "the polluter need not pay" went from de facto to official policy. Cumulative appropriations for the period 2000–2004 were between \$1.3–\$1.75 billion short of what the program actually needed, according to a report to Congress by Resources for the Future. The Clinton administration routinely asked Congress to reinstate the taxes; Bush II did not. Similarly, enforcement and general program activity stalled under Bush II. In 2001, construction completions dropped by half and have stayed there since. Private party commitments for future cleanup also fell precipitously.

Before the corporate taxes expired, they put approximately \$1.5 billion into the trust fund annually, or about \$4 million a day. Three categories of taxes fed the fund: a broad-based corporate tax and assessments on crude oil by the barrel and chemical feedstock taxes by the ton. The taxes were

always controversial, largely because companies felt that they were being asked to pay twice: once when the government imposed liability and again when they paid taxes on their revenues. This argument ignores the fact that Congress decided to tax the industry as a whole rather than hit up the taxpayer for a problem historically created by the industry as a whole. To put the controversy into perspective, consider that the revenues lost to the trust fund last year were equivalent to the profits earned by the top six oil companies in only a week. Indeed, the salaries of their CEOs alone would add up to one month of those lost revenues. From 1993–99, public money paid for approximately a fifth of the program, the corporate taxes paid the rest. By 2004, the taxes in the fund were entirely depleted. Today, the public pays the entire cost.

Without tax revenues or enforcement to compel private cleanup, the sites languished. In a recent report, *The Toll of Superfund Neglect: Toxic Waste Dumps & Communities at Risk*, the Center for American Progress and the Center for Progressive Reform published the results of a study of the five worst non-military NPL sites in each of the ten most populous states — California, Texas, New York, Florida, Illinois, Pennsylvania, Ohio, Michigan, New Jersey, and Georgia — for a total of 50 sites. All have Hazard Ranking System scores between 42.24 and 74.86, well above the 28.5 required for listing. Most are located in heavily populated urban or suburban neighborhoods. Median incomes for residents of 30 of the 50 census tracts around the sites are below — often well below — the nation's \$41,994. Thirteen of the 50 census tracts have populations that are at least 40 percent racial or ethnic minority, including four with percentages greater than 70.

Some sites lack any responsible party. But in many other cases, cleanups have languished even though obviously viable parties are available. For example, a 75-acre New Jersey site owned by Honeywell was listed in 1983; last year, Honeywell ranked number 75 on the Fortune 500, with profits topping \$1.2 billion. Such examples confirm the work of the author of the aforementioned report to Congress, RFF's Katherine Probst, the nation's most prominent independent Superfund expert. She found that responsible parties are available to shoulder responsibility for cleanup at a significant number of NPL sites if EPA enforcement were not as flawed as the rest of its cleanup effort.

Passion fatigue seems to have gripped thousands of regulators, environmentalists and politicians

A Program For Lawyers, Not Cleanup

Are the sites more than just an eyesore? Approximately 4.5 million gallons of liquid waste heavily laced with such volatile organic compounds as vinyl chloride, benzene, and trichloroethylene were dumped in unlined lagoons at the Honeywell site, polluting the nearby Hackensack River Basin. Similarly, the 85-acre Bofors-Nobel site in Muskegon County, Michigan, was first listed in 1988, with responsible parties that include American Cyanamid, Akzo-Nobel, Bissell Corporation, DuPont, Eli Lilly, General Electric, IBM, and Union Carbide. Unlined lagoons were used for disposal of wastes generated by the production of alcohol-based detergents, pesticides, herbicides, and dye intermediaries.

Several of the 50 sites contain chemicals such as creosote and lead that are now banned for most purposes. Over the decades, these substances spilled onto the ground, where they seeped into aquifers or were washed by rain into adjacent storm sewers, rivers, or creeks. For example, from 1902-81, the American Creosote Works (Pensacola Pit) site in Escambia County, Florida, housed ponds set up to "percolate" wastes that routinely overflowed, spilling their contents into Bayou Chico and Pensacola Bay.

Notoriety is no guarantee of accomplishment. The infamous 17-acre Stringfellow site, used as a hazardous waste disposal facility from 1956-72, was front-page news when Superfund was reauthorized in 1986 and remains on the NPL today. It accepted over 34 million gallons of waste from metal refinishing, electroplating, and pesticide manufacturing companies, dumping the toxic compounds into surface evaporation ponds. The 550-acre LCP Chemicals site in coastal Glynn County, Georgia, was used for seven decades as an oil refinery, paint manufacturing plant, power plant, and chlor-alkali factory. EPA estimates that more than 380,000 pounds of highly toxic mercury was "lost" between 1955-79. Commercial fishing has been banned in the area.

Last but not least, the Normandy Park Apartments site in Hillsborough County, Florida, was proposed for listing in February 1995, but EPA never

Has Superfund been successful during its twenty-six year history? Depends on whose side of the toxic fence you've been on. The statute's intent was to clean up hazardous waste sites and to seek restitution for these costs from responsible parties. The program has been successful in identifying and investigating sites, but not in cleaning them up. What went wrong? Unfortunately, the law's intent has been abused at the whim of an arbitrary bureaucracy.

Under the statute, Superfund liability is retroactive and strict, which means that the government does not need to prove fault to impose responsibility for cleanup. This liability extends to cleanup of wastes disposed of at any time in the past. Superfund liability is also joint and several, meaning that anyone connected with a site can be forced to pay the total cleanup bill, no matter how limited their participation.

EPA used these authorities to create a "lawyers first, shovels later" approach, which is not really a fair system for all stakeholders. A waste generator that gave its waste to a legitimate disposal company that took it to a licensed landfill is still liable for cleaning up the entire landfill. So is the transporter. Companies in full compliance with operational and disposal standards are treated with the same regard as the midnight dumper; the legality of the company's actions is irrelevant.

In addition, there are few checks and balances on how EPA appropriates funds for site investigation and cleanup. Cost control of work performed at Superfund sites has been strongly criticized by independent auditors and the Government Accountability Office. Analysts at Resources for the Future estimate that cleanup costs of sites controlled by potentially responsible parties are 15 to 20 percent less than the costs

of government-controlled cleanups. Organized political interests, burdensome bureaucratic processes, unrealistic cleanup standards, and poor oversight created a system ripe for wasteful practices. Some 70 percent of today's cleanup funds come from responsible parties; elimination of wasteful spending practices would go a long way to make up the missing 30 percent.

The spine of the insurance industry was nearly broken over asbestos and lead claims in the 1970s, when along came the massive bills to clean up identified hazardous waste sites. By the early 1990s estimates

of the insurance industry's liability resulting from Superfund litigation ranged from \$26 billion to \$213 billion. Under "lawyers first," the money spent by insurers for legal expenses was running at 90 percent of total Superfund claims.

Adjusting to these new exposures, the insurance industry introduced "absolute" and "total" pollution exclusions in standard property and general liability policies, effectively halting payments under new policies for pollution claims. But insurance companies are still burdened with unquantifiable claims reserves for legacy pollution claims. Today, with few sites being cleaned up and little accountability, the insurance industry has every right — no, the responsibility — to question the logic of the statute's liability scheme and to lobby for better management of these funds.

Fixing Superfund needs to start with legal reform and fiscal discipline first. Throwing money at a problem without accountability or even a clear path forward is not the solution.

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Joseph Kulak

finalized the listing, claiming that it is still “cooperating” with responsible parties on a voluntary cleanup. The site once housed a recycling operation that involved crushing batteries and smelting lead. Apartment buildings were later built on the site and they remain occupied.

Rhetoric. For two decades, the insurance industry has spent uncoupled millions on a largely successful campaign to convince the public and their elected representatives that Superfund is an irremediable fiasco. Insurers claim that lawyers are the only beneficiaries of the program and that affected communities would be far better off if Superfund were converted into a public works program, with liability all but eliminated. They rail against the “fundamental unfairness” of the liability scheme, which punishes hardworking businesses by exacting huge sums for the results of activities that were perfectly legal at the time. The campaign for the repeal of liability at taxpayers’ expense has never achieved political traction, but it has ruined Superfund’s reputation for effectiveness and, as important, fairness.

The insurers’ success was achieved without the active cooperation of their customers until relatively recently. The largest petrochemical companies were the first target of Superfund enforcement and, by the late 1980s, most had established effective internal processes for evaluating sites, accepting responsibility for cleanup, and finding other responsible parties to share the costs. They were deeply resentful of environmentalists for dubbing them the “polluters” who must be made to pay, but with grim corporate efficiency they made the best of a bad situation. As the insurers’ rhetoric escalated, they soldiered on, even negotiating a short-lived compromise with environmentalists for a second reauthorization of the program in 1994 that was washed away by the Contract with America.

Over the past decade, anemic enforcement has taken its toll on these efforts to the point that corporate cleanups have dwindled along with the rest of the program. In its 2004 decision *Cooper Industries, Inc. v. Aviall Services, Inc.*, the Supreme Court worsened these dynamics by curtailing cost recovery unless cleanup was done pursuant to a federal government order. Underfunded

and overmatched, EPA is often incapable of providing this route to cost-sharing, fatally undermining corporate incentives to volunteer. To add injury to this legal insult, the Court was egged on by the Bush II Justice Department, which filed a brief against the company that had done the right thing without EPA enforcement.

Double Speak. On a very few occasions, senior political appointees in the Bush II administration have deigned to testify before Congress or made other public statements about Superfund’s pitiable state. Even accounting for the duress the program provokes in anyone held accountable for its poor performance, these remarks have reached new heights in disingenuous and misleading doublespeak. In 2004, Marianne Horinko, bumped up to acting EPA administrator from her post as assistant administrator in the Office of Solid Waste and Emergency Response, claimed that “the link between the Superfund tax and EPA’s cleanup budget is one of those urban myths, like giant alligators in the sewer system. There are no alligators, and there is no link.” Instead, she claimed, reinstating industry taxes would make no difference because low annual appropriations reflect the “funding pressure” on all federal programs. Horinko’s successor at OSWER, Susan Bodine, has made similar claims.

In a limited sense, Horinko and Bodine are correct: because today’s program is supported by general taxpayer revenues, appropriations for cleanup must compete with appropriations for everything from the war in Iraq to Katrina relief. If corporate taxes were reinstated, however, the law says that those funds cannot be spent on any purpose except NPL cleanup. Taxes would increase the fund’s balance and no one could raid them for other purposes. Then, Superfund’s only remaining problem would be that the president and Congress have been leaving the money in the fund because those amounts, however modest, count as an offset against deficit spending.

The Trickle-Down Effect. The states’ Little Superfund reforms were based on the reasonable premise that contaminated property blights urban and suburban landscapes, impeding economic development. In recent years, many states amended their laws to give developers incentives to reclaim the sites, including liability releases and state funding for site evaluation. Predictably, the pressure of demonstrating win-win progress through such “third generation” approaches has com-

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pelled state officials to approve hasty cleanups, clearing sites off their various lists.

In an especially troubling trend that has never been evaluated comprehensively, “institutional controls” increasingly are used in lieu of any physical containment of wastes. This euphemistic term of art refers to the use of perimeter fencing and paper commitments like deed restrictions to justify state decisions to approve sites for reuse as industrial or commercial property. Such “remedies” do not always limit people’s physical access to toxic hot spots that are left behind. In theory, state officials “enforce” such restrictions. In practice, states are so starved for resources that oversight is neglected. A few years ago, EPA tried to avert these predictable outcomes by imposing minimum standards for such programs but, given Superfund’s greatly weakened condition, the agency was easily shouted down.

The New Jersey day care center offers a particularly painful example of how such situations play out. According to the *Newark Star-Ledger*, at some point (the date remains unclear) the state applied for Superfund money to pay for a short-term, emergency cleanup. EPA rejected the request in a letter downplaying any danger to people because the building was vacant. The day care center’s landlord subsequently brandished the letter as proof that the site was deemed “safe” by the government.

The Options

People enmeshed in acute dysfunctional conditions like drug addiction or alcoholism must envision alternatives well outside their comfort zone to make any lasting change. The same dynamic applies to reforming Superfund. Imagine for a moment that the most affected interest groups swallowed truth serum that would allow them to consider radical options for the future, without regard to political viability. Three starkly different alternatives would immediately become obvious.

Cancel the Federal Program. Congress could simply repeal the federal statute — eliminating the funding, cleanup rules, and liability. Some transitional arrangements might be necessary to finish the most serious sites already on the NPL. Presumably, the states could be tempted to take them over if the block grant were large enough. But EPA’s administrative structure at headquarters and in the regions would be dismantled, leaving behind only a small corps of people to serve

as liaison with the states. Given this sweet carrot, affected companies might even be motivated to contribute to transitional funds.

This option would leave the companies that have acted responsibly by undertaking cleanup, as well as their contractors and lawyers, high and dry. Repeal would also thrust the states into the unenviable position of inheriting yet another difficult and expensive social problem from Washington.

The implications of administrative amputation are definitely more mixed for Superfund’s other stakeholders. From the perspective of communities and environmentalists, the big downside is that less cleanup would get done as the feds abandoned the field and the states struggled to gain control over the problem. But given Superfund’s sorry state, it is an open question how much real difference its official death would make, at least as regards listed sites. Another risk is that, in the absence of national funding and the threat of federal enforcement, the bottom could fall out of state programs as well, leaving sites to languish until they re-emerge in circumstances akin to the Kiddie Kollege fiasco.

The main advantage of repeal is that it would at last be crystal clear which level of government has responsibility for responding to citizen concerns. EPA specifically would be much better off, at last able to turn its back on this rich breeding ground for dissatisfaction with its performance. Without an incompetent EPA to kick around, companies would either have to try to shift the blame to newly minted state officials or stand in the limelight on their own. Most of them have done everything they could to avoid that uncomfortable stance for 20 years.

Lawyers First and Last. A second alternative is to abandon the fight for federal budget dollars, and convert Superfund into an enforcement-only program. While preserving strict, joint, and several liability, this approach would require three crucial statutory supplements. First, Congress would adopt an amendment to overturn the *Aviall* contribution case mentioned earlier, establishing an unequivocal cause of action for contribution even if the company volunteering for cleanup had not so much as talked to the government about its obligations.

Second, the statute would be changed

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to accomplish a drastic downsizing of the government's burden to demonstrate to the courts what should be done at the site, instead requiring responsible parties to conduct such studies under court order once EPA had proved them liable. A major impediment to enforcement at this point is the need to come into court with an elaborate remedial plan in order to compel responsible parties to take charge. Bifurcation of this burden, giving the government the ability to order a site takeover without knowing much about what to do, would make enforcement substantially more affordable.

Third, like all the other major environmental laws, Superfund would have a citizen suit provision with a similarly lower burden of proof that puts the onus on potentially responsible parties to define cleanup. Citizens would have the ability to collect attorneys and technical expert fees and the statute would award a bounty for successful plaintiffs. The bounty would be used for programs to improve the environment, with no other strings attached, and would be subject to approval by the courts.

The biggest downside of this approach for industry is obvious: exposure to multiple legal actions that are significantly less well-developed than those that squeeze through the very small Superfund pipeline today. The upside is the absence of the extended government review, agency indecisiveness, and regulatory confusion that drive companies trying to deal responsibly with their liability crazy. For communities and environmentalists, the approach requires a tremendous leap of faith that EPA will find the backbone it has worked so hard to lose since the early days of Bill Ruckelshaus's first tour. An indeterminate number of sites are truly orphan and would remain unaddressed in this scenario, although making enforcement the only real alternative could flush the system to the point that we really understood how many truly belong in this category.

Shovels First and Last. In the game of truth or dare I envision, the final alternative would take insurers at their word and revive Superfund from near death with a large influx of cash, in the form of general taxpayer revenue, reinstated industry taxes, or some combination. Congress would re-

peal liability and abandon any pretense of enforcement, converting Superfund into a massive public works program.

The downside to this approach is the danger that cleanup will become grossly inefficient, as the Army Corps of Engineers takes time out from building levees to discover the cleanup technologies that have eluded us all these years, and the equally troubling possibility that American industry could revert to the high-minded waste disposal practices of the past, an outcome made more likely by anemic enforcement of federal and state hazardous waste disposal laws.

The great advantage of this approach is the elimination of the friction generated by fear of liability that makes the existing program operate so slowly. Technological problems would remain as daunting as ever, but could be solved in relative peace and quiet. The government's efforts to reclaim military facilities contaminated by even more potent waste deposits could inform the search for solutions at private sites.

The Inevitable Resurrection

From the perspective of preserving the credibility of the rule of law, if not for protecting public health, any of these three very radical options is preferable to watching Superfund die an unofficial, ignominious death. But the fact remains that none are politically viable for the foreseeable future. They will remain inaccessible for as long as Superfund's national stakeholders have the luxury of ignoring the situation or, in other words, for as long as the implications of the slow death of federal and state programs remain obscure. Yet no one familiar with Superfund's history, and especially the scope and severity of the environmental contamination it was designed to address, can believe that this state of denial can last forever, or even a few more years. For the Kiddie Kollege day care catastrophe is no anomaly, but, rather, the re-emergence of problems that never really went away.

When the inevitable happens, and sites either de-listed or contained by institutional controls release toxics into the environment, threatening people or wildlife, or rainfall washes wastes from an NPL site into the streets of adjoining neighborhoods, stakeholders will once again stand at an unavoidable fork in the road. They can choose between a radical new direction. Or they can revive and re-invigorate the compromise approach Congress constructed with so much difficulty 25 years ago. •

We can choose a radical new direction for cleanups, or reinvigorate the compromise made when the law was passed