Reauthorization Overview: EPA’s Perspective

William A. White*
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EPA'S PERSPECTIVE†

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THIS morning I will be setting the stage for today's discussion by covering the whole range of Reauthorization issues. I am going to talk about the background of Superfund,¹ the public expectations and the congressional action on the statute up until now. In addition, I will review the statute's performance to date, and give you an overview of the problems and criticisms that people have had with Superfund and the new legislative proposals that are designed to deal with those problems and criticisms.

There have been some developments since the time the legislation was introduced on February 4th,² and I am going to talk — speculate, actually — about the outcome of this process.

You all know that Superfund was passed in 1980 in response to public perceptions and a very strong sense of concern about uncontrolled releases of hazardous substances at places like Love Canal,³ and although the sense of concern about these kinds of things was very high in Congress, the circumstances under which the statute passed were confused. The result was a very badly drafted, very hastily put together compromise at the end, and some of its parameters as passed in 1980 are evidence of the somewhat naive expectations at the time.

Congress gave EPA five years and $1.5 billion to deal with the problem that it perceived in 1980.⁴ At that time, the general view was that clean-up was not such a monumental job and the number of sites was small, and therefore, would not cost that much money.

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4. The “Superfund” was funded originally through the Hazardous Substance Response Trust Fund under CERCLA § 221, 42 U.S.C. § 9631 (1988). SARA § 517(c), 100 Stat. at 1774, repealed this provision and established a Hazardous Substance Superfund under Subchapter A of Chapter 98 of the Internal Revenue Code (I.R.C.). SARA § 517(a); I.R.C. § 9507(a) (1988).
However, the task of implementation fell into the hands of a group of people who I would have to characterize as not particularly enthusiastic about its implementation. A couple of names come to mind — Rita Lavelle and Anne Burford, and basically not a lot happened under Superfund at EPA — at least not for a number of years after the statute was passed. However, a lot of work was being done in terms of characterizing sites and beginning to try to figure out what to do, particularly as far as implementation. When Congress looked at Superfund again in 1986, SARA was passed. Not only did SARA seek to clarify the liability scheme under CERCLA, but it also forced a lot more responsibility onto EPA. The amendments made Superfund — already fairly complex and vague — even more complex and even more difficult to interpret. The amendments also imposed a series of deadlines which I liken to the concept of “technology-forcing” environmental laws — only this was more of a “bureaucracy-forcing” mechanism.

Under SARA, Congress gave the Agency five more years and about three times as much money as it gave it the first time around. This was due to the perception developing in Congress that the problem was bigger and more complicated than previously believed, which would necessarily require the Reagan Administration to work harder and more effectively to overcome it.

The next time Congress looked at Superfund was 1990 and they did not want to tamper with it. They had what you might call a “midnight reauthorization.” They simply added an extension of the taxing authority — i.e., an extension of the operating authority for Superfund onto a Revenue Bill — and they did it without giving anybody an opportunity to discharge their pent-up desires to discuss Superfund issues — but they got the authorization up to $11.5 billion, and the program is now funded up through 1994, with taxing authority through 1995.

I think it is fair to say that the actual performance by the government got a lot better after the SARA Reauthorization. EPA had a different group of appointees with a lot more experience, both on the


technical and the legal side, and some initiatives were developed in the late 1980's which worked to shift the focus.

By the end of 1990 through early 1991, EPA could say that they had actually taken care of immediate risks to the environment at every Superfund site. They had taken removal actions at 2500 sites, and the Agency could assure the public that there were no uncontrolled, immediately dangerous releases of hazardous substances occurring anywhere that they knew about.

They could also say that they had work underway at almost every one of the Superfund sites that they had identified, and they had completed all work at 220 of the 1300 sites that they had identified. And Potentially Responsible Parties (PRPs) were performing the work at seventy percent of the sites that EPA was dealing with and that in the aggregate, PRPs had committed over seven billion dollars towards the cleanup of Superfund sites as a result of either administrative orders or settlements.

In reality, the Agency’s performance improved over the years, but in my view, the perception of Superfund and its ability to deal with the problem that was identified in 1980 has really not changed all that much. I think you could hear the undertones of the poor public perception in President Clinton’s inaugural address, when much to EPA’s surprise, he remarked about how Superfund was generating a lot more money for lawyers than it was for clean-up, and that had to be fixed.\footnote{Marianne Lavelle, \textit{Minority Activists Are Split on Superfund}, NAT'L L. J., Feb. 21, 1994, at 6.}

When you look at the context of what we at EPA were working on, one of the key concerns was what to do about the expiration of CERCLA authority in 1994; we knew it was coming. I began working at EPA in 1991 and it was at least three years until Reauthorization. However, it seemed important to me as an enforcement lawyer to start making a record on which the statute was going to be judged. The future of any successful environmental enforcement program required this at a minimum.

What we basically had to work with was a statutory framework that was having a positive impact on environmental law, and I think it’s fair to say that on top of all the clean-up accomplishments that Superfund generated, the presence of a strict joint and several liability scheme\footnote{42 U.S.C. § 9607(a) (1988).} fundamentally changed people’s behavior with respect to the generation and disposal of hazardous waste. Thus, when reviewing the options for reauthorizing Superfund, it should be noted that the same scheme that received criticism for its high transaction costs and strict liability scheme nonetheless had positive impacts.

In looking beyond the enforcement aspects,\footnote{42 U.S.C. § 9603 (1988).} which I worked on, and considering the criticism that the Agency was preparing to deal...
with in Reauthorization, there exist approximately six or seven areas of real public and Agency concern. At the top of the list is the inability to answer reliably the question, how clean is clean at various sites? Often, the clean-up decisions that the Agency makes through the procedures demanded under present statute are inconsistent, and that is because EPA takes a “custom approach” to establishing parameters at every site, and thus the Agency ends up with basically different decisions at sites that appear to be fundamentally similar. Additionally, EPA often takes too long to make those decisions. And there is a perception — I don’t know if it is the reality — but there is a perception that EPA spends too much money once those decisions are made.

Another consistent, and probably inescapable, criticism is one of high transaction costs. One of the realities generated by EPA’s “enforcement first” approach to getting clean-ups from responsible parties was that responsible parties then turned around and went after other people that the Agency had not gone after. This led to a great deal of concern for very small, or de minimis parties, and by municipalities who were brought in as third parties into cases after EPA had settled them.

There is also a very large body of insurance coverage litigation which EPA actions generated as well, and this is the part of the public perception that led to the President’s comments in his inaugural address and to a general perception that the only thing happening under Superfund was litigation.

In connection with the high transaction costs was a fundamental argument about the unfairness of a retroactive liability scheme that made people liable for conduct which was not unlawful at the time they engaged in it. The perception is that it is not the American way to have the government reach out and fine people for vast amounts of money — in fact, for more than your fair contribution — to fix a problem which was not a problem when the act took place.

Another great concern within the government was a persistent pattern of state and federal conflicts that had developed. The way Superfund sets up institutional arrangements13 inextricably intertwines the State and Federal Governments at National Priorities List (NPL) sites.14 And there was a perception that the way the institutional arrangements worked generated conflict between sovereigns — delay, expense, and great dissatisfaction for everyone involved in the sites.

Another very fundamental and developing issue in the administration of the program was a feeling that EPA was not adequately involved with the affected communities in the vicinity of sites. EPA was told that its community outreach process simply was not open to com-

munication from and with the people whom our activities were supposed to benefit, and it generated a lot of difficulty for the people managing the program and a lot of dissatisfaction on both sides. The communication problems were disheartening for EPA staff, particularly when the communities in which they were working did not understand or appreciate the hard work that was being done on their behalf. The affected communities would often organize and resist the work that the Agency was doing.

The final issue that the proposals were supposed to address was a more general concern that Superfund liability was somehow skewing rational economic decision-making towards developing "Greenfield" sites and away from locating work and jobs at places where sites had already been used for industrial property. The liability scheme was simply operating in a way that was not consistent with other economic revitalization goals that the Clinton Administration had in mind.

So these were the problems, both real and perceived, which the Administration’s Superfund reform package was designed to address. Fundamentally, in terms of speeding clean-up and cutting costs of reaching clean-up decisions, as well as the cost of clean-ups themselves, EPA is approaching remedy selection from a new perspective. Essentially, the fundamental principle that the EPA Administrator put forth is that all communities are entitled to the same protection from potential health hazards from Superfund sites.16

How do you get this all accomplished? First, you have to standardize the process. You have to have basic goals for health protection and environmental protection; you have to have national clean-up levels which are consistent with those goals for the contaminants commonly found at Superfund sites.17 Additionally, you must have a process for evaluating sites on a site-specific basis to make sure that these levels are going to be met, and you must use broad generic remedies that will achieve results at any level. It is important to involve the community in all decisions regarding probable future land use.

When conducting risk assessments, customized standards should not be applied except when the methodology developed is not appropriate; when risk assessment is conducted, realistic rather than worst case assumptions should be applied. Applicable, relevant and appropriate standards should not be used to modify the outcome.18 The only standards that apply to Superfund clean-ups should be those that are made specifically applicable under state and federal law.

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15. A “Greenfield” site is one on which there has been no previous economic activity, and thus no issues are raised respecting potential contamination.
You need to move from a preference for permanence in remedy selection and treatment of contamination to a concept of long-term reliability for chosen remedies and treatment of hot spots; this requires the use of a cost-weighing approach to look at the effectiveness of alternative remedies. If, in fact, you encounter a site where remediation is currently impossible, you have to be willing to wait. You will have to stabilize the site and defer doing anything until you can develop a remedy that will work in the future.

That is what the Reauthorization proposal is designed to do, at least that is what the proposal is in the remedy selection area.\textsuperscript{19}

In terms of trying to cut transaction costs and increase the level of fairness for getting all this work done, the Senate Bill proposes a process which is basically designed to reduce the transaction costs for those least able to bear them, and give people greater certainty as to liability and the opportunity to settle with the government. This can be accomplished by doing a good investigation of PRPs — especially at multi-party sites — very early in the process. Once EPA does that search, it should immediately work to settle claims with \textit{de minimis} parties and parties who cannot pay, thereby cutting transaction costs.

The Bill includes a statutory exemption for PRPs with minimal liability. If, for example, the only thing that anyone could say about a party’s connection with the site is that they sent five hundred pounds or less of municipal solid waste or ten gallons or less of material gaining hazardous substances, they would not be liable.\textsuperscript{20} This process will in many cases eliminate \textit{de minimis} parties.

The Bill also has an early settlement provision for municipal solid waste generators and transporters.\textsuperscript{21} This includes cities and municipalities, with a ten percent cap on their liability in the aggregate. Another section provides for early resolution of claims against parties who have ability-to-pay problems.\textsuperscript{22}

Bankruptcy considerations, although not addressed in the Bill, would be impacted. The likelihood of early settlements should increase where parties are on the verge of bankruptcy.

Once early settlements are completed, the allocation process is convened for the remaining parties.\textsuperscript{23} A third-party expert will be brought in to determine liability among the PRPs from the site. EPA then works with PRPs to settle on an allocation scheme for site remediation. It hears arguments from the parties based on the evidence at the site as to what their shares ought to be, and somewhere between six and nine months after this starts, the allocator submits a report which takes into account the evidence and recommends alloca-

\begin{itemize}
\item \textsuperscript{19} S. 1834.
\item \textsuperscript{20} Id. §§ 403-06.
\item \textsuperscript{21} Id. § 408.
\item \textsuperscript{22} Id.
\item \textsuperscript{23} Id. § 409.
\end{itemize}
tions among liable parties. An “orphan’s share” is also designated, which is to come out of the Fund.\textsuperscript{24}

The impact of the new allocation scheme on sites that are now in the “pipeline,” if you will, and the effect the Bill will have on sites currently in litigation, are not clear from the language of the statute. Under the Bill, Superfund sites involving two or more PRPs will be regulated under the new regime if EPA enforcement action was not pending at the time of Reauthorization. Parties who have reached a tentative settlement can request assistance from a neutral allocator,\textsuperscript{25} however, the Agency is not proposing to reopen settlements that it has already entered into, and I think that the new enforcement approach is designed to be purely prospective.\textsuperscript{26}

The process for determining allocation personnel is not yet clear; the only requirement in the statute, as it is now drafted, is that they be experienced and qualified to participate in making allocations.\textsuperscript{27}

As discussed previously, successful site remediation requires that there be agreement on who will act as allocator, and the PRPs will have a role in that process. Basically, the individual must not be “conflicted out” for any reason and they must be qualified.

If there is a settlement, the United States will usually end up picking up the share of liability attributable to insolvent parties; it will also pick up the difference between the ten percent municipal share that it settled for earlier in the process, based on what the allocator thinks is the right share for Municipal Solid Waste (MSW).\textsuperscript{28} The United States may sometimes end up covering a significant portion of remediation costs under the Bill, while it has been our practice in the past to simply charge those costs back to responsible parties.\textsuperscript{29}

There is a provision in the statute which establishes that the United States is no more required to settle than any other party,\textsuperscript{30} but generally, when the process is going well and a rational proposal has been put forth from an arbitrator, it is going to be in everyone’s interest to settle on the basis of that process, and the United States will do it also.

Essentially, in a settlement, a party is agreeing to cover their fair share, so there would be no need for contribution claims against non-settlers, and there would be no need for contribution protection against anybody for non-settlers. In the proposal, there will be contribution protection from non-settlers.\textsuperscript{31} If a party pays a premium to

\begin{itemize}
\item \textsuperscript{24} Id. § 702.
\item \textsuperscript{25} Id. § 409.
\item \textsuperscript{26} Id. §§ 407-09.
\item \textsuperscript{27} Id. § 409.
\item \textsuperscript{28} Id. § 407.
\item \textsuperscript{29} 42 U.S.C. § 9622(h)(4) (1988) (settlement with a party does not discharge any other PRPs but only reduces their potential liability by the amount of the settlement).
\item \textsuperscript{31} S. 1834 § 408.
\end{itemize}
the United States, they can get a final settlement, which is something that is not available under current law.

Senate Bill 1834 allows a party to work out a settlement which includes a covenant not to sue, notwithstanding remedy failure or new information about the site. The United States will assume the risk of such developments under these types of settlements, which is something that is statutorily unable to do now except in extraordinary circumstances.

The United States will, if it settles with a group of the parties, undertake the responsibility for dealing with non-settlers, so settlers are going to waive any contribution claims they may have against non-settlers, and it will basically be up to the United States to manage the liability scheme after a settlement at a site and to decide who is in and who is out.

Another fundamentally new approach in the coverage area is the Environmental Insurance Resolution Fund. This is a complicated proposal, and I don’t intend to talk about it in any detail, but the general plan is to develop a fund through taxation of the insurance industry. The revenue will be available to settle claims for environmental insurance coverage for parties who have such claims pending now, and there will be a formula which is designed to structure the amount of the settlement according to the nature of the claim under the state law which will determine it.

The Fund is still under intensive debate, and what is now being talked about is fundamentally different from what was in the Bill. It is certain that whatever Fund there is, and whatever formula is employed, the effect of the Bill will be to stay pending insurance coverage litigation while the Fund gets itself in a position to make an offer to settle those claims. And if a party declines a settlement offer made in response to a claim that it brings under the jurisdiction of the Fund — and goes on to litigate and recovers less than it could have settled for — it will be forced to pay double the attorneys’ fees and may face other undesirable consequences as well. I do not know where it stands at the moment, but it will be similar to an offer of judgment plus. Parties who use the process and then turn down an offer of settlement will be penalized.

In terms of state roles, the aim is to structure the statute to permit states to take full responsibility for individual sites, for classes of sites, or for all sites within their jurisdictions, with access to the Superfund if

32. Id. § 409(g)(3)(B).
33. Id. § 408.
34. Id.
35. Id. § 802. [hereinafter the “Fund”].
36. Id.
37. Id.
38. Id.
they have programs which are substantially consistent with that required of the federal government.\textsuperscript{39}

With respect to community involvement, there will be a community information access office for each state which is going to supposedly do a much better job of making information available and getting information from community groups. There is to be a community working group at each site, which is (1) designed to be representative of the community, (2) to act as liaison and advisory counsel for the Agency, and (3) to serve many functions in the remedy selection area, both in assuring that the remedy selected through this process is going to have community involvement and support, and in assuring that the future land use presumptions on which the remedy is based are those which are acceptable in the community.\textsuperscript{40}

Moreover, the availability of technical assistance grants is going to be expanded. The Agency is going to have authority to do demonstration projects analyzing the exposures from multiple sources in an area in picking remedies, and the procedures for listing sites are going to be modified to take disadvantaged communities into account.\textsuperscript{41}

With respect to revitalization — particularly economic revitalization — the goal is to provide changes to the liability scheme which will reduce the likelihood that a purchaser of property will be liable for conditions that pre-existed the purchase.\textsuperscript{42} Right now, the innocent landowner defense will not generate that kind of protection; you can only get a prospective purchaser settlement with the Agency at sites where the Agency is actually involved. So the theory here is that there is going to be a self-executing process that anyone purchasing contaminated property can initiate to limit the scope of their clean-up responsibility.

What is going to happen? It is very hard to say. There are a lot of negotiations going on. There is a lot of angst within industry and the environmental community. Looking at it from the outside, I would characterize it as a sign that people are getting serious, because as negotiations get serious, people get increasingly unhappy about how things are going, and by the time there is a settlement — if, in fact there is a settlement — everybody will be unhappy and then you know that the deal was just about right.

But all of this I think has got to happen in the very near future. If there isn’t a basic agreement very soon, there is not going to be enough time to do anything in this session. And if there is not a basic agreement within the next three weeks, Congressman Swift is not go-

\textsuperscript{39} Id. §§ 201-03.
\textsuperscript{40} Id. §§ 101-04.
\textsuperscript{41} Id. §§ 705-06.
\textsuperscript{42} Id. § 403.
ing to do the heavy lifting to make it happen.\textsuperscript{43} It is his last session, and there is no reason for him to leave without the conflict resolved. Will the Reauthorization be in 1994 or 1996? I don't know. I hope it is 1994, because I think there are a lot of benefits to be gained from reauthorizing the statute now, as opposed to two years from now.

I will close with one last thought. To me, the most interesting thing about this whole proposal is that after we went through all the criticism, I went back and looked at what we were able to do under current law, and the reality is that we are able to do virtually everything that we proposed doing in this reauthorization under the existing statute. Only with a very few exceptions do we really need the statutory authority that we are asking of Congress.

The Reauthorization effort has resulted in a public discussion about the Superfund program and how it should ideally be operating, and that is a positive outcome in and of itself. That discussion led to a fundamental review of what the country has attempted to do since 1980, and to an effort to determine what we should do next.

I hope this overview has been helpful.

\textsuperscript{43} Rep. Swift (D-Wash.) is Chairman of the House Transportation and Hazardous Materials Subcommittee and Chief House sponsor of the bill.