Potentially Responsible Parties: Liability Issues

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I want to point out that it is not unusual for the person who pays the bill to come at the end, particularly in consideration of some of the issues that have come up in the Reauthorization proposal.¹

One of the things I thought I would do is to try to listen carefully to what was said earlier in the program and to offer some rebuttal. As I listened to some of the earlier speakers, it occurred to me that we have a lot in common. What we do not share, however, is an understanding of the impact of what some of the changes will mean over time. For example, I think we all would like the remedy selection process to be quicker and fairer. I think as a society we would like the industrial areas of the United States to be more efficiently and effectively utilized than they are today, and we ought to try to redevelop some of them. Those goals conflict with the liability scheme of Superfund because of the retroactive liability for clean-up imposed upon past and current owners,² as Walter Mugdan eloquently outlined.³

Another problem is the joint and several liability aspect of CERCLA.⁴ This is a problem because of the orphan share portion of Superfund,⁵ which, in the view of many potentially responsible parties (PRPs), has been inequitably shouldered by them. We have had to pay for history, and we have had to pay for those who are not at the table.

So, what do we like about the Superfund Reauthorization, and what do we not like? In summary, this is a welcome first step. I think I have represented a fair number of potentially responsible parties in different matters, and I subscribe to some of the views of the industrial associations who have spoken on these issues.

There are two aspects of the Superfund Reauthorization that I would like to focus on: remedy selection and liability. The remedy selection process is one that has been commented on in a number of

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⁵ See Walter E. Mugdan, Allocation of Superfund Liability: Capping the Municipalities' Share, 5 FORDHAM ENVTL L.J. 335 (1994).
different aspects. One aspect of remedy selection was commented on by the representative from NRDC with respect to the differential impact of remedy selection in neighborhoods of color, which are frequently located in industrial areas.\footnote{See Vernice D. Miller, Toward a Reasonable Allocation Scheme: A Public Interest Perspective on Superfund Reauthorization, 5 Fordham Envtl. L.J. 317, 319 (1994).}

Remedy selection for older sites has been a problem under Superfund because of the preference for treatment, and the preference for permanent solutions. The technology does not exist to remedy all the wrongs of one hundred years of industrialization in America. It is a practical matter, I think, and many of the people at the table will agree with me that the problems presented, particularly in heavily industrialized areas, require a great deal of thought and care to find the most appropriate, cost-effective method for selecting remedies.

One significant advance contained in the Reauthorization Bill is that it takes treatment and puts it on an equal level with other considerations of the Bill, and makes the review of the health aspects of the site an important part of it.\footnote{See, e.g., S. 1834 §§ 501(a), 503(b)(3)(A).} Such review is probably the only way we are going to put these kinds of sites on equal footing.

Another troubling aspect for PRPs, and I suspect also for EPA, is trying to establish the applicable and relevant appropriate requirements (ARARs).\footnote{42 U.S.C. § 9621 (1988).} The process of establishing how clean one needs to make a Superfund site is very complex. One has to deal with state, federal, and sometimes even local concerns that are raised by others. In order to do that effectively, the Reauthorization Act looks at setting national goals.\footnote{S. 1834 § 502(d)(5)(A)(i)-(ii).}

Locally, there are different approaches taken by states with respect to clean-up standards. New York, for example, has a flexible approach to sites. Regulators look at what they think is the appropriate level of clean-up and try to come to some kind of agreement with the PRPs that makes sense from the view of the regulatory agency.\footnote{Id. § 501(c).}

New Jersey has informally adopted standards that have a different level of clean-up for residential and commercial sites.\footnote{See, e.g., N.Y. Envtl. Conserv. Law § 27-1313 (McKinney 1984).} If a residential standard is applied, clean-up may be completed to the level imposed in the regulation, and then the site will not have any further restriction. If you’re going to clean to the commercial level, you have to do engineering and a deed restriction. A deed restriction means giving notice to the world that the levels left on the site are above the
residential standards. You also may have to take some steps to assure the health and safety of the people in the area.

New Jersey's standards represent a relatively sane view, although I have had a lot of problems with particular sites in determining whether the appropriate standard can be met. The Reauthorization Bill seems to imply that it will be similar to New Jersey's plan in that it is going to set national goals. The question then becomes, how flexible would that national standard be? PRPs are concerned that we are going to get a one-size-fits-all national standard for clean-up that is going to be unrealistic and will not take into account the different levels that are feasible given current technology. We also fear that a national standard will not be appropriate from a health risk standpoint for the sites which are most difficult to handle technologically. The other aspect of this is the preference for treatment, which I mentioned earlier in permanent remedies. Treatment and permanent remedies are expensive. The technology is evolving.

What does treatment mean? It means either destruction of the chemicals at a site, or their removal. What we have learned by pricing removal is that we do not have any place to put the waste. If we are going to dig it up in New York, we do not have any place in New Jersey to which to move it, and vice versa. Also, the cost of removal for a Superfund site that is also a solid waste municipal landfill is frequently in the billions of dollars. There is no money available under the Fund for these kinds of clean-ups on any kind of ongoing basis, and it does not make any sense if there is an equally good containment technology that meets the health risk standards.

I think the idea of containment makes sense. What bothers me is the Bill's view of hot spots. The Reauthorization Act says that treatment is still the preferable alternative for hot spots. This troubles me because I do not know what a hot spot is. How big is a hot spot — the size of the state of New Jersey? Is it the size of the state of New York? Or is it the size of this room? Maybe it is as big as this table. Nobody can tell me the answer to that, so we really do not know whether we have advanced at all if the hot spot is going to be the whole site. That is a troubling aspect of the Bill.

Next I will discuss ARARs. I think the withdrawal of ARARs is an important advance. The rancor and the disagreement over ARARs has held up Superfund clean-up to the detriment of the program and it has caused some concern. I note, however, that in the Bill, the Administration would continue requiring clean-up levels to meet federal standards deemed suitable by EPA, and any applicable

13. S. 1834 § 501(c).
15. Id.
state standards. These provisions seem inconsistent with the approach of backing away from ARARs and having national standards. So I am concerned as to how that will play out. I do not know whether we are going to have the same rancor or disagreement because of that process under the Reauthorization Act, although I am concerned about it.

Next I will discuss levels of risk. I think one has to understand that where one sets the level of risk has a direct relationship to how much it costs to clean up the site, because the technologies are expensive. The usual example given is that it costs a certain amount of money to get to one level of clean-up, but to get the last few molecules, if that is where we set the level of risk, is very expensive. This is because you would have to get into innovative technologies that will make it very expensive for the participants: federal, state and private.

Thus is why the statute resisted setting, for example, a risk level for cancer. I know several studies have suggested a one-in-a-million risk for cancer. Recently, in New Jersey we have adopted a statute called the Industrial Site Recovery Act (ISRA), which adopts a cancer risk of one-in-a-million for site clean-ups. Non-cancer risks are set under the hazard index of one.

These kinds of levels should be resisted, however, because under Superfund we have developed a relatively mature science of risk assessment. I think flexibility with respect to setting the risk and negotiation of that risk between EPA and the private sector has worked out fairly well, although not perfectly, on both sides. Any bright-line tests for risk levels ought to be resisted, and the flexibility that this Reauthorization Act seems to have right now ought to be maintained.

Another aspect of the Reauthorization Bill that I want to comment on is liability. Obviously PRPs are concerned about liability; this statute would expand it.

Why do I say that? Because if you look at section 107, it expands liability under Superfund from hazardous substances, to pollutants and contaminants. What does this mean? Walter Mugdan just went through a very interesting discussion with respect to municipal solid waste and the kinds of analyses that we have done to determine what is and is not a Superfund hazardous substance. A great deal of advancement has been made in distinguishing hazardous from non-hazardous substances on many levels, of which legislators and regulators do not appear to be aware.

First, hazardous substances have been a basis in the informal allocations in Superfund groups for a long period of time. Many of these

19. Id.
20. S. 1834 § 107
21. See supra note 3.
allocations are imperfect and there have been arguments among the PRPs as to whether or not they are liable, and the extent of their liability based upon given hazards. However, if you withdraw that hazard standard for those substances that are defined as Superfund hazardous substances, and you expand the universe, essentially everything is equal. This creates a problem for those people who have already allocated.

I do not know what we should do about that at old sites. I suppose we are stuck with the allocations to which we have agreed. But looking ahead, much of what we have learned about the allocation process will have to be re-learned, because we are going to be operating with a different set of substances that are subject to section 107.22

The establishment of pollutant and contaminant standards is going to go well beyond the industrial sector. It is going to get into many other areas of our society, and I think that as a result, municipal governments are going to have expanded liability; I do not know if the drafters and the interested localities have really focused on this issue.

In particular, I am looking at municipal treatment of sewage and water treatment plants, and other areas that have traditionally not fallen within the ambit of Superfund. The discharges from those kinds of facilities could in the new Act be included as pollutants and contaminants. From the PRP perspective, I have mixed emotions, since misery, of course, loves company. We like to invite others to the party to be able to play and help pay some of the clean-up costs, but I am not sure that is really what the drafters had in mind.

Let me make one other comment on special treatment for the federal government. Because the Administration wrote the Bill, it got to pick and choose some of the important benefits that would be included in Superfund Reauthorization. It is fundamentally unfair in my view, for the government to exempt itself under the so-called FMC exemption.23 when it is in fact, a PRP. For instance, in wartime situations government officials commandeered certain facilities to build airplanes and other machinery. The Administration is now seeking exemption from liability for that.

Well, it seems to me that fair is fair. The Superfund liability pertains to any entity, whether private or governmental, that has discharged hazardous substances that require clean-up. If the government discharged a hazardous substance, therefore, it ought not be permitted to carve out an exception for itself and pass that liability on to private parties.

Next, I would like to discuss the orphan share.24 The orphan share, as I understand it, will be funded by a Fund and will cover such things

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22. S. 1834 § 107.
23. Id. § 403(a)(5)(D).
24. Id. § 702.
as the shortfall and municipal liability and the share not picked up by insolvent and bankrupt parties.\textsuperscript{25}

That is a very interesting piece of the puzzle, and it is something on which I have not completed my analysis, but generally I like it. From a PRP standpoint, we have never gotten any money from these guys anyway, and now there is a fund that will stand in their shoes.

Who is the most liable party at a site? Who do you think should pay the biggest share? The owners and operators, and they are now bankrupt and gone. If this applies to the owner and operator's share, then I like it, because it is going to cut down the portion of liability for the generators in a very substantial way, and I think that is an improvement in the statute. This improvement is perhaps unintended, I might add, since the Fund only sets aside $300 million a year to cover these obligations,\textsuperscript{26} and I do not think that is going to be enough if they have to pick up the bankrupt owner and operator's share.

I am familiar with the National Environmental Trust Fund proposed by, I think AIG, which was a proposal to create a retrospective premium to fund the insurance obligations for Superfund sites.\textsuperscript{27}

I think it is a good idea. One of the problems with insurance has been the surprise aspect of environmental liability for insurance companies who wrote risks that they thought were finite and have become infinite, because of the construction of old insurance policies to include these environmental risks later in time. At the risk of raising an unpopular aspect of this, the insurance companies have a pretty good gripe, although the purpose of insurance from many of the industrial clients' standpoints is to cover them for precisely these unknown and unknowable risks. That is why they bought insurance. But Superfund and some of the state liability statutes that have imposed these retrospective and retroactive costs on insurance companies in some states are hurting their bottom line, and some would say, unfairly. The proposal would not walk away from the issue, but would do something for the insurance companies to soften the impact and have some benefits on the vitality of the insurance industry.

Until it is fully evaluated, you cannot really give an opinion on it, but it does have some meritorious aspects. With that I complete my remarks. I hope I have provided some clarification on liability for potentially responsible parties.

\textsuperscript{25} Id.
\textsuperscript{26} Id. § 705.
\textsuperscript{27} Id. §§ 802, 903.