Toward a Reasonable Allocation Scheme: A Public Interest Perspective on Superfund Reauthorization

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TOWARD A REASONABLE ALLOCATION
SCHEME: A PUBLIC INTEREST
PERSPECTIVE ON SUPERFUND
REAUTHORIZATION†

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I will begin by saying that I have been working with Martin A. McCrory, Esq., coordinator of the Public Health Program and senior attorney at the Natural Resources Defense Council (NRDC) and with Dr. Linda Greer, senior scientist at the NRDC in a team effort to involve and incorporate the interests of the environmental justice community and of communities of color across the United States that are impacted by Superfund, but who have not had equal enforcement and protection of Superfund in the cleanup efforts in their communities. I am going to start by providing a brief overview of some of the issues that the NRDC is examining, in particular, concerns with Reauthorization and the Administration's proposal, as well as some of the specific concerns of others in the environmental justice community.

The NRDC has long participated in the process of creating and implementing Superfund. We participated in the original authorization of the Superfund program in 1980,¹ as well as in the Act's Reauthorization in 1986,² and we are currently active in discussions centering on the program's reauthorization. The NRDC has been involved in the implementation of the Superfund program since its inception more than a decade ago, and NRDC has provided legal and technical assistance to communities throughout the nation affected by Superfund sites. Additionally, we actively participated in the

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rulemaking process, published reports and worked with various environmental and governmental organizations to analyze key issues in the program.

One key issue we are currently analyzing is the liability scheme under the Comprehensive Environmental Response and Liability Act, or CERCLA. We are intensely interested in how CERCLA's liability scheme will develop, and I will discuss this topic in more detail later. We have been working diligently with various environmental groups, with local, state and federal organizations, with industrial and small business representatives, with congressional representatives, and with local grass roots organizations, particularly communities of color, in an effort to analyze CERCLA and to develop a new liability scheme that is more fair to potentially responsible parties (PRPs), that protects the environment and does not cause a drastic increase in taxes nor a depletion of the Fund. NRDC is working with the various groups to develop a liability scheme that retains strict joint and several liability, and yet provides an effective, efficient, and expeditious process for allocations of responsibility, mediation and dispute resolution. Moreover, the scheme we are developing would require the government to utilize its mixed funding authority at sites in order to expedite settlements and cleanup. We are working on a liability scheme that will provide expedited allocations and settlements for de minimis PRPs. We hope that this will largely alleviate some of the problems faced by small business that have become entangled in Superfund third-party allocations. We will continue to work with Congress, the affected communities, as well as the regulated communities in an effort to develop a scheme that is fair to everyone. As we have heard this morning, everyone is concerned that a new reauthorized program be fair to all of the interested and impacted parties.

The NRDC plans to develop a liability scheme that protects the public, protects the environment, provides for reasonable allocations and does not call for major increases in federal taxation and spending. However, in the meantime, the NRDC will continue to advise Congress to be wary of liability schemes that merely replace transaction costs associated with litigation with transaction costs associated with administrative adjudication. Congress should also beware of any system which simply shifts the PRP's transaction costs or other costs to the government and taxpayers.

Currently, there are serious proposals on the table that discuss reallocating liability from the polluter to the public. One serious proposal, the Chemical Manufacturers Association's (CMA) "fair share"

5. Id.
6. Id. at 2.
proposal, should be evaluated in order to determine whether it complies with the Due Process Clause of the Constitution, which may require full administrative adjudication on the record prior to a binding determination of liability and allocated costs. We also plan to look at the CMA proposal to decide whether its creation of a binding allocation scheme that determines liability, grants the right to judicial review, and grants rights to reopeners will actually lower transition costs. The issue of reallocating liability is a critical issue that we at NRDC believe is being overlooked by many.

At this time, I want to highlight what the Superfund has meant, and not meant, to communities of color. At NRDC, we are particularly concerned about the high degree of discontent and frustration with local environmental regulation that is especially pronounced among low income communities and communities of color which feel that they have not been protected by federal statutes implemented for that reason. A related development, the articulation of public works proposals connected to the previously mentioned reallocation of liability proposals, has been emerging from interested constituencies within these communities and arises from these community feelings.

Communities of color are exposed to environmental hazards disproportionately, and have been inadequately protected from environmental degradation by Superfund. For example, according to the widely acclaimed National Law Journal report, Unequal Protection, the Racial Divide and Environmental Law, which was published in September of 1992, communities of color wait up to four years longer than white communities in getting Superfund sites cleaned up. Moreover, not only is Superfund disproportionately ineffective, but Superfund is also discriminatorily implemented. According to the same National Law Journal report, permanent treatment remedies were selected twenty-two percent more frequently than mere containment technologies at sites surrounded by white communities. In contrast, containment technologies were selected more frequently than permanent treatment by an average of seven percent at sites surrounded by communities of color.

7. H.R. 3624, 103d Cong., 2d Sess. (1993) (bill introduced by Reps. Boucher and Upton refers to "assigned shares," rather than "fair shares" but has been supported by the Chemical Manufacturers Association). See Superfund Legislation Introduced in House; Bill Suggests Speedier Cleanups, CHEM. MARKETING REP., NOV. 29, 1993, at 5 ("Chemical Manufacturers Association says is [sic] strongly supports the Boucher-Upton plan, which would replace the current joint and several liability with a "fair-share" type of system for allocating responsibility at Superfund sites").

8. Unequal Protection, the Racial Divide and Environmental Law, NAT'L L.J., Sept. 21, 1992, at S1-12 (hereinafter Unequal Protection]

9. Id. at S-4.

10. Id.

11. Id. at S-1.
While the National Law Journal report is perhaps the best known work in this area, disparate treatment by the government has been shown in studies conducted before and after the report. For example, the 1987 report, Toxic Waste and Race in the United States, published by the United Church of Christ, showed that three out of every five Black and Hispanic Americans live in communities with uncontrolled toxic waste sites. I was a research assistant on that report and helped write it. The General Accounting Office documented similar findings in 1983. Studies conducted in 1993 extend these findings. The percentage of African-Americans and Latinos in communities with National Priority List (NPL) sites is greater than is typical nationwide. Communities with relatively high percentages of people of color have fewer clean-up plans or signed RODs than other NPL sites.

This deplorable record has galvanized environmental justice activists and advocates to develop and advocate a broad range of reforms to Superfund. Having experienced the most profound deficiencies of Superfund implementation, communities of color and low income communities are uniquely positioned to offer meaningful suggestions for improving the program. These suggested reforms touch every phase of the Superfund process, including assessment of health risks, allocation of liability, and selection of remedial technologies.

As a primary reform, environmental justice activists are demanding innovative programs that will constitute significant improvements in the roles of local communities and positioning public health as the centerpiece of reform. The paramount concern is achieving fairness in communities, experiencing disproportionate impact and preventing unfairness in the future. For example, while countless studies have been funded and conducted concerning clean-up costs to government and industry, few inquiries are underway concerning the costs of failure to protect human health and the environment.

These and other deficiencies reinforce the critical need for early and continuous involvement in decisions on Superfund reform by the people most affected by these risks. There is a new process that the Administration has put forward which involves communities in remedy selection. Historically, the community-based environmental justice movement has concentrated on discriminatory exposures encompassing ambient indoor workplaces, and poor economic environments. Through this lens, activists promote a comprehensive Superfund

12. For recent references to this study, see Conne Koenenn, Clean Air for All Is on the Agenda, L.A. Times, Jan. 24, 1992, at E3; Desda Moss, He Puts Waste Issue in Plain Sight, USA TODAY, Oct. 24, 1991, at 2A.
14. Id.
Reauthorization Plan encompassing revisions to how sites are ranked for listing on the NPL, establishing clean-up standards, selecting treatment technologies, performing health assessments, assuring that liable parties are held responsible for clean-up costs, as well as enhancing public input.

The Administration's Bill deals inadequately with the problems encountered by Native American communities in its clean-up projects slated to take place on Native American reservations. The Reauthorization Bill is silent on sovereign governance and the ability of Native Americans to protect themselves and their sacred sites from pollution exposure. A more complete approach to statutory reauthorization, insuring availability of adequate funding and training opportunities, as well as tribal access to EPA Superfund program managers is needed. Sovereign tribal governments have not shared in the technical assistance and federal funding needed to develop environmental infrastructures to levels comparable to those found at the state level.

Tribal governments are currently unable to adequately implement the Superfund program. EPA must be compelled to adequately fund and work closely with the tribal nations to address the special cultural and jurisdictional issues encountered when cleaning a Superfund site affecting Native American communities. There are particular difficulties such as issues of tribal sovereignty, the tribal relationship to the federal government in uniting to the EPA, which has authority to conduct clean-ups, and the resources to clean up Native American reservations. This is a huge issue that we feel has been insufficiently addressed in the Administration's Bill.

There have been some commendable steps made by the Administration on the issue of community involvement and community participation. The Administration Bill underscores the significance of community input and of protecting public health.

However, section 102 of Title I of the Bill, relating to community input would be strengthened by a few modifications. The proposal should require mandatory, early and more active citizen participation. As drafted, this section grants extensive discretion to the government, by attenuating public input to the remedial investigation/feasibility study (RI/FS) stage of the clean-up process. Instead of postponing public input until the RI/FS stage, the government should be required to solicit community views as early as possible during the initial site assessment phase. Moreover, citizens should be granted an enforceable right to participate throughout the clean-up.

The environmental justice community has discussed with the Administration and with Congress the need to have greater public partic-

17. Id. § 102 (Early, Direct and Meaningful Community Participation).
ipation in improving the hazard-ranking system (HRS), particularly in terms of re-ordering it, and re-selecting or re-configuring how national priority list sites are chosen. On the human health aspect, multiple cumulative and combined exposures and synergistic effects have gone practically unexamined. These areas have significant impact on communities of color and low income areas which are inundated with pollution sources. Favorably, the Administration’s Bill, particularly sections 106 through 108 of Title I, focuses on multiple risk sources. These sections would authorize pilot projects in communities experiencing disproportionate exposure, require assessment of multiple risk factors, and augment the hazard-ranking system by adding multiple risk as a scoring factor. This is a significant improvement in terms of enhancing what Superfund may do in the future to add sites located in communities of color and low income areas to the NPL.

However, studies mandated by these sections need to be accompanied by an agenda which prioritizes clean-up in these areas. The Bill does not indicate what is to be done when multiple factors are considered in these pilot projects. Sanctioning these multiple risk studies without creating a remedy leaves the effect of these provisions unclear.

Equally important, nothing in the proposal responds to communities already in distress by requiring EPA to rescore old sites under the new HRS. The bill only refers to new sites, not old ones. One of the biggest problems that communities of color have had in the past was that, even when investigated and scored, it was incredibly difficult to have a site designated and enter the process as an NPL site when it was located in a community of color. Many of those sites that should have made the NPL but did not were in communities of color. Thus, many of the communities that are most impacted are not even in the process at all, and have no hope of clean-up since they are “old” rather than “new” sites. Old sites must be addressed in the reauthorization bill.

If sites are re-scored under a revised HRS which contemplates multiple source exposure, more communities adversely affected by these hazards will be listed on the NPL and thus eligible for Superfund clean-up. This will create the problem of developing a priority scheme that reflects multiple source exposure.

However, additional factors in a community can also affect the danger posed to residents by an NPL site. The ranking hierarchy should consider factors such as: the socio-economic status of residents, their lack of access to adequate health care, deficiencies in their diet, and

18. Id. §§ 106–109 (Multiple Sources of Risk Demonstration Projects, Assessing Risks From Multiple Sources, Multiple Sources of Risk in Priority Settings, Disease Registry, and Medical Care Providers, respectively).
other environmental factors which could elevate risks from exposure to hazardous waste.

The small number of pilot projects and their funding are another area of concern. In view of the potential effects of multiple and disproportionate exposures, ten demonstration projects in ten communities over five years is too few over too long a period of time in relation to the number of affected people of color to provide any meaningful data.

The thirty million dollars authorization to finance this venture may be inadequate if circumstances in these areas are very complicated. Notably, the titles concerning human health protection did not deal with the role for the Agency for Toxic Substances and Disease Registry (ATSDR). Problems associated with the role of the ATSDR in clean-up decision-making increase the difficulty in fulfilling the Agency's mandate to develop a Toxic Substance Disease Registry and to conduct meaningful assessments of community health.

Communities are currently questioning the adequacy of assessments performed by the ATSDR and the responsiveness of these assessments to community concerns. Many of us have looked at the relationship between information that is gathered by the ASTDR and how the hazard ranking is actually performed and how NPL decisions are made, and have come to realize that ATSDR participation in this process needs to be enhanced and more firmly defined.

Finally, I want to discuss debates on the Superfund liability scheme and the related debates on a Superfund public works program. Consistently, critics of the Superfund program have cited its liability provisions as the major existing impediments to achieving the original risk elimination objective of the statute: accomplishing effective, efficient hazardous waste clean-ups to protect human health and the environment.

Those who are regulated by the Superfund program, community organizations, public interest groups, and experts agree that the pace of site clean-ups has been slow. At the end of fiscal year 1993, only fifty-two of 1,300 sites had been cleaned up and deleted from the NPL. Remedial action had begun on only 541 sites. Thus, over half of the sites have yet to be improved.

Over the past three years, the pace of clean-ups has been somewhat faster, unfortunately resulting in a considerable backlog of site investigations in yet unevaluated communities for inclusion by EPA on the

19. Id. § 706 (amending CERCLA § 111, 42 U.S.C. § 9611 (1988), by adding new subsections; subsection (s) provides for "multiple sources of risk demonstration projects and allows a maximum of $30,000,000 to be spent from Oct. 1, 1994 to Sept. 30, 1999").
NPL. For example, an examination of the fiscal year 1993 targets reveals that while remedial design and remedial action work have accelerated, several regions have fallen short of their targets for site investigations. As a result of the emphasis on the pace of clean-ups, the liability scheme and transaction costs have further diverted attention and resources away from the most critical problems, i.e., getting sites listed so that federal clean-up action can be initiated, starting with the actual clean-up process. Many of the sites awaiting investigation are in communities of color.

Critics point to mounting clean-up costs, including high administrative costs, contract mismanagement and wasted trust fund resources. Citizens are concerned about whether clean-ups are, in fact, protecting human health and the environment. The permanence of remedies is uncertain and the long-term efficiency of clean-up remedies is unclear. However, the most intense focus of criticism relates to claims that transaction costs associated with Superfund enforcement and litigation associated with the liability schemes escalate expenditures by government and private parties alike. Among insurers and responsible parties in Superfund cases, the surrogate for cost-cutting is eliminating retroactive strict joint and several liability.

These concerns as well as recommendations to improve EPA performance and cost-cutting are well documented. However, it is important to note that experts agree that costs can be reduced within the present liability system. While some parties and insurers have called for changes in the Superfund enforcement and liability schemes to reduce litigation (which is cited as the principal reason for clean-up delays, escalating transaction costs, and as requiring the most critical cost-cutting measures), the federal government should explore the possibility of streamlining the clean-up process and reducing costs within the present system before considering a drastic change such as changing liability.

The public works proposals that have been put forward, most notably by the National Association for the Advancement of Colored People (NAACP), have been combined with the elimination of strict joint and several liability. Of all the reauthorization proposals that are being advocated today, the most disturbing is the public works plan.22 Although we have heard several variations on this scheme, the basic tenet remains the same. Under a public works plan, Congress would eliminate strict joint and several liability for all waste disposed at any site prior to January 1, 1987. Remedial action would be conducted by a public works program, financed by a tax on industry, and if that proves insufficient to cover projects, by general tax revenues.

22. See, e.g., Industry Critical of Superfund Plan, CHEM. MARKETING REP., Feb. 14, 1994, at 7 (Rep. Swift did not believe a plan to replace retroactive liability for pre-1987 sites with a public works program funded by a new tax on business was workable).
The public works proposal was originally created and proposed by members of the insurance industry. However, the insurance industry has combined with industry and the NAACP to form a coalition called the Alliance for Superfund Action Partnership that is lobbying heavily both Congress and the Administration to eliminate strict joint and several liability and to set up a public works scheme. Generally, while insurance companies are not PRPs at Superfund sites, they face billions of dollars in potential claims by their policy holders, and they are losing about half of their claims in state courts. It is only logical that they would support these proposals that promise to lower their exposure and pass potential expenditures on to the regulated industries, state and local governments, and the taxpayers. The insurance industry prefers the 1987 cutoff date since many changed their policies at that time to specifically exclude pollution-related coverage using pollution exclusion language. When insurance representatives claim that the purpose of the statute is to increase and expedite clean-ups to help the affected communities cope with their environmental tragedies, Congress and the Administration must look beyond this thin veil and realize the true strategy at work. The insurance industry has been quite successful in the elimination of its post-1986 liability, and now it seeks to rid itself of its pre-1986 liability. In essence, the insurance industry is attempting to utilize CERCLA Reauthorization to pre-empt state contract law and to abrogate its contractual obligations to its corporate policy holders. While this is not a sinister plot, it is hardly altruistic. In Reauthorization discussions that may modify the existing allocations of the clean-up burden, it is imperative that no one sector, government, industry, insurer, or local community be unfairly burdened.

One of the concepts that is being put forward by the Alliance for Superfund Action Partnership is to create a trust fund. This would be a public fund to which the insurance industry would pay an additional one percent tax, as would many of the waste producers themselves. The trust fund would be used to fund the clean-up as an alternative to the usual strict joint and several liability scheme. However, if the trust fund is insufficient to cover the cost of clean-up, then general federal tax revenues would be tapped to fund the clean-ups. We believe that this scheme was not the envisioned purpose of Superfund, that it was not the intent of the bill as it was originally proposed, and we do not believe that a Reauthorized bill should follow it and pass along costs in this manner.

We at the NRDC are concerned that small generators be treated fairly in Reauthorization. Earlier, Mr. White talked about the new construct for de minimis parties. That is a concept that the NRDC

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and some of the small business manufacturing organizations have already discussed together.

There are so many interests and so many interested parties involved in the Reauthorization Bill that we now find parties working together who previously had only sat down across courtroom tables as opponents. However, we remain particularly concerned that a constituency that has not had its particular needs adequately addressed, namely the nation’s communities of color, should receive more consideration in the Administration’s bill. We remain concerned about issues of development in urban areas that have been contaminated, but not remedied. We are interested in seeing economic development regenerated in those areas, but not at the cost of human health. We want to see a program that provides for cleaning up sites using the best available technology and that delivers an impetus for industry to return to urban areas and to participate in economic revitalization and not continue their flight to the external suburbs.

There are many Reauthorization issues that the NRDC is considering. However, our most critical issue is maintaining strict joint and several liability and making sure that communities of color have adequate and equal protection under the new Reauthorized bill.