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SUPERFUND REAUTHORIZATION: PROGRAM FUNDING, DISPUTE RESOLUTION, LOCAL CONTROL AND TAX INCENTIVES

Steven Felsenthal*

INTRODUCTION

The Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA")¹, was enacted in 1980² and revised by the Superfund Amendments and Reauthorization Act of 1986 ("SARA").³ CERCLA was enacted in response to the public's perception of danger following the discovery of toxic waste buried beneath the residential community of Love Canal, New York.⁴ One of the purposes of Superfund is to finance hazardous waste cleanup costs attributable to insolvent or unidentified parties.⁵ While some commentators have criticized CERCLA as being poorly drafted and ineffectively implemented,⁶ others support the law and advocate only modest changes. Almost everyone involved in the CERCLA debate, however, believes that CERCLA should be altered to effect a more efficient administration of hazardous waste cleanups.⁷

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1. 42 U.S.C. §§ 9601-9675 (1994).

2. Pub. L. No. 96-510, 94 Stat. 2767 (1980).

3. Pub. L. No. 99-499, 100 Stat. 1615 (1986).

4. Stephen Crable, *ADR: A Solution for Environmental Disputes*, 48 *ARB. J.* 24, 26 (1993).

5. *Id.*; see John H. Cushman, Jr., *G.O.P. to Start From Scratch in Revising Toxic Dump Law*, *N.Y. TIMES*, Jan. 31, 1995, at A19. These costs are often referred to as "orphan shares." See *Gould v. A & M Battery and Tire Serv.*, 901 F. Supp. 906, 908 (M.D. Pa. 1995).

6. See, e.g., 140 *CONG. REC.* S14,736 (daily ed. Oct. 7, 1994) (statement of Sen. Dole); Cushman, *supra* note 6, at A19.

7. See Al Meyerhoff, *The Fine Print on the Contract With America*, *L.A. TIMES*, Jan. 12, 1995, at B7; see also Cushman, *supra* note 4, at A19.

During the 103d Congressional term, legislators introduced a compromise bill designed to reauthorize CERCLA.⁸ Environmentalists, the Clinton Administration, congressional committees, polluters and the entire insurance industry cooperated in an effort to pass much needed CERCLA reauthorization and financing.⁹ Despite the best efforts of the bill's supporters, partisan politics prevailed and prevented passage of the bill.¹⁰

The political climate has since changed. The elections of November, 1994, brought a Republican majority to both the House of Representatives and the Senate.¹¹ The 104th Congress does not share some of the basic assumptions of its predecessors regarding CERCLA. In fact, many of the newly elected members of Congress favor repealing CERCLA altogether and devising an entirely new approach to the cleanup of potentially harmful toxic wastes.¹² Senator Robert Dole (Republican-Kansas), the Senate Majority Leader, for instance, views CERCLA as a "bad law, in both the way it has been structured and implemented."¹³ The Republican lawmakers who will exert the most influence on CERCLA by virtue of the committees they chair, Senators Robert C. Smith of New Hampshire and Representative Michael G. Oxley of Ohio, have signaled that they will disregard any previously agreed upon compromises and start anew when they review the law.¹⁴ According to Erik Olson, an attorney with the Natural Resources Defense Council, the overwhelming defeat of incumbent Democrats in 1994 did not stem from the public's view of environmental concerns.¹⁵

8. S. 1834, 103d Cong., 1st Sess. (1994); H.R. 3800, 103d Cong., 1st Sess. (1994).

9. Ellin Rosenthal, *Natural Resources 1994 In Review and the Year Ahead*, 8 NAT. RESOURCES TAX REV. 9 (1995).

10. *Id.*

11. *See An Overview of Possible Impacts of 1994 Elections on Environmental Issues*, 25 Env't Rep. (BNA) 1392 (Nov. 18, 1994).

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

13. 140 CONG. REC. S14,736 (daily ed. Oct. 7, 1994) (statement of Sen. Dole).

14. Cushman, *supra* note 6, at A19.

15. *See An Overview of Possible Impacts of 1994 Elections on Environmental Issues*, 25 Env't Rep. (BNA) 1392 (Nov. 18, 1994).

Rather, dissatisfaction with Democrats and the appeal of the upstart Republicans appeared to be based upon widespread public dissatisfaction over tax policy.¹⁶ Senator Smith and Representative Oxley have expressed that existing taxes are adequate fund the cleanup of most toxic waste sites if the states and other parties acted more efficiently and if cleanup standards were more flexible.¹⁷ In keeping with the Republican party's "Contract With America,"¹⁸ Senator Smith and Representative Oxley have stated that any changes to CERCLA will not include new taxes.¹⁹

This Note discusses some of the numerous tax issues involved with CERCLA reauthorization. Part I explains the current structure of CERCLA. Part II discusses some of the primary difficulties with the current statutory scheme. Part III describes a solution involving new taxes proposed by the Clinton administration. Finally, Part IV proposes the author's own solution for reforming financing for the cleanup of hazardous waste sites by extending the current CERCLA taxes without imposing new taxes and encouraging the use of alternative dispute resolution.

I. THE CURRENT FUNDING STRUCTURE OF CERCLA AND ITS EFFECTIVENESS

Under the present law, which includes CERCLA, SARA and later extensions of the law by Congress,²⁰ the proceeds from four separate taxes provide the funding for toxic waste cleanups.²¹ First, there is a 14.7 cents per barrel excise tax on domestic and exported crude oil or refined products.²² A second provision of the Internal Revenue Code provides for an excise tax on certain hazardous

16. See *An Overview of Possible Impacts of 1994 Elections on Environmental Issues*, *supra* note 12, at 1392.

17. Cushman, *supra* note 6, at A19.

18. "Contract With America" refers to the Republican party's legislative agenda for the 104th Congress as popularized by Speaker of the House of Representatives, Newt Gingrich.

19. Cushman, *supra* note 6, at A19.

20. The 101st Congress extended the appropriations authorization for three years through February 1994 and the taxes for four years through December 31, 1995. Pub. L. No. 101-508 § 6301, 104 Stat. 1388 (1990).

21. See I.R.C. §§ 59A, 4611, 4661, 4671 (1995).

22. I.R.C. § 4611 (1995).

chemicals ranging from \$.22 to \$4.87 per ton.²³ A third excise tax is imposed on imported substances, the manufacturing or production process of which contain one or more of the hazardous chemicals subject to tax for export under I.R.C. § 4661.²⁴ The final CERCLA tax is a corporate environmental income tax equal to .12% of the amount of modified alternative minimum taxable income in excess of \$2,000,000.²⁵ In other words, corporations must pay \$12 in taxes for every \$10,000 of alternative minimum taxable income. The first \$2 million of a corporation's annual income is exempt from this tax.²⁶ This corporate environmental tax is imposed even if a corporation is not required to pay the alternative minimum tax.²⁷ Justification for these four taxes is that because industry was the primary beneficiary of the processes which created the hazardous substances that require cleanup, they should assist in funding the cleanups.²⁸ Legislation to extend these taxes beyond their expiration date of December 31, 1995, passed the House of Representatives of the 103d Congress but stalled in the Senate.²⁹

Under CERCLA, the Environmental Protection Agency ("EPA") maintains a list of sites requiring cleanup known as the National Priority List ("NPL").³⁰ The bulk of cleanup costs for these sites are borne by "potentially responsible parties" ("PRPs"),³¹ as identified by the EPA.³² PRPs are held jointly and severally liable, as well as strictly liable, for cleanup costs of an NPL site irrespective of the relative volume of wastes they contributed.³³ In addition,

23. *Id.* § 4661.

24. *Id.* § 4671.

25. *Id.* § 59A.

26. [1996] 1 Stand. Fed. Tax Rep. (CCH) ¶ 5451.01; I.R.C. § 59A (1995).

27. [1996] 1 Stand. Fed. Tax Rep. (CCH) ¶ 5451.01.

28. Crable, *supra* note 5, at 27.

29. *Ways-Means Leaders Say Retroactive Liability Under CERCLA Must Be Repealed*, 64 Banking Rep. (BNA) No. 8, at 365 (Feb. 20, 1995).

30. 42 U.S.C. § 9605(a)(8)(B) (1994).

31. CERCLA defines PRP to include owners and operators of vessels or facilities, those who owned or operated the vessel or facilities at the time of the waste disposal, and transporters of and those who arranged for the transport of hazardous wastes. 42 U.S.C. § 9607(a) (1994).

32. CERCLA conveys this authority to the President. 42 U.S.C. § 9611(a) (1994). This power, however, has been delegated to the EPA. ROBERT V. PERCIVAL ET AL., *ENVIRONMENTAL REGULATION* 292 (1992).

33. Although CERCLA does not expressly impose joint and several liability,

liability is retroactive, meaning that a PRP may be liable even though the waste was disposed of before CERCLA was enacted.³⁴ When the EPA cannot identify a PRP with sufficient assets, Superfund bears the cost.³⁵ Thus, CERCLA's civil liability scheme seeks to ensure that funding exists to clean up existing NPL sites, as well as to deter future environmental damage.

When CERCLA was enacted in 1980, \$1.6 billion was provided to fund the first five years of the program's operation.³⁶ In 1986, funding was increased to \$8.5 billion to cover the next five years of cleanup.³⁷ In order to provide adequate funding for the program the rates of the four CERCLA taxes have been adjusted. CERCLA authorizes the EPA, in its efforts to clean up hazardous wastes, to pursue two alternative cleanup payment procedures. First, the EPA itself may pay for the cleanup from the Superfund and then attempt to recover the costs from the PRPs.³⁸ Second, the EPA may require PRPs to accomplish the cleanup without financial contribution or outlay from the Superfund.³⁹

II. CRITICISM OF CERCLA

In August of 1994, the EPA reported that only 240 of the more than 1,300 NPL sites had been successfully remediated.⁴⁰ The current pace of cleanup is much too slow for congressional leaders who are determined to root out the problems that are delaying the cleanup process.⁴¹ One problem with the current system is that much of the money available for remediation is being squandered

such liability has been found in cases in which the defendants can demonstrate that the harm is divisible. *United States v. Monsanto Co.*, 858 F.2d 160, 171 (4th Cir. 1988); *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 810 (S.D. Ohio 1983).

34. *Monsanto*, 858 F.2d at 173.

35. 42 U.S.C. § 9611 (1994).

36. *Id.* at 27.

37. 42 U.S.C. § 9611(a).

38. *Id.* §§ 9604, 9607.

39. *Id.* § 9606.

40. 140 CONG. REC. S12,604-605 (daily ed. Aug. 25, 1994) (statement of Sen. Lautenberg).

41. *Id.* at S12,605.

on transaction costs.⁴² In other words, too much of the money is going to lawyers and not enough to the cleanup of hazardous waste sites.⁴³ Two reasons for this inefficiency are the haggling among PRPs as to what share of the cleanup costs are attributable to which parties and the difficulty in locating additional PRPs to help defray the cleanup costs.⁴⁴ In addition, litigation between PRPs and their insurers over the extent of insurance coverage for CERCLA cleanup costs adds substantially to the cost and delays associated with cleanup.⁴⁵

Many other shortcomings of CERCLA have been noted by its critics. These include the inefficiency of the cleanup process,⁴⁶ the high costs with little corresponding benefit,⁴⁷ and the harassment of small businesses and municipalities by large corporate polluters in an attempt to spread the costs of cleanup to others.⁴⁸ Economic development has been stifled as a result of money lenders and prospective property purchasers being discouraged by the potential CERCLA liability.⁴⁹ CERCLA's retroactive liability holds PRPs liable for actions that, when they were performed, may have been entirely lawful.⁵⁰ Because they fear CERCLA liability, potential investors may be scared to invest in the cleanup and redevelopment of NPL sites.⁵¹ Finally, cleanup standards bear no relation to the expected future use of the NPL site.⁵²

42. *Id.*

43. *Id.*

44. *See, e.g.,* Sandy Shore, *Environmental Detectives Track Down Polluters Superfund*, L.A. TIMES, Jan. 15, 1995, at B5.

45. Mark Reisch, CONGRESSIONAL RESEARCH SERVICE ISSUE BRIEF, SUPERFUND REAUTHORIZATION ISSUES IN THE 103RD CONGRESS 2 (Oct. 5, 1994), at 2.

46. 140 CONG. REC. at S12,605.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Ways-Means Leaders Say Retroactive Liability Under CERCLA Must Be Repealed*, *supra* note 30, at 365.

51. 140 CONG. REC. at S12,605.

52. Keith Schneider, *New View Calls Environmental Policy Misguided*, N.Y. TIMES, Mar. 21, 1993, at 1, 30.

III. THE CLINTON APPROACH: THE ENVIRONMENTAL INSURANCE RESOLUTION FUND

In anticipation of the expiration of CERCLA taxes in 1995, the Clinton Administration proposed two tax-related plans.⁵³ The first proposal called for the fairly non-controversial extension of the present CERCLA taxes through the year 2000.⁵⁴ The proposal allocated \$1.6 billion for CERCLA in 1996, an increase of \$131.7 million from the 1995 level.⁵⁵ The second Clinton Administration proposal was designed to address the issue of the abundance of litigation surrounding insurance coverage of environmental cleanups. The Administration proposed the imposition of two new insurance-related taxes relating to commercial insurance and reinsurance policies.⁵⁶ These new taxes called for by the provision are intended to finance a new Environmental Insurance Resolution Fund ("EIRF").⁵⁷

A. *Why is the EIRF necessary?*

Insurance coverage for CERCLA claims has become one of the most heavily litigated areas of the law.⁵⁸ One study estimates that 42% of the money spent by insurance companies in connection with CERCLA "was spent on litigation related to contesting coverage claims by insureds."⁵⁹ The insurance industry, if required to compensate the insured's claims, would significantly deplete its

53. The entire Clinton Administration proposal may be found in H.R. 3800, the "Superfund Reform Act of 1994," 103d Cong., 1st Sess. (1994).

54. S. 1834, 103d Cong., 1st Sess. § 903 (1994).

55. *Hearings on the President's Budget Request for 1996 Before the Senate Environment and Public Works Comm.*, 104th Cong., 1st Sess. (1995) (statement of Carol M. Browner, Administrator U.S. Environmental Protection Agency), available in, WESTLAW, USTESTIMONY Database, 1995 WL 60951, at *2.

56. S. 1834 § 903.

57. *Id.*

58. Theodore C. Taub, *Pre-Transaction and Transactional Issues Involving Hazardous Materials/Waste*, in LAND USE INSTITUTE: PLANNING, REGULATION, LITIGATION, EMINENT DOMAIN, AND COMPENSATION, at 251, 278 (ALI-ABA Course of Study Materials, No. C851, 1993).

59. *Id.* (citing LLOYD S. DIXON ET AL., PRIVATE SECTOR CLEANUP EXPENDITURES AND TRANSACTION COSTS AT 18 SUPERFUND SITES (Rand Institute for Civil Justice ed., 1993)).

capital reserves in a manner that would threaten the viability of the industry. Potentially, the insurance industry would have to pay as much as \$30 to \$50 billion over 30 years.⁶⁰ The total capital reserves of the affected insurance companies are estimated to be only \$70 billion.⁶¹ There are hundreds of suits pending across the country by insureds seeking reimbursement for CERCLA-related expenditures.⁶² One of the goals of the Clinton proposal is to eliminate the need for this morass of litigation over insurance coverage related to the cleanup of Superfund sites.⁶³

In simplified form, the insurance litigation is based on differences in the interpretation of Comprehensive General Liability ("CGL") insurance policies. Until the late 1980's, when most insurers revised the wording of CGL policies, the standard form provided in pertinent part:

The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of . . . property damage to which this insurance applies, caused by an occurrence, and the company shall have the right and duty to defend any suit against the insured seeking damages on account of such . . . property damage . . .⁶⁴

Insureds and their insurance companies disagreed as to the meaning of the word "damages." Some courts, agreeing with the insureds, have held that the term damages includes government mandated cleanups that are not the result of litigation.⁶⁵ Other courts, however, have held the opposite view, holding that the term damages has a strict legal meaning and the cost of comply-

60. William T. Hassler, *Insurance Aspects of Hazardous Waste Sites*, in HAZARDOUS WASTES, SUPERFUND, AND TOXIC SUBSTANCES, at 205, 209 (ALI-ABA Course of Study Materials, No. C948, 1994).

61. *Id.*

62. *Id.*

63. Barbara Kirchheimer, *Administration Modifies Superfund Taxes to Satisfy Reinsurers*, 94 Tax Notes Today 182 (Sept. 15, 1994).

64. Taub, *supra* note 59, at 278-79.

65. *Id.* at 279 (citing *AIU Ins. Co. v. Superior Court*, 799 P.2d 1253 (Cal. 1990); *McDonald Indus. Inc. v. Insurance Co. of N. Am.* 475 N.W.2d 607 (Iowa 1991); *Hazen Paper Co. v. United States Fidelity and Guarantee Co.*, 555 N.E.2d 576 (Mass. 1990)).

ing with environmental statutes and regulations does not fall within the word's scope.⁶⁶

Another source of contention is over the meaning of the so-called pollution exclusion clause that was a part of most CGL policies between 1973 and 1986. The pollution exclusion clause provided:

This insurance does not apply . . . to . . . property damage arising out of the discharge of . . . contaminants or pollutants into or upon land . . . [T]his exclusion does not apply if such discharge . . . is sudden and accidental.⁶⁷

The "sudden and accidental" exception to the pollution exclusion is another source of contention between insurers and insureds. Some courts have agreed with the insured corporations' interpretation that an occurrence that is unintended and unexpected from the perspective of the insured is covered by the policy.⁶⁸ Other courts, however, have sided with the insurance companies, holding that coverage is excluded when the pollution occurred over an extended period of time because in such instances the discharge could not be considered sudden.⁶⁹

Corporations acquire CGL policies to shield themselves from a broad spectrum of potential liabilities.⁷⁰ Because these policies provide generic coverage for a broad range of issues, the

66. Taub, *supra* note 59, at 279 (citing *Continental Ins. Co. v. Northeastern Pharmaceutical and Chem. Co.*, 842 F.2d 977 (8th Cir. 1988), *cert. denied*, 488 U.S. 821 (1988); *Maryland Casualty Co. v. Armco, Inc.*, 822 F.2d 1348 (4th Cir. 1987), *cert. denied*, 484 U.S. 1008 (1988); *Aetna Casualty and Surety Co. v. Gulf Resources and Chem. Corp.*, 709 F. Supp. 958 (D. Idaho 1989)).

67. *Id.* at 280.

68. *Id.* at 280-81 (citing *Hecla Mining Co. v. New Hampshire Insurance Co.*, 811 P.2d 646 (Colo. 1991); *Claussen v. Aetna Casualty and Surety Co.*, 380 S.E.2d 686 (Ga. 1989); *U.S. Fidelity and Guaranty Co. v. Wilkin Insulation Co.*, 578 N.E.2d 926 (Ill. 1991); *Just v. Land Reclamation, Ltd.*, 456 N.W.2d 570 (Wis. 1990)).

69. *Id.* at 281 (citing *A. Johnson and Co. v. Aetna Casualty and Surety Co.*, 988 F.2d 66 (1st Cir. 1991); *New York v. Amro Realty Corp.*, 936 F.2d 1420 (2d Cir. 1981); *United States Fidelity and Guaranty Co. v. George W. Whitesides Co.*, 932 F.2d 1169 (6th Cir. 1981); *Upjohn Co. v. New Hampshire Ins. Co.*, 476 N.W.2d 392 (Mich. 1991)).

70. Crable, *supra* note 5, at 28.

language contained therein is necessarily general and broad.⁷¹ Naturally, since insurance carriers had not contemplated liability to the extent of CERCLA claims, nor had they anticipated the number of claims or even the existence of liability, CGL policies have become a fertile battleground.⁷²

B. *The Environmental Insurance Resolution Fund*

The EIRF was the Clinton Administration's proposed method to end the proliferation of environmental insurance litigation related to cleanup of Superfund sites, thereby reducing the transaction costs associated with prolonged litigation. The plan proposed a fund, out of which insurance companies, through their own contributions, would mitigate their own cost associated with environmental insurance claims and thus lessen the amount of litigation involved.⁷³ The EIRF would be funded through new taxes on CGL policies or commercial multi-peril insurance for any period prior to January 1, 1986.⁷⁴ Forty-six percent of the funding would be generated by a tax on direct commercial liability insurance premiums: twenty-three percent by a tax on reinsurance premiums, and thirty-one percent by a prospective tax on insurance premiums for policies covering commercial lines of business.⁷⁵ In other words, sixty-nine percent of the revenues from these taxes would be raised by a retroactive tax on the insurance industry on policies written between 1971 and 1985, while thirty-one percent of the revenues would be raised from an excise tax on policies written during a five year prospective period commencing with the enactment of the tax.⁷⁶ According to Treasury Department Assistant Secretary for Tax Policy Leslie B. Samuels,

71. *Id.*

72. *Id.*

73. See S. 1834, 103d Cong., 1st Sess. §§ 801-807 (1994).

74. *Id.* § 802(g)(2).

75. Kirchheimer, *supra* note 64, at 182.

76. *JCT Describes Revenue Related Provisions of Superfund Bill*, 7 NAT'L RESOURCES TAX REV. 1885 (1994). Although this article states that the figures are 70% and 30%, respectively, the totals used here are derived from the Kirchheimer article, *supra* note 64, at 182.

these figures were calculated with the intention of raising \$810 million per year.⁷⁷

The fund, once established, is designed to be used for partial reimbursement directly to policyholders for the cost of environmental cleanup instead of the more common method of reimbursement from insurers.⁷⁸ In a mechanical manner, the EIRF would determine a single percentage that would be applied to all of a policyholder's eligible sites.⁷⁹ The factors that would go into determining the percentage of costs that a policyholder would receive include the location of any suits filed by the policyholder and the location of each eligible site claimed by the policyholder.⁸⁰ A reimbursement percentage of either twenty percent, forty percent, or sixty percent would be statutorily assigned to each of the fifty states, depending on whether the particular state's law favors the insurer or the insured.⁸¹ The percentage assigned to a particular policyholder is permanent and would apply to all of that policyholder's future sites.⁸²

The fund would endeavor to eliminate the insurance litigation involved in hazardous waste cleanups. Once a policyholder accepts a payment from the EIRF, that policyholder's claims under the applicable insurance policy would be extinguished.⁸³ The policyholder, instead of incurring huge litigation expenses, would receive coverage for a percentage of the costs of remediation, while remaining liable for the remaining costs out of its own funds. The insurance company, in exchange for paying taxes to

77. Kirchheimer, *supra* note 64, at 182.

78. S. 1834, 103d Cong., 1st Sess. § 802(g)(5) (1994).

79. *Id.* § 802(g)(2)(B)-(g)(4).

80. *Id.* § 802(g)(4).

81. *Id.* § 802(g)(4)(B). States would be divided into three groups. Claimants from Florida, Maine, Maryland, Massachusetts, Michigan, New York, North Carolina, and Ohio would receive 20%; California, Colorado, Georgia, Illinois, New Jersey, Washington, West Virginia, and Wisconsin would receive 60%; and claimants from all other states would receive 40%. *Id.* See also Rena I. Steinzor, *The Reauthorization of Superfund: Can the Deal of the Century be Saved?*, 25 *Envtl. L. Rep. (Envtl. L. Inst.)* 10016 n.104 (1995).

82. S. 1834, 103d Cong., 1st Sess. §802(g)(5)(1994).

83. *Id.* § 802(g)(5)(B).

support the EIRF, would be released from all CERCLA liability for all policyholders who accept a payment from the fund.

Although the Clinton proposal appeared to be a healthy compromise and a viable method to reduce, if not eliminate, the abundance of insurance-related litigation resulting from CERCLA liability, congressional approval of the EIRF was not forthcoming. Despite landmark cooperation among a wide variety of opposing interest groups in drafting the bill, its shortcomings prevented its passage.⁸⁴ Such shortcomings included the possibility that large policyholders would refuse to avail themselves of the fund because of a belief they would fare better in court.⁸⁵ In addition, although the larger insurance carriers generally supported the bill,⁸⁶ many of the smaller members of the insurance industry did not.⁸⁷ Lastly, and probably most decisively, Congress was reluctant to enact new taxes. These factors, combined with an unwillingness to reach a political compromise, led to the defeat of the Clinton Superfund Reauthorization proposal during the 103d Congress.

IV. A COMPREHENSIVE APPROACH TO SUPERFUND REAUTHORIZATION

The Environmental Protection Agency objectives in pursuing Superfund Reauthorization include fairly assessing liability costs and increasing efficiency in carrying out the actual cleanups.⁸⁸ These objectives are not controversial. The only question is how to achieve fairness and efficiency. Representative Michael B. Oxley (Republican-Ohio), Chairman of the House Commerce Subcommittee on Commerce, Trade, and Hazardous Materials, has stated that he and other Republican congressional leaders will

84. Rosenthal, *supra* note 10, at 9.

85. Nancy Rutter, *Superstalled*, CAL. LAW., July 1994, at 28, 30 (quoting James Otto of Cummins & White, Los Angeles).

86. *Hearings on House Ways and Means Superfund Revisions Before the House Comm. on Ways and Means*, 103d Cong., 1st Sess. (1994) (statement of John P. Mascotte, Chairman of the American Insurance Association).

87. *Lawmakers Starting to Address Superfund Reform Plans for 1995*, 64 Banking Rep. (BNA) No. 4, at 155 (Jan. 23, 1995).

88. John E. Osborn & Steven N. Williams, *Reauthorizing Superfund: Problems and Prospects*, N.Y.L.J., Mar. 29, 1994, at 4.

push for comprehensive reform of CERCLA, rather than piecemeal legislation.⁸⁹ Included in their objectives are the reduction of CERCLA-related litigation costs, more control over cleanups and cleanup standards by local communities, different cleanup standards for individual hazardous waste sites related to expected future use, and the repeal of retroactive liability.⁹⁰ The Republicans intend to accomplish all of these goals without expanding the current taxes under CERCLA and without enacting any new taxes.⁹¹ The methodology for attaining these goals without enacting new taxes remains unclear. The goal of the following proposal is to apply a variety of cost saving techniques that will lower costs associated with cleanups, improve the current system, and avoid raising taxes.

According to leaders of the 104th Congress, "everything is on the table" regarding CERCLA reform.⁹² Currently, House and Senate committees and subcommittees are hearing testimony and holding meetings in an effort to completely overhaul CERCLA and reform the current system.⁹³ According to one congressional insider, every facet of CERCLA will be debated.⁹⁴

A. No New Taxes

Senator John Chafee (Republican-Rhode Island), Chairman of the Senate Environment and Public Works Committee, has stated that it is highly unlikely that new taxes would be enacted under CERCLA Reauthorization.⁹⁵ The consensus among the Republican leadership is that only the existing CERCLA taxes will be renewed and no new taxes will be considered.⁹⁶ In fact, Repre-

89. *Lawmakers Starting to Address Superfund Reform Plans for 1995*, *supra* note 88, at 155.

90. Telephone Interview with Jeff Merryfield, Majority Counsel Senate Subcomm. on Superfund Waste Control and Risk Assessment (Feb. 6, 1995).

91. *Id.*

92. *Congressmen Say Everything is on the Table with Superfund*, 64 *Banking Rep.* (BNA) No. 6, at 266 (Feb. 6, 1995).

93. Telephone Interview with Jeff Merryfield, *supra* note 91.

94. *Id.*

95. *Congressmen Say Everything is on the Table with Superfund*, *supra* note 93, at 267.

96. *Ways-Means Leaders Say Retroactive Liability Under CERCLA Must Be*

sentative Bill Archer (Republican-Texas), House Ways and Means Committee Chairman, warned, "[d]on't come to me and ask me for any increased taxes, because they are not coming out of the Ways and Means Committee."⁹⁷

In light of the strong sentiment opposing the imposition of new taxes, it is unlikely that the 104th Congress will consider, and even less likely that they will pass, the Clinton EIRF proposal. Rather, Congress will attempt to reach, at a minimum, the same objectives provided for in the Clinton Administration proposal without raising taxes. This goal presumably can be accomplished by lowering costs associated with CERCLA, helping to curb or even prevent the need for new taxes.

B. *Alternative Dispute Resolution*

One of the primary factors that has added to the cost and decelerated the pace of hazardous waste site cleanups is litigation among insurers and insureds, as well as litigation among PRPs.⁹⁸ Issues of liability have slowed the progress of the entire system and entangled it in a web of transaction costs.⁹⁹ Increasingly, parties have resorted to alternative dispute resolution methods ("ADR") to decrease costs and speed disposition of conflicts throughout the legal system.¹⁰⁰

Repealed, supra note 29, at 365.

97. *Id.*

98. ROGER STRELOW, CENTER FOR PUBLIC RESOURCES LEGAL PROGRAM, INTRODUCTION TO CPR MODEL PROCEDURE, CONTAINING LEGAL COSTS: ADR STRATEGIES FOR CORPORATIONS, LAW FIRMS, AND GOVERNMENT 433 (1988). This study advocates a private procedure for settling Superfund issues developed by the Center for Public Resources Hazardous Waste Committee, which consists of leading experts in hazardous waste cleanup issues from the private bar and major corporations. In 1993, CPR successfully resolved business disputes involving \$1.7 billion through ADR. *See also* CATHY CRONIN-HARRIS, ADR COST SAVINGS AND BENEFIT STUDIES, CENTER FOR PUBLIC RESOURCES MODEL ADR PROCEDURES AND PRACTICES I-30 (1994).

99. *Id.*

100. Barbara Hopkinson Kelly, *Alternative Dispute Resolution of Environmental Insurance Coverage Claims*, in ENVIRONMENTAL INSURANCE COVERAGE CLAIMS AND LITIGATION 1994 511, 511-12 (PLI Comm. Law & Prac. Course Handbook Series No. 691, 1994); *see also* Thomas P. Grumbly, *Insufficient Use of ADR is Obstacle to Achieving More Superfund Settlements*, in ALTERNATIVE

The use of alternatives to traditional litigation to resolve CERCLA liability issues is not a novel approach. The use of binding arbitration has been recommended by the National Commission on Superfund.¹⁰¹ SARA allows PRPs to settle issues of proportional liability for *de minimis* parties in exchange for an exemption from joint and several liability under CERCLA.¹⁰² Also, under SARA, PRPs are given an opportunity, before the EPA begins cleanup or remedial actions, to negotiate a cleanup and financing proposal with the EPA.¹⁰³ SARA establishes a time frame within which the settlement must take place in order to facilitate negotiations.¹⁰⁴

As suggested by these other proposals and procedures, some lawmakers believe that alternative methods of dispute resolution can work. Why not attempt to make it work on a grander scale and restructure the entire system? A hybrid approach including negotiation, mediation, arbitration and summary trials, would provide an efficient system in which to settle liability disputes.¹⁰⁵ Presumably, ADR may be employed to resolve disputes among the EPA and PRPs or between local governments and PRPs in regard to cleanup standards as well. The alternative system would also be available for use by PRPs to resolve contribution claims. All of these issues, in fact, could be addressed in one comprehensive proceeding, rather than separate litigation, resulting in a further reduction of the overall costs involved in the cleanup of hazardous waste sites.

DISPUTE RESOLUTION PRACTICE AND PERSPECTIVES: A BNA SPECIAL REPORT 149, 152 (1990); CRONIN-HARRIS, *supra* note 99, at I-36.

101. Osborn & Williams, *supra* note 89, at 4.

102. 42 U.S.C. § 9622(g),(h) (1994). *See also* Dravo Corp. v. Zuber, 804 F. Supp. 1182 (D. Neb. 1992), *aff'd*, 13 F.3d 1222 (8th Cir. 1994). Many courts have also exempted PRPs from joint and several liability where the defendant can show that a reasonable basis for apportioning liability exists. *See In re Bell Petroleum Services, Inc.*, 3 F.3d 889 (5th Cir. 1993); *United States v. Broderick Inv. Co.*, 862 F.Supp. 272 (D. Colo. 1994).

103. 42 U.S.C. § 9622.

104. *Id.*

105. *See* STRELOW, *supra* note 99, at 438-39. In a Maryland case, the use of ADR procedures in settling factual disputes over the identification, amount and remediation cost of asbestos removal was estimated to have saved three years of litigation. Crable, *supra* note 5, at 30.

ADR methods have proven to be less costly and less time consuming than litigation.¹⁰⁶ President Clinton's proposed EIRF may reduce the transaction costs incurred as a result of prolonged litigation over cleanup liability.¹⁰⁷ Presently, however, the Clinton plan merely shifts much of the cost involved and requires it to be paid in the form of a tax.¹⁰⁸ In reality, under the Clinton plan, PRPs who thought they could receive a better settlement in court than that offered by the EIRF would likely continue to engage in litigation, and hinder the EIRF from achieving its desired effect. What is needed is a system that reduces transaction costs stemming from protracted litigation. It is important to examine alternative options to the traditional adversarial system.¹⁰⁹

An alternative system for settlement of all CERCLA-related litigation issues would have several distinct advantages. First, dispute resolution would result reduction of transaction costs, including attorney's fees, expert witness fees and trial expenses.¹¹⁰ An ADR system would first allocate liability among the PRPs. Thus, at the very beginning of the process, each PRP would know precisely its own share of the total cleanup costs. Since all proportional liability will be determined initially, incentive to litigate may be removed because the potential for joint and several liability is greatly reduced.¹¹¹ Once each PRP knows its proportionate share of the liability costs, all PRPs have the common objective of negotiating with the government and accomplishing cleanup.¹¹² This spirit of cooperation may enable PRPs to share costs of counsel, expert witnesses, and consultants.¹¹³

106. STRELOW, *supra* note 99, at 438-39.

107. *See supra* notes 74-84 and accompanying text.

108. *See supra* notes 74-78 and accompanying text.

109. Kelly, *supra* note 101, at 511.

110. *Id.* at 511-12.

111. STRELOW, *supra* note 99, at 435. Although joint and several liability is not expressly mandated under CERCLA, courts have uniformly applied it to Superfund cases. *See O'Neil v. Picillo*, 883 F.2d 176 (1st Cir. 1989), *cert. denied*, 493 U.S. 1071 (1990); *United States v. Wade*, 577 F. Supp. 1326 (E.D. Pa. 1983); *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802 (S.D. Ohio 1983).

112. STRELOW, *supra* note 99, at 436.

113. *Id.* At the Glenwood Landing, New York site alone, 257 PRPs hired more than 130 law firms. Rudy Abramson, *The Superfund Cleanup: Mired In Its Own Mess*, L.A. TIMES, May 10, 1993, at A1.

This arrangement can potentially reduce not only duplicate costs and effort, but litigation costs as well if a trial does, in fact, follow.¹¹⁴ In an April 1985 study of Superfund-related litigation costs, the economic consulting firm of Putnam, Hayes and Bartlett indicated that two-thirds to three-fourths of Superfund litigation costs could be eliminated and cleanups would occur more quickly if PRPs could share resources in the manner described.¹¹⁵

The Center for Public Resources ("CPR") has compiled statistics demonstrating the savings achieved through effective use of ADR in non-environmental contexts. In 1993, with the help of third-party neutrals provided by CPR, 150 companies estimated direct savings in legal costs of \$37.5 million.¹¹⁶ During the three year period between 1990 and 1993, in disputes settled through ADR and involving CPR assistance, parties have saved \$187 million of their estimated legal costs.¹¹⁷ Similar savings have been demonstrated by other studies.¹¹⁸ One such study indicates that, typically, litigation costs will exceed ADR costs by as much as 50%.¹¹⁹ The Center for Public Resources has claimed that ADR has been successfully used to resolve complex disputes involving commercial contracts, patents, construction, joint ventures and transnational issues,¹²⁰ thereby demonstrating its suitability for complex environmental disputes.

Alternative dispute resolution allows the judge, arbitrator, mediator or negotiator to be creative in crafting a settlement.¹²¹ This would ensure the pursuit of a fair and just settlement, and alloca-

114. STRELOW, *supra* note 99, at 439.

115. *Id.* at 436.

116. CRONIN-HARRIS, *supra* note 99, at I-33.

117. *Id.*

118. *Id.* at I-36 to I-43 (citing DELOITTE AND TOUCHE LITIGATION SERVICES 1993 SURVEY OF GENERAL AND OUTSIDE COUNSELS: ALTERNATIVE DISPUTE RESOLUTION (Deloitte Touche Tohmatsu International, ed. 1993) and PRICE WATERHOUSE 1993 LAW DEPARTMENT SPENDING SURVEY SCHEDULES 6.4 to 6.5 (9th ed.)).

119. CRONIN-HARRIS, *supra* note 99, at I-36.

120. See James F. Henry, CPR Institute for Dispute Resolution, *Why a Corporate Policy Statement on Alternatives to Litigation* (1984).

121. *Id.*

tion of costs, as well as a realistic determination of the most effective ways in which to mitigate costs. Through the use of site-specific cleanup goals and the direct supervision of the cleanup contractor by the PRPs involved, contractors would not have the opportunity to cheat the government and PRPs out of monies that should have been spent on the actual cleanup itself.¹²²

This alternative settlement system would be funded through already-existing Superfund taxes, as well as through private funding by the parties. The limited time frame provided under the statute would require the parties to fund a much shorter period of the equivalent for litigation costs and many of these costs would be shared by the parties.¹²³ Therefore, a substantial savings in litigation costs may be realized and the money saved could be better spent on cleanup and redevelopment of sites.

In order to illustrate how the alternative system would operate, imagine that company "A" has been identified by the EPA as a PRP. Under this system, the EPA and the PRP would cooperate in identifying other PRPs. If company "A" and the EPA discover that companies "B," "C," and "D" are also PRPs, they would all have the option of engaging in litigation or utilizing the alternative system. The savings achieved by avoiding protracted litigation operates to encourage these companies to choose to make use of the alternative system. Additionally, if ADR is promptly employed before extensive pre-trial discovery has begun, the expenses that parties usually incur prior to trial can be greatly reduced.¹²⁴

Once the parties enter into the settlement system, an administrator would guide them through the various processes. The choice of administrator is particularly important to the success of the ADR system. Under this system, the administrator must be a neutral third party with extensive knowledge of Superfund issues and a reputation for integrity.¹²⁵ The administrator pool would be drawn from the Center for Public Resources Judicial Panel and

122. See 141 CONG. REC. S3,068 (daily ed. Feb. 23, 1995) (statement of Sen. Glenn).

123. See discussion *infra* part I.

124. HENRY, *supra* note 121, at 1.

125. STRELOW, *supra* note 99, at 438.

other eminent scientists and retired senior executives of major corporations.¹²⁶ The PRPs would share in the costs of compensation for the administrator and assistants the administrator deems necessary,¹²⁷ with costs to be divided according to the eventual allocation of liability.

First, a short time period would be established, based on the complexity of the particular case, during which the parties could pursue factual investigation followed by negotiation and mediation. At the end of this period, if no agreement has been reached and the administrator does not opt to extend the time period, the parties may then seek either a summary trial before a judge or binding arbitration. If the parties cannot agree on which option to choose, the administrator of the case would make the decision based on position papers presented by all parties. The time periods allotted to each process would be short enough to encourage serious negotiation from the beginning, but long enough to allow these negotiations to be meaningful and fruitful.

Returning to our hypothetical case, the EPA and "A," after identifying the other PRPs, would invite "B," "C," and "D" to a preliminary meeting with the administrator. The administrator would explain the process and outline the advantages of ADR. Under this proposal, parties would first be required to attempt to resolve all the issues through ADR before having the option of bringing a lawsuit.¹²⁸ Before beginning the negotiating process, all of the PRPs would be encouraged to voluntarily agree to be bound by the administrator's final determination in the event that no settlement is reached. If, however, the PRPs are unwilling to do so, the process will not necessarily fail.¹²⁹ When the process is complete, a rational PRP may realize, after reviewing the result

126. *Id.* Other neutral dispute resolution organizations that are available to provide similar services include Clean Sites, American Arbitration Association, Environmental Common Sense and Resolve. Crable, *supra* note 3, at 34.

127. STRELOW, *supra* note 99, at 438.

128. Kit R. Kricken & Pamela Rekar, *Superfund Negotiators Suggest ADR As Way to Break Settlement Logjam*, in *Alternative Dispute Resolution Practice and Perspectives: A BNA Special Report* 153, 158 (1990).

129. STRELOW, *supra* note 99, at 439.

and the rationale supporting it, that he will not likely fare better in court.¹³⁰

If negotiation and mediation fail to produce an agreement, the administrator begins the next phase of the process. Each PRP has an opportunity to be heard by the administrator in either an arbitration or summary jury trial setting. After each party has presented its argument, the administrator issues a final and, hopefully, binding final determination.¹³¹

This alternative system is not the sole prong of this CERCLA reauthorization proposal. It should be noted that the entire plan presented here is a comprehensive approach and many of the component parts will be facilitated and supported by other components. The process described above is designed to save a substantial amount of present transaction costs and should relieve the judicial system of the substantial burden created by lengthy environmental cleanup litigation. Further, these funds could then be put to better use in financing the cleanups themselves. A viable ADR option may greatly enhance the efficiency of the pre-cleanup process and reduce transaction costs, estimated to account for thirty-eight percent of total CERCLA expenditures.¹³²

C. *Local Control*

In the words of former Governor of New Jersey and CERCLA author Jim Florio, “[i]t doesn’t make any sense to clean up a rail yard in downtown Newark so it can be a drinking water reservoir.”¹³³ Intuitively, if cleanup standards are lowered, less work must be performed at each site, and cleanup costs will also decrease.¹³⁴

The Republican congressional leadership of the 104th Congress has considered handing over more of the supervision of cleanup to state and local governments.¹³⁵ The Republicans have suggested that the authority to determine how clean a particular site

130. *Id.* at 443.

131. *Id.* at 439.

132. PERCIVAL ET AL., *supra* note 33, at 369.

133. Schneider, *supra* note 53, at 30.

134. *See infra* text accompanying notes 167-69.

135. Cushman, *supra* note 6, at A19.

needs to be delegated to the states.¹³⁶ In fact, congressional support for transferring nearly all authority to administer the CERCLA program to the states is growing.¹³⁷ Under the author's proposal, the federal and state governments should encourage companies to clean up and redevelop urban sites and delegate supervision of cleanups to state and local governments. As Stephen Goldsmith, Mayor of Indianapolis, Indiana, stated, "[a]s citizens of my basketball-savvy state will tell you, the official closest to the action is usually in the best position to make the call."¹³⁸ Control over the implementation of hazardous waste site cleanup should be given to the states and local governments who are the officials "closest to the action."

The statistics, not merely the rhetoric, support the contention that the states should control CERCLA cleanups. In Illinois, Wisconsin, and Minnesota more than 500 sites have already been remediated under state supervision.¹³⁹ During the same time period, the entire federal program has remediated only 280 sites.¹⁴⁰ Forty-four states currently have CERCLA funding authorities of their own.¹⁴¹ These states should be given the authority to remediate the approximately 1300 NPL sites remaining.¹⁴²

In the original debates in the House of Representatives concerning the enactment of CERCLA, Representative Dave Stockman (Republican-Michigan) suggested an alternative approach to a centralized federal cleanup system.¹⁴³ He proposed that the tax funds collected through CERCLA be given to the states in the

136. *Id.* Federal cleanup standards are contained in 42 U.S.C. § 9621 (1994).

137. Viki Reath, *Momentum Building to Shift Superfund to State Authority*, 8 ENV'T WK. (Mar. 23, 1995), available in WESTLAW, ENVWK Database, 1995 WL 7721229.

138. *Testimony to the House Ways and Means Comm.*, 104th Cong., 1st Sess. (Jan. 12, 1995) (testimony of Stephen Goldsmith, Mayor of Indianapolis, Ind.), available in WESTLAW, USTESTIMONY Database, 1995 WL 10397 [hereinafter *Testimony*].

139. Reath, *supra* note 138.

140. *Id.*

141. *Id.*

142. *Id.*

143. 126 CONG. REC. H11,802 (daily ed. Jan. 14, 1980) (statement of Rep. Rudd).

form of block grants.¹⁴⁴ With this money the states would be able to establish their own procedures to deal with hazardous waste sites within their borders according to their own priorities and standards.¹⁴⁵ Under this system, the only federal involvement would be determining how much money each state would receive.¹⁴⁶ The author proposes that each state should receive a specified amount based on the number and size of the CERCLA sites within their boundaries and should use those funds, in addition to the funds they currently possess, for clean-up-related expenses.

Currently, CERCLA cleanups administered by the federal government cost twenty-percent more than comparable private cleanups.¹⁴⁷ The unwieldy system that has been created makes it too difficult for the EPA to properly supervise and reduce costs.¹⁴⁸ Local governments are in a better position to scrutinize the details of a plan and devise cost-cutting efficiency measures.¹⁴⁹

Under state and local control it is more likely that there will be more effective use of resources.¹⁵⁰ It is very difficult for the federal government to determine future land use of NPL sites on a nationwide basis.¹⁵¹ When control over cleanups is closer to home, local prerogatives may be better achieved.¹⁵²

Support for decreased direct federal involvement in cleanups has been forthcoming from many quarters. In testimony before the House of Representatives Ways and Means Committee, Mayor Stephen Goldsmith stated a common feeling among many local government officials:

[N]o federal agency gives less thought to the unintended side effects of its actions than does the Environmental Protection Agen-

144. *Id.*

145. *Id.*

146. *Id.*

147. Viki Reath, *Tax Question May Scuttle Radical Superfund Overhaul*, 8 ENV'T WK. (Jan. 5, 1995), available in WESTLAW, ENVWK Database, 1995 WL 7721129.

148. *Testimony, supra* note 139 (testimony of Mayor Stephen Goldsmith).

149. *Id.*

150. Osborn & Williams, *supra* note 89, at 4.

151. *Id.*

152. *Id.*

cy. When the EPA imposes draconian clean-up standards, it effectively quarantines urban sites. No company will build and no bank will lend on a property with even a hint of contamination, not for fear of the environmental hazard, but for fear of EPA lawyers. Rather than invest in clean-up, businesses and investment find it much easier to leave our cities. Our tax base shrinks, the urban sites never get cleaned up, and the urban poor lose access to good jobs. Everyone loses.¹⁵³

It is difficult to create procedures that will work in all fifty states.¹⁵⁴ Local control of CERCLA cleanup standards will enable states and localities to determine how clean a site must become in light of the site's probable future use.¹⁵⁵ Gearing clean-up standards to potential future uses would allow funds to be spent more efficiently.¹⁵⁶ For example, Justice Stephen Breyer recalled a case that came before him as Chief Judge of the United States Court of Appeals for the First Circuit.¹⁵⁷ Although everyone involved had conceded that a person could safely ingest dirt at a certain Superfund site seventy days a year, the government insisted on an additional expenditure of \$9.3 million so that the dirt would be safe for consumption 245 days per year.¹⁵⁸ The government failed to take into account, however, that the site was a swamp and nobody was going to consume the contaminated dirt.¹⁵⁹

Some states already have assumed an active role in stimulating redevelopment of abandoned urban waste sites¹⁶⁰ known as

153. *Testimony, supra* note 139.

154. Osborn & Williams, *supra* note 89, at 4.

155. *Id.*

156. *Id.*

157. *Alliance for Reasonable Regulation: Hearings Before the House of Representatives. Comm. on Gov't Aff.*, 104th Cong., 1st Sess. (Feb. 15, 1995) (statement of Jerry J. Jasinowski, President of the National Association of Manufacturers), available in WESTLAW, USTESTIMONY Database, 1995 WL 62917 [hereinafter *Alliance*]; see STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* 12, 12-13 (1993).

158. *Alliance, supra* note 158 (statement of Jerry J. Jasinowski).

159. *Id.*

160. Gaines Gwathmey, III & William J. O'Brien, *States Stimulate 'Brownfield' Development*, N.Y.L.J., Nov. 14, 1994, at S1, S9 n.6. (discussing states that have enacted voluntary remediation programs that include aspects of

'brownfields.'¹⁶¹ Under the federal system, "[i]t is simply safer to develop a cornfield on the periphery than to redevelop a downtown site."¹⁶² Some states, however, employ lower remedial standards based on the assumption that future use of the site will be non-residential.¹⁶³ Cleanup to meet such non-residential standards is less expensive because the standards governing the contamination that may remain on-site are less stringent.¹⁶⁴ In reauthorizing CERCLA, Congress should grant all cleanup supervisory duties and powers to state or local agencies, who would have the power to relieve future CERCLA liability for that site, certify a developer's qualification for tax incentives and determine how clean a site must be in light of the expected future use of that site.¹⁶⁵ In fact, many cities are currently lobbying for projects designed to accomplish this objective.¹⁶⁶

risk-based and future use-based remedial standards, including Delaware, Illinois, Indiana, Massachusetts, Minnesota, Missouri, New Jersey, Ohio, Oregon and Virginia). For example, New Jersey has made an effort to stimulate brownfield redevelopment by employing less costly remedial standards based on the assumption that the future use of a particular site will not be residential. *Id.* at S9. Because there is less risk of exposure at a non-residential cleanup site, the cleanup standards can be made lower and the cost of redevelopment can be reduced. *Id.* New Jersey's law also allows, in some circumstances, the construction of fences and the posting of warning signs in lieu of cleanup. *Id.* This further reduces costs. When less stringent cleanup occurs, restrictions on future use may be placed on the site. *Id.*; see New Jersey Industrial Site Recovery Act ("ISRA"), N.J. STAT. ANN. §§ 13:1K-6 TO -13, 58:10B-1 TO -14 (WEST SUPP. 1995).

161. "Brownfields" are "industrial and commercial properties" that "are left vacant and often abandoned, depriving cities of jobs and taxes, blighting the cityscape, and discouraging urban redevelopment." Gwathmey & O'Brien, *supra* note 161, at S1. These sites are "generally well-served by roads, rail, public transportation and water and sewer systems." *Id.* They "generally suffer from at least low levels of environmental contamination" and are "subject to the far-reaching liability structure and rigorous remedial requirements of applicable federal and state environmental laws" such as CERCLA. *Id.*

162. 141 CONG. REC. R31 (daily ed. Jan. 5, 1995)(statement of Rep. Upton).

163. Gwathmey & O'Brien, *supra* note 161, at S9.

164. *Id.*

165. See John B. Casserly, Comment, *Minnesota's Land Recycling Act: Solving Problems by Evolving Superfund*, 2 WIS. ENVTL. L.J. 261, 272 (1995).

166. *Id.* (citing Interview with Dave Gontarek, Project Manager, City of St. Paul Planning Dept., St. Paul, Minn. (Nov. 22, 1994)).

Lower costs and immunity from liability will encourage developers to utilize otherwise valueless urban sites.¹⁶⁷ Once the fear of liability is eliminated, developers become interested in these areas, that in many instances are equipped with pre-existing infrastructure such as highway and rail access, public transportation and water and sewer systems.¹⁶⁸ Instead of encouraging the abandonment of these properties, this plan would stimulate redevelopment of brownfield sites and reduce the increasing number of eyesores on the city landscapes.

Not only have those outside of the federal government recognized the attraction of local control over Superfund sites. Congressional leaders have taken note as well. Senator Robert C. Smith (Republican-New Hampshire), Chairman of the Senate Environment and Public Works Subcommittee on Superfund, Waste Control, and Risk Assessment, has recognized that state and local agencies ought to have the authority to assess the risks posed by hazardous waste sites and determine their own cleanup priorities.¹⁶⁹

Under CERCLA, contractors have too little incentive to control cleanup costs.¹⁷⁰ A recent study of three contractors revealed that "all three billed the Government for entertainment, tickets for sporting events, or alcoholic beverage costs."¹⁷¹ Audits of contractors are rarely conducted due to the abundance of cases presented to the EPA for inspection and review.¹⁷² Local control allows closer monitoring of spending and may lead to a reduction in costs.

167. See Gwathmey & O'Brien, *supra* note 161, at S9.

168. *Id.* at S1, S9.

169. *Congressmen Say Everything is on the Table With Superfund*, *supra* note 93, at 266.

170. 141 CONG. REC. S3,068 (daily ed. Feb. 23, 1995)(statement of Sen. Glenn).

171. *Id.*

172. As of August 1994, there were 528 outstanding requests submitted to the EPA for audits of Superfund contractor costs. *Id.*

D. *Tax Incentives*

A last, but essential, component of this comprehensive plan for CERCLA reform and reauthorization is the encouragement of investment and redevelopment of waste site locations through the use of tax incentives. To further encourage brownfield redevelopment, Delaware Governor Thomas Carper has endorsed a plan under which the state grants tax credits and other reductions in taxes to corporations that clean waste sites with the goal of redeveloping them.¹⁷³

These ideas are not foreign to congressional leaders. Republican congressional leaders have discussed the idea of offering tax incentives to private companies that cleanup pollution voluntarily.¹⁷⁴ In fact, the IRS has interpreted § 162 of the Internal Revenue Code to allow a deduction for environmental cleanup-related costs, providing private companies with the tax-based incentive to clean up hazardous sites.¹⁷⁵ Similarly, efforts to prevent pollution and research to develop new non-polluting manufacturing techniques may be encouraged through similar tax incentives.¹⁷⁶

173. Jerry Shields, *Delaware: Governor Would Give Tax Credits for Pollution Cleanup*, 8 NAT. RESOURCES TAX REV. 1187 (1995). Other states that have enacted similar incentive plans include Minnesota and Wisconsin. *Id.* These plans include an exemption from retroactive liability in order to allay developers fears of potential liability. Casserly, *supra* note 169, at 263, 273. Although these plans address state Superfund sites, which generally are less hazardous than Federal Superfund sites, it is the author's proposal that similar tax incentives be offered on a federal level.

174. Cushman, *supra* note 6, at A19.

175. See Rev. Rul. 94-38, 1994-1 C.B. 35; Rev. Rul. 80-245, 1980-2 C.B. 72. The IRS recently revoked PRIV. LTR. RUL. 95-41-005, which denied a section 162 deduction for legal and consulting fees associated with environmental cleanup. The IRS has ruled that these expenses are currently deductible as an ordinary and necessary business expense. See *Reversing Position, IRS Rules that Legal and Consulting Fees Incurred in Anticipation of Environmental Cleanup Are Currently Deductible*, 96 Tax Notes Today 13-3 (Jan. 19, 1996).

176. See, e.g., Hazel Bradford & Tom Ichniowski, *Superfund Reform to Start Afresh*, 234 ENG'G NEWS-REC., Feb. 6, 1995, at 9.

CONCLUSION

The Superfund program is currently funded by four corporate level taxes. The rationale supporting this funding scheme is that because corporations have benefited from the processes that created hazardous waste, they should provide the means for cleaning up contaminated sites. As proposals to reauthorize CERCLA continue to be introduced, one prevalent question has been whether the current funding scheme should be continued.

CERCLA has been criticized for failing to achieve the goals of providing for remediation of many of the contaminated sites across the nation. This failure has been attributed to the high transaction costs involved in apportioning liability between PRPs. Another criticism has been the high cost of litigation between PRPs and their insurers over coverage for brownfield cleanups.

The Clinton Administration has proposed two plans to reauthorize CERCLA. The first simply extends the current CERCLA tax scheme through the year 2000. The second, more creative plan proposes the creation of the Environmental Insurance Resolution Fund. The EIRF program was designed to lower CERCLA transaction costs associated with litigation between insurers and policy holders, as well as among PRPs. The EIRF would be funded by three taxes on insurance policies intended to raise \$810 million. PRPs would be eligible to choose to be reimbursed from the fund for a specified percentage of their cleanup costs, rather than litigate whether their insurer should cover the claim. Opting for inclusion in the EIRF would preclude coverage by the insurer, thus eliminating all liability associated with the site for the insurer. To date, the EIRF proposal has failed to gain congressional approval.

Congressional leaders are currently attempting to develop comprehensive reform of CERCLA. Their proposals include vesting authority for remediation to state and local governments, authorizing flexible cleanup standards to be tied to expected future use of the site, and the repeal of retroactive liability. By lowering transaction costs, these proposals intend to achieve the goals of CERCLA without imposing new taxes.

The author proposes a three-part reform of CERCLA. One prong encourages the use of alternative dispute resolution to allocate cleanup costs among PRPs. ADR is believed to be less cost-

ly and less time-consuming than traditional litigation in determining these issues. As opposed to the EIRF proposal, which merely shifts costs to the insurance industry, ADR is believed to decrease the actual costs of the parties by reducing duplicate costs and effort. ADR has been successful in lowering the costs of resolving non-environmental disputes. Additionally, ADR permits the decision-maker to reach more creative results to ensure fair and equitable settlements.

The second prong is to devolve authority over cleanups to state and local governments. These authorities are believed to have the ability to better control spending and to more effectively determine the appropriate cleanup standards based upon expected future use. State and local governments should receive block grants from the federal government to allow them to implement the cleanup processes that will be most effective within their borders. This devolution of control has been currently gaining increasing support.

The final prong of the proposal is to use tax incentives designed to encourage the development of new cleanup strategies, as well as to encourage corporations to engage in cleanup activities. It is the author's view that no new taxes will be required to implement this proposal. The component parts of this proposal work together to encourage the successful and cost-effective remediation of contaminated property.