UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

AUG 2 1983

OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

MEMORANDUM

SUBJECT: CMA Book on Key Superfund Liability Issues

FROM: Gene A. Lucero, Director Gene
Office of Waste Programs Enforcement

TO: Waste Management Division Directors
Regions I,V,X

Air & Waste Management Division Directors
Regions II,III,IV,VI,VII,VIII,IX

As requested in the AO workshop, I am sending CMA's six-chapter book which gives the responsible party's view on key Superfund liability issues.

You and your staff should review this book which represents a fairly complete set of arguments that can be made by a defendant in a superfund enforcement action.

Also, we suggest you share this document with the Regional Counsel and Enforcement Attorneys. Additional copies may be obtained from the Chemical Manufacturers Association, 2501 M Street, N.W., Washington, DC, 20037, Telephone 202/887-1100, at a fee of $12.50 per copy.

Attachment

cc: Kirk Sniff, w/Attachment
Regional Counsel, w/o Attachment
Superfund Enforcement Branch Chiefs, w/o Attachment

A PRESCRIPTION FOR PROMPT AND EFFECTIVE WASTE SITE CLEANUP UNDER SUPERFUND

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A PRESCRIPTION FOR PROMPT AND EFFECTIVE WASTE SITE CLEANUP UNDER SUPERFUND

I. INTRODUCTION AND SUMMARY.

The Administration recently changed management at EPA amid a barrage of charges that Superfund was not being implemented properly. EPA's critics have not, however, outlined how the Superfund cleanup can proceed effectively, and it will be up to the new Administrator and his team to embrace policies which will result in timely and effective cleanup. [Vocal critics have questioned the orientation of the old management towards settlements and have touted litigation as a preferred policy. Nevertheless, implementation should be based on the statute itself, because in Superfund Congress provided a clear and sensible cleanup policy.]

Congress' first preference in the Superfund statute is for voluntary cleanup -- not litigation. This choice is in keeping with the American legal system's traditional preference for settlement, not to mention the unique problems presented by litigating simultaneously against the dozens, sometimes hundreds, of "generators" who may have sent waste materials to an old waste disposal site. Moreover, settlement efforts should take place before the institution of litigation impairs the possibility of dialogue and problem solving among the parties. Only if efforts to achieve a

negotiated solution fail should EPA use its expansive authority under Superfund to clean up the site and to recover its costs. Except where a health emergency is presented, litigation is appropriate only after cleanup costs have been incurred and EPA seeks reimbursement from potentially responsible parties.

Although much maligned, EPA's settlement program to date has collected well over $100 million to be used for cleanup of more than forty sites nationwide. Far from being "sweetheart" deals, these settlements have been for at least "a hundred cents on the dollar," apportioned among generators primarily on the basis of estimates of each generator's volumetric share of the total wastes allegedly sent to the site. As a result of such settlements, where industry rather than government personnel arranged for and supervised cleanup conducted by outside engineering contractors, cleanup has begun much sooner and generally will be carried out far more efficiently. Moreover, because of the administrative and legal costs saved by settlement, the aggregate costs relating to cleanup can be expected to be far cheaper than would be the case after litigation.

For negotiated cleanup to become a casualty of the recent controversy over EPA personnel would indeed be tragic. The new EPA Administration should give top priority to developing a fair and effective settlement process. If

settlement becomes difficult or impossible, the inevitable outcome must be protracted, costly, and uncertain litigation, accompanying delays in actual site cleanup and eventual depletion of the statutory Superfund. Accordingly, it is imperative that EPA adopt and adhere to the statutory plan which is described in this paper.

II. SUPERFUND PROVIDES AN EFFECTIVE CLEANUP PROGRAM.

A. Congress Intended for the National Contingency Plan to Serve as the Touchstone for Prioritized, Cost-Effective Cleanup.

Throughout the deliberations which led up to the passage of Superfund, there was uncertainty regarding the scope of the old waste site problem, the actual level of risk to human health and the appropriate levels and probable costs of cleanup.[1/] With Congress not in a position to direct how available cleanup resources should be managed, it delegated this job to the President and EPA under Section 105 of Superfund.[2/] In order to provide a well-managed cleanup program,

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1/ See, e.g., S. Rep. No. 848, 96th Cong., 2d Sess. (1980) at 5 (uncertainty about the "scope of the problem" and the sources of hazard) and 18 (uncertainty about the number of sites and the needed cleanup revenues); H.R. Rep. No. 1016, Part I, 96th Cong., 2d Sess. (1980) at 18 (uncertainty about the number of sites) and 21 (uncertainty about the locations and hazards presented by abandoned sites).

2/ 42 U.S.C. § 9605.

Section 105 requires a revised National Contingency Plan ("NCP") to set cleanup priorities and to insure cost-effective cleanup.

The first step under the NCP is the preparation of a priority list of at least 400 sites "designated individually" from "throughout the United States" which are to be known as the "top priority among known response targets."[3/] The list is to be developed according to "[c]riteria and priorities . . . based upon relative risk or danger to public health or welfare or the environment . . .."[4/] The purpose of the National Priorities List is to direct and focus the national cleanup effort on "those facilities and sites or other releases which appear to warrant remedial actions."[5/] Once these "top priority" sites are identified, Section 105 then requires that the NCP provide "means of assuring that remedial action measures are cost effective . . .."[6/]

With the NCP as the touchstone, the statute then sets forth an orderly procedure for implementing a prioritized, cost-effective cleanup program. Under Section 104, EPA must

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3/ Section 105(8)(B), 42 U.S.C. § 9605(8)(B).

4/ Section 105(8)(A), 42 U.S.C. § 9605(8)(A). To assist in the preparation of the list, Section 103(c), 42 U.S.C. § 9603(c), provides for a comprehensive round of reporting on the existence and location of old disposal sites.

5/ S. Rep. No. 848, 96th Cong., 2d Sess. 60 (1980).

6/ Section 105(7), 42 U.S.C. § 9605(7).

first determine whether the site will be cleaned up voluntarily by potentially responsible parties. If voluntary cleanup will not be provided, EPA may then use the statutory Trust Fund to clean up the site in accordance with the NCP. Thereafter, Section 107 provides for recoupment from responsible parties of monies spent in accordance with the NCP. Finally, Section 106 provides injunctive authority to compel private cleanup when an imminent and substantial endangerment arises and EPA's Section 104/107 authority is not adequate. It is to this statutory cleanup plan that we now turn.

B. In Keeping with the Congressional Plan, the First Step Is to Seek Voluntary Cleanup from Potentially Responsible Parties.

Far from being an unauthorized means of cleaning up waste sites, voluntary cleanup under Superfund is the preferred means of remedying conditions at old waste sites. Section 104(a)(1) thus specifically provides that EPA must always make an initial determination of whether "removal and remedial action will be done properly by the owner or operator of the vessel or facility from which the release or threat of release emanates, or by any other responsible party."[7/]

The genesis of this provision is Section 311 of the Clean Water Act,[8/] which provides the model for Superfund's

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7/ 42 U.S.C. § 9604(a)(1).

8/ 33 U.S.C. § 1321.

National Contingency Plan, government response authority and liability provisions.[9] Under Section 311, the requirement that EPA first determine the availability of voluntary cleanup of spills into the rivers and other waterways has proved highly successful. A large percentage of spills are cleaned up voluntarily, thus allowing cleanup to take place expeditiously with a minimum of red tape and delay.[10]

By embracing voluntary cleanup as the remedy of choice, Congress acted in the best tradition of the American legal system. For although we are generally acknowledged to be a litigious society, most disputes are not solved by litigation. In 1981, for example, over 93% of civil cases in the Federal Courts were settled before trial.[11]

Moreover, as the number and complexity of lawsuits has increased, leading jurists have repeatedly stressed the need

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9/ Like Superfund, Section 311 provides for a National Contingency Plan for spills (Section 311(c)(2)), for cleanup using federal funds after a determination that voluntary cleanup is not available (Section 311(c)(1)), and for recoupment from responsible parties (Section 311(f)).

10/ See, e.g., Anglo Fabrics, Co., Inc. v. United States, No. 279-77, slip op. at 15, 23 (Ct. Cl. Jan 9, 1981) ("the policy behind the FWPCA . . . encourages owners and operators of oil facilities to promptly and efficiently clean up any oil spills . . ."). Recognizing the efficiency of this approach, Congress authorized government Section 311 cleanup only "[i]f the owner or operator fails to do so." S. Rep. No. 351, 91st Cong., 1st Sess. 17-18 (1969). Thus, the Coast Guard routinely seeks private cleanup before resorting to the government's authority. See, e.g., Union Petroleum Corp. v. United States, 651 F.2d 734, 740 (Ct. Cl. 1981).

11/ 1981 Annual Report of the Director of the Administrative Office of the U.S. Courts, Table 36, page 238.

to accelerate the trend toward private dispute resolution. In the words of Judge Hubert L. Will, one of the nation's leading trial court judges:

> One of the fundamental principles of judicial administration is that, in most cases, the absolute result of a trial is not as high a quality of justice as is the freely negotiated, give a little, take a little settlement. . . . Therefore it is essential as part of your procedures to provide some techniques that will maximize the possibility of freely negotiated settlements in cases for which you are responsible.12/

Chief Justice Warren E. Burger has consistently made much the same point:

> It is becoming trite to say Americans tend to be the most litigious people on the globe, using the courts for airing all manner of grievances, disputes and perceived "entitlements." The escalating demands imposed on the courts have led to their becoming congested, slow, and costly. Fortunately, there has been a steady but all too limited increase in the number and variety of alternative dispute resolution programs, largely stimulated by the American Bar Association following the Pound Conference of 1976. This reflects the view that courts are not the appropriate forums for the resolution of many problems, regardless of the condition of their dockets.13/

12/ Will, Hubert L., et al. "The Role of the Judge in the Settlement Process," Federal Judicial Center Education and Training Series, at 1 (1977).

13/ Burger, Warren E., 1982 Year-End Report on the Judiciary, 8-9 (1982) (footnote omitted).

The trend in favor of alternative dispute resolution has recently played a growing role in regulatory and administrative law.[14/]

Any limitation of settlement discussions would be particularly distressing given the great advantages to the public of voluntary cleanup rather than litigation. Private industry, particularly the chemical industry, generally has more technical and engineering knowhow than the government. For example, at Seymour, Indiana, private parties were able, given their superior knowledge of waste management practices, to contract for the surface cleanup at far less cost than the government estimate.[15/] And at Bluff Road, South Carolina, settlement was achieved only after the generators selected one of the parties to carry out cleanup at costs much lower than anticipated by EPA.[16/] Moreover, in addition to savings

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14/ Cohen, Neil J., "Settling Litigation: A New Role for Regulatory Lawyers," 67 ABA Journal 878 (July 1981); Harten, Philip J., "Negotiating Regulations: A Cure for the Malaise?" Report to the Administrative Conference of the United States (January 1982).

15/ See Legal Times, October 18, 1982, at 1. The Seymour negotiations led to a settlement where 24 generators committed 7.7 million dollars, the full amount needed to clean up the surface of the site. United States v. Seymour Recycling Corp., Haz. Waste Lit. Rep. at 3,489 (S.D. Ind. 1983).

16/ At this site 15 generators paid almost two million dollars towards surface cleanup. See United States v. South Carolina Recycling & Disposal, Inc., Civ. No. 80-1274-6 (D.S.C.), partial consent decree (March 23, 1982). See also Chemical Applications Co., Inc. v. Home Indemnity Co., 425 F. Supp. 777, 779 (D. Mass. 1977) (insurer urges insured to cleanup oil spill since government cleanup is likely to be more costly).

that result from harnessing industry's technical expertise, voluntary cleanup generally produces further economies because of the administrative and legal costs saved by foregoing time-consuming and costly litigation.

In short, recent efforts to achieve voluntary cleanup are in keeping not only with Superfund and the predecessor spill program under the Clean Water Act but also with long-standing traditions favoring settlement rather than litigation of most disputes.[17/] If settlement discussions are stalemated, or alternatively, are allowed to take place only after a complaint is filed, the objective of achieving prompt cleanup will be frustrated. Once a case is turned over to the trial lawyers, resources and available funds are likely to be directed towards the litigation rather than problem solving. Dialogue among the parties is generally impaired or becomes impossible once litigation counsel take the reins from company lawyers and agency personnel whose institutional interests favor settlement rather than litigation.

17/ Although this paper advocates continuation of the settlement process, we do not intend to embrace the negotiating strategy or legal positions taken by EPA and the Justice Department in such negotiations.

C. If Voluntary Cleanup Is Not Possible, Superfund Provides Both the Authority and Resources for Effective Government Cleanup.

While voluntary cleanup is the first and preferred step in the Superfund scheme, the heart of the statute is the authority and funding provided for government cleanup. In Section 104, Congress granted EPA broad authority to remedy conditions at inactive waste sites releasing or threatening to release hazardous substances into the environment. This authority permits EPA to take a wide variety of emergency actions (defined as "removal actions") as well as to fund long-term or permanent solutions (defined as "remedial actions"). Section 101(23), (24), 42 U.S.C. §§ 9601(23), (24). The funding for such cleanup is provided by a Trust Fund financed primarily by a special tax on chemical and petroleum products.[18/]

The fundamental importance of the Section 104 cleanup provisions was recently emphasized by Senator George J. Mitchell (D. Maine):

> [I]t [Superfund] is primarily a clean up mechanism, it is a mechanism designed to give the government, the only institution in our society that can deal with this

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18/ Section 211 of Superfund, 26 U.S.C. § 4611, imposes the Superfund tax; Section 221, 42 U.S.C. § 9631, establishes the Trust Fund; and Section 111(a), 42 U.S.C. § 9611(a), sets forth the authorized uses of the Fund including "payment of governmental response costs incurred pursuant to section 9604 of this title."

> massive nationwide problem, the opportunity to take those [cleanup] steps.19/

Senator Mitchell's comments echo Congress' original intent which was to establish "a revolving fund" that would allow the government to "cleanup hazardous waste sites first" and "then try to recover the costs of cleanup later" from responsible parties.20/

Some have suggested that there are stumbling blocks in the path of Section 104 cleanup. Most frequently mentioned are the requirements for state participation under Sections 104(c) & (d), and the 10 percent matching fund imposed by Section 104(c)(3). Neither of these requirements, however, imposes a serious constraint on EPA's cleanup efforts. Local participation in the remedial process is valuable to public understanding of the risks posed and remedial steps taken in site cleanup. Thirty-two states have already passed legislation addressing the 10 percent matching share.21/ Moreover, even if a state cannot provide the matching share, Sections 104(c)(1)(A)(i)-(iii) authorize EPA to spend unlimited funds to remedy emergency conditions without regard to the matching funds requirement.

19/ Transcript of Hearings on Oversight on Implementation of Superfund Before the Senate Committee on Environment and Public Works, 98th Cong., 1st Sess. 117 (Feb. 23, 1983).

20/ S. Rep. No. 848, 96th Cong., 2d Sess. 12 (1980).

21/ National Conference of State Legislatures, Hazardous Waste Management: A Survey of State Legislation 1982 III-1 (1982).

The government has also suggested that the Fund is financially inadequate to support a full cleanup effort under Section 104.[22/] This contention cannot be supported. At year-end 1982, the Treasury reported a current balance in the Fund of over $430 million.[23/] Moreover, hundreds of millions in additional taxes are due to be collected and additional millions can be expected from settlements and recoupment actions under Section 107.[24/]

If the Fund should ever prove inadequate, EPA can and should make its case to Congress. Much consideration was given during the legislative debates as to how large a fund was needed. This subject was "especially controversial" and only after the "closest scrutiny" did Congress decide on

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22/ In its brief in United States v. Wade, a case in the United States Court of Appeals for the Third Circuit, No. 82-1715, the government attempts to justify reliance on emergency injunctive provisions instead of Section 104 on the grounds that the Fund is "simply inadequate" or "wholly inadequate." Government Brief at 5, 30, 32.

23/ Department of Treasury, Bureau of Government Financial Operations, Division of Financial Management, Trust & Revolving Funds Branch, "Status of Hazardous Substance Response Trust Fund" (December 31, 1982).

24/ Under Superfund Section 303, 42 U.S.C. § 9653, the statutory tax will terminate after September 30, 1985, when the full $1.6 billion will have been collected. To date more than $183.3 million have been recovered in settlements and recoupment actions. See Office of Solid Waste and Emergency Response Accomplishments (Jan. 21, 1983) (citing monies obtained from settlements, private party cleanups and cost recoveries).

$1.6 billion.[25] Nonetheless, Congress recognized even in doing so that the "precise scope" of the problem was not "readily ascertainable" and that Congress could always "reexamine the situation."[26]

As a means of assisting Congress in carrying out such a reexamination, Section 301(a) expressly calls for EPA, no later than December, 1984, to make "a projection of any future funding needs," as well as to offer "recommendations for legislative changes," including "recommendations concerning authorization levels, taxes [etc.]." 42 U.S.C. §§ 9651(a)(1))(C), (G). This Section 301 report provides the vehicle for EPA to present any inadequacy in Fund financing and, if necessary, to seek a statutory increase in the Fund.

D. EPA's Authority to Recoup "Costs Incurred" from Responsible Parties Preserves the Fund and Promotes a Fair Allocation of Society's Cleanup Burden.

Once a site is cleaned up using the $1.6 billion Fund, Section 107(a) provides the government an opportunity to recover "costs incurred" consistent with the NCP from responsible parties. 42 U.S.C. § 9607(a). Responsible parties

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25/ Statement of Rep. Florio, 126 Cong. Rec. H9155 (daily ed. September 19, 1980); Statement of Sen. Helms, 126 Cong. Rec. S14969 (daily ed. November 24, 1980).

26/ H.R. Rep. No. 1016, Part II, 96th Cong., 2d Sess. 5 (1980).

are broadly defined to include site owners and operators, transporters, and some waste generators. The standard of liability under Section 107 is modeled after the liability provisions of Section 311 of the Clean Water Act.[27/] Although designed to be tough, these liability provisions were intended to provide a fair allocation of the burdens of cleanup. For owners and operators, the standard is "strict" liability;[28/] for other responsible parties, defenses are narrowly circumscribed by Section 107(b). 42 U.S.C. § 9607(b). After much debate, Congress adhered to common law causation principles[29/] and rejected language which would have imposed joint and

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27/ Section 101(32) of Superfund, 42 U.S.C. § 9601(32) provides that "'liable' or 'liability' under this subchapter shall be construed to be the standard of liability which obtains under [Section 311 of the Federal Water Pollution Control Act]."

28/ Section 311 imposes strict liability on the owners and operators of a facility. See United States v. LeBeouf Brothers Towing Co., 621 F.2d 787, 789 (5th Cir. 1980), cert. denied, 452 U.S. 906 (1981). For Superfund parties, such as generators and transporters, whose connection to the hazardous condition is more remote, a negligence standard may be appropriate. See City of Philadelphia v. Stepan Chemical Co., 544 F. Supp. 1135, 1143 n.10 (E.D. Pa. 1982).

29/ Section 107 of Superfund provides that before a plaintiff can obtain reimbursement from a defendant, he must show that the defendant's waste "cause[d]" the "release or threatened release" necessitating cleanup action. Superfund Section 107(a)(4), 42 U.S.C. § 9607(a)(4). By this language, Congress intended to implement the long-standing common law principle that causation is a fundamental and essential prerequisite for assigning legal liability. See W. Prosser, Law of Torts 236 (1975); 2 F.V. Harper & F. James, The Law of Torts § 20.2 at 1110 (1956).

several liability.[30/] Consequently, a defendant is only required to bear his proportionate, fair share of liability.

Under these circumstances, Section 107 provides an adequate tool allowing EPA to recover its cleanup "costs incurred" when the prerequisites of responsible party liability are proven. These liability provisions are carefully drafted so as to replenish the Fund and encourage settlement while preserving the basic common law principles of responsibility and fairness necessary to engender cooperation and confidence in the cleanup program.

30/ Joint and several liability had been provided in early versions of Superfund, but it was explicitly removed from the final compromise bill. As described by Senator Stafford as well as other Senators, the deletion of joint and several liability was deliberate and, indeed, essential to achieve enactment. In Senator Stafford's words:

> I am a realist and know that many perceive [S. 1480] as punitive and unnecessarily rigorous. For that reason Senator Randolph and I introduced [a compromise bill] last week.
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> * * *
>
> We eliminated the term joint and several liability.

126 Cong. Rec. S14967 (daily ed. Nov. 24, 1980). Confirming his statement, a "list of changes as presented by the Environment and Public Works Committee" for consideration by the full Senate, entitled "Concessions in Stafford-Randolph Compromise," stated that the revised bill (which ultimately passed) "[e]liminated joint and several liability." Id. at S15004 (remarks of Senator Helms).

E. Section 106 Provides for Emergency Injunctions in Those Rare Cases Where the Section 104 Authority is Inadequate to Address an Imminent and Substantial Endangerment.

In the case of emergencies, Congress provided in Section 106 for injunctive relief if and when the provisions of Sections 104 and 107 are inadequate to deal with site cleanup. Section 106 is specifically limited to "imminent and substantial endangerment"[31/] and provides relief under the limitations of traditional equitable principles.[32/] Use of Section 106 would, therefore, be appropriate in the case of an imminent and substantial danger needing very prompt attention where the owner's assistance was required to deal with the problem.

Congress' decision to limit Section 106 injunctive actions to emergency circumstances was based on sound public

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31/ 42 U.S.C. § 9606(a). Congress specifically amended Section 106 on the Senate floor to add the condition that an endangerment be "imminent and substantial" before an injunction could issue, even though it was aware of the "tremendous burden of proof associated" with this standard. See Subcomm. on Oversight of Government Management of Senate Comm. on Governmental Affairs, 96th Cong., 2d Sess., Report on Hazardous Waste Management and the Implementation of the Resource Conservation and Recovery Act 29 (Comm. Print 1980).

32/ It is well-established that statutory injunctive authority such as Section 106, like all equitable remedies, may issue only when the plaintiff lacks an adequate remedy at law. See Weinberger v. Romero-Barcelo, 102 S. Ct. 1798 (1982). Congress itself has specified that this type of imminent hazard provision should "not be used when the system of regulatory authorities provided elsewhere in the bill could be used adequately to protect the public health." H.R. Rep. No. 1185, 93d Cong., 2d Sess. 35 (1974) (Safe Drinking Water Act).

policy considerations. Injunctive litigation embroils both the government and private parties in time-consuming and expensive legal proceedings draining off resources which could be better used for site cleanup. Perhaps worse is the delay which can result from litigation. Cases as complex as the typical Superfund cleanup can drag on for years with site cleanup stalled during the interim. Senator Mitchell captured the essence of the problem in the recent Senate oversight hearings when he remarked that the "legal process does not afford appropriate response, it does take time, it can be used to delay up to five . . . or ten years; and it is one of the reasons Superfund was created . . .."[33/]

An equally compelling reason for limiting the use of injunctive actions is that of avoiding further impositions on already overburdened courts.[34/] Besides being time-consuming, the questions presented by site cleanup are scientifically complex and generally beyond the ken of most trial judges. Site cleanup under the NCP, for example, would require the court to conduct or oversee a preliminary hazard evaluation (40 C.F.R. § 300.64, 47 Fed. Reg. 31180, 31214 (1982)) and then to choose among eleven "immediate removal" options (40 C.F.R. § 300.65, 47 Fed. Reg. at

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33/ Transcript of Hearings before the Senate Committee on Environmental and Public Works, supra note 19, at 114.

34/ Burger, Warren E., 1982 Year-End Report on the Judiciary, 12 (1982) ("New judgeships are desperately needed to cope with the ever increasing caseload").

31214-15), followed by an even more detailed evaluation of longer-term "planned removal and remedial action" (40 C.F.R. § 300.66, 47 Fed. Reg. at 31215). This, in turn, requires an in-depth review of six technical factors which bear on whether planned removal action (40 C.F.R. § 300.67, 47 Fed. Reg. at 31215-16) and remedial action (40 C.F.R. § 300.68, 47 Fed. Reg. at 31216-17) are being carried out in a cost-effective manner.

The courts, by definition, are ill-equipped to supervise resolution of such complex technical questions.[35/] Far from promoting prompt site cleanup, therefore, achievement of Congress' cleanup objectives would be frustrated and delayed by having the courts routinely involved in depth at the pre-cleanup and cleanup stages.

III. CONTINUED ADHERENCE TO THE STATUTORY PLAN CAN ACHIEVE PROMPT WASTE SITE CLEANUP.

Whatever the merits or demerits of EPA's management, it was Congress that chose voluntary cleanup as a key weapon in the government's waste cleanup arsenal. The wisdom of that choice has generally been confirmed by the cleanup experience

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35/ See Friends of the Earth v. Wilson, 389 F. Supp. 1394, 1396 (S.D.N.Y. 1974) ("'Courts should not, in the exercise of sound discretion grant relief'" where their "supervision would be of a highly technical nature" (citations omitted)). See also Refrigeration Engineering Corp. v. Frick Co., 370 F. Supp. 702, 715 (W.D. Tex. 1974) ("difficulty of enforcement is, in itself, often a sufficient reason for denying injunctive relief").

to date. Litigation, such as that the government chose to file in United States v. Conservation Chemical Company[36] and United States v. Price,[37] has languished in delay and time-consuming court filings that might have been avoided had settlement negotiations been pursued.

By contrast, negotiated voluntary cleanups such as those achieved at Bluff Road, South Carolina,[38] Seymour, Indiana,[39] Deerfield, Ohio,[40] Hyde Park, New York,[41] and St. Louis, Michigan[42] resulted in prompt cost-effective

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36/ Civ. No. 80-0883-CV-W-5 (W.D. Mo., filed Sept. 29, 1980). The Conservation Chemical Co. case was originally a RCRA Section 7003 complaint against the site owner/operator alleging immediate and substantial endangerment. On November 22, 1982 a new action, Civ. No. 82-0983-CV-W-5, was filed under Superfund. Despite the allegation of imminent and substantial endangerment over two and a half years of litigation have passed without even a site assessment in compliance with the NCP, much less cleanup.

37/ Civ. No. 80-4104 (D.N.J., filed Dec. 22, 1980).

38/ See United States v. South Carolina Recycling & Disposal, Inc., supra note 16.

39/ See Memorandum Opinion, United States v. Seymour Recycling Corp., Haz. Waste Lit. Rep. at 3489 (S.D. Ind. 1983).

40/ See Certificate of Completion filed in Ohio v. Georgeoff, Civ. No. C81-1961 (N.D. Ohio, Oct. 13, 1982) (Ohio EPA certified that the surface of the site had been properly cleaned up).

41/ See United States v. Hooker Chemicals & Plastics Corp., Civ. No. 79-989 (W.D.N.Y. Jan 19, 1981) (Consent decree providing for the cleanup of the Hyde Park Landfill in Niagra, New York).

42/ See United States v. Velsicol Chemical Corp., Civ. No. 82-303 (E.D. Mich., Order of Dec. 27, 1982 providing for cleanup of Velsicol's former plant site in St. Louis, Michigan).

cleanup. A key factor in the prompt effective action at these sites seems to have been that the cleanup contractor was selected and provided by the settling parties without the delay of government red tape.

Superfund settlements have also provided an important supplement to the resources available in the Fund. Many agreements have been reached by site owners, many of whom are on-site generators.[43/] By year-end 1982 over $118.7 million had been collected as a result of EPA's efforts.[44/]

Against this background of success, it is most unfortunate that recent allegations and controversy have disrupted Superfund's preferred policy of voluntary cleanup. Hopefully, the new EPA Administrator will adhere to Congress' original policy preference and achieve many future settlements in those cases where litigation can sensibly be avoided. That is not to say that use of the Fund will be unnecessary. When settlement cannot be achieved, the Administrator should use his authority under Section 104 and then seek reimbursement of the government's costs incurred consistent with the

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43/ See, e.g., United States v. Olin Corp., Civ. No. CV-80-PT-5300NE (N.D. Ala.) (see 5 Chem. & Rad. Waste Lit. Rep. 1023-24 (March, 1983)) (cleanup of Olin's plant on the Redstone Arsenal in Huntsville, Alabama); In the Matter of Stauffer Chemical Co., Westport, Connecticut, EPA Docket No. 82-1070 (May 25, 1982) (agreement to perform an investigative study at the Woburn, Massachusetts site).

44/ Office of Solid Waste and Emergency Response Accomplishments (Jan. 21, 1983).

NCP under Section 107. But the aim should be to use the Fund only when voluntary efforts fail so that the Fund can be preserved for those circumstances where responsible parties do not exist or cannot be found.

In the end, public confidence in the fairness and propriety of EPA's cleanup program can best be preserved if the statutory plan is followed. Settlements made in accordance with NCP procedures will protect the public health, welfare and the environment. Federal funds will be used for cleanup when voluntary cleanup is not available. And responsible parties will be required to reimburse the government for their share of the costs incurred in federally funded cleanup under an even-handed and fair interpretation of the liability provisions of Section 107.

CHEMICAL MANUFACTURERS ASSOCIATION

December 30, 1982

TO: CMA Board of Directors
General Counsels' Group
Ad Hoc Superfund Litigation Group
Superfund Task Group
CMA Member Company Legal Contacts--
Superfund

FROM: David F. Zoll, Vice President
and General Counsel

RE: Kirkland & Ellis Book on Key Superfund Liability Issues

This memorandum transmits a six-chapter book which will be of assistance to our members either in conducting Superfund settlement negotiations or in litigating key Superfund liability issues. Development of this book is part of a range of CMA Superfund-related activities. This memorandum briefly explains those various activities and summarizes the content and conclusions of the book's six chapters.

Background

CMA conducts activities relating to Superfund on a number of fronts. Under the leadership of the Government Relations Committee, we closely follow legislative developments on the federal and state level. Under the leadership of the Environmental Management Committee, we play an active role in the development of regulations and other administrative policies.

The legal department has been managing other elements of our Superfund activities. For instance, we have expended a great amount of time and resources (and will continue to do so) promoting procedures and principles to further reasonable settlements between industry and government at waste sites. This is in line with CMA's policy that the national inactive waste site problem is manageable, and can be solved relatively quickly, by rational prioritization, cost-effective use of the Fund, and expeditious, fair settlements with responsible parties.

We have also recognized that in order to foster fair settlements, CMA and its members should be prepared to challenge unreasonable implementation of Superfund in the courts. To further

these goals, various company counsel recommended that we establish an "Ad Hoc Superfund Litigation Group." We established this Group, consisting of company attorneys with expertise in Superfund legal issues, in April, 1982. (A list of the members of this Group is included in front of the book.) Based on the advice of various company attorneys, the Group selected Ed Warren of the law firm of Kirkland & Ellis to serve as counsel. As events have developed, this Group's efforts have been broadly divided into two phases.

Under "Phase I," Kirkland & Ellis has drafted--with the Group's guidance, review, and input--a book with six chapters on crucial issues of Superfund interpretation as they might affect the liabilities of our members for individual waste site remedial actions.

Under "Phase II," the Group has been monitoring various Superfund cases throughout the country to determine which cases may be appropriate for some form of institutional CMA participation. The purpose of this phase is to assure that the courts render the most responsible interpretations of the key Superfund liability issues addressed in the book. We have already determined that the South Carolina Recycling case (Bluff Road, South Carolina) is an appropriate forum for such involvement.

The Book

Phase I is now complete. We are today distributing the book with the following six chapters:

(1) Apportionment of Liability Under Superfund (56 pp.)--Analyzes Superfund's structure/language/legislative history, common law, and equitable principles, and case law under §311 of the Clean Water Act, and concludes that damages are to be apportioned and that "joint and several" liability does not apply; also develops point that even if "joint and several" were imposed, a right of "contribution" would then exist.

(2) The Standard of Liability (17 pp.)--Analyzes development of "strict liability" at common law, Superfund's structure/language/legislative history, and case law under §311 of the Clean Water Act, and concludes that Superfund provides a "hybrid standard" which is nominally "strict," but which allows considerations of relative fault when allocating liabilities among multiple parties; concludes that "relative degree of fault" may become an important factor for apportionment.

(3) The Causation Requirement (46 pp.)--Analyzes development of causation principles at common law, Superfund and Clean Water Act (§311) structure/language/legislative history, and concludes that Superfund preserves traditional principles which impose burdens on the government or other plaintiffs to prove cause-in-fact and proximate cause; concludes that "relative degree of causation" may become an important factor for apportionment.

(4) Substantive Standards Under Section 106 of Superfund (57 pp.)--Analyzes the structure/language/legislative history of §106, both alone and as it relates to other Superfund provisions; concludes that §106 is a limited emergency provision designed to supplement the primary Superfund response provisions (§§104 and 107) in extraordinary cases in which the government can meet the traditional requirements for equitable relief; concludes that generators are not proper parties under §106; and that in all events, remedies under §106 must be in accordance with the cost-effective principles of the NCP and must be based on balancing of equities and equitable defenses.

(5) The Liability Provisions of Section 107 (71 pp.)--Analyzes the structure/language/legislative history of §107, both alone and as it relates to other Superfund provisions; concludes that Congress carefully limited the types of response costs and damages which might be recoverable; analyzes which parties may be proper plaintiffs; distinguishes among the liabilities which may properly attach to various types of defendants; develops numerous defenses and liability limitations; and analyzes the important limitations Congress placed on the "punitive" damages provisions.

(6) The Potential For Constitutional Challenge to Superfund Provisions Having Retroactive Effect (88 pp.)--Analyzes Supreme Court development of constitutional doctrines in areas of (a) impairment of contracts, (b) taking of property without just compensation, (c) deprivation of property without due process; concludes that in specific factual situations in which the government or other party makes over-reaching or harsh demands, any of these doctrines might invalidate specific portions of Superfund as so applied; and that in harsh factual situations, the presentation of persuasive constitutional arguments may promote judicial rulings which adopt reasonable statutory constructions.

Special Points Regarding the Book

I would like to make three important points about the book:

(1) The chapters of the book should be read together as one integrated document. The concepts of apportionment, standard of liability, and causation are, for instance, highly interrelated. One should not be addressed in isolation from the other, and the various chapters contain numerous cross-references. Similarly, a firm understanding of the concepts in the first three chapters is crucial to an understanding of the positions in the §106 and §107 arenas.

(2) The book is written from an advocacy perspective and its sections are basically in the style one would use to write an adversarial brief before a court. The book does not generally include the types of discussions a counsel would use in presenting a confidential assessment of the relative strengths and weaknesses of positions and alternatives.

(3) Finally, it is important to stress that by providing this book to our members, we do not intend to encourage members to litigate rather than settle their potential Superfund liabilities. It is our hope that this book can primarily serve to provide our industry with a full recognition of its best legal arguments which may be relevant to waste site negotiations, so that we can negotiate from a position of strength in obtaining fair settlements. But we recognize that various of our members may from time to time be forced into Superfund litigation, and in such situations this book will provide valuable research and drafting assistance.

In this context, it is important to understand the purpose of including the chapter on constitutional issues. CMA fully supports a rapid, efficient, and cost-effective cleanup program under Superfund and we believe the statute provides the government with the necessary tools--including the $1.6 billion fund derived largely from taxes on our industry--to accomplish these goals. As the chapter on constitutional issues notes, however, there may be factual situations in which a federal or state entity may seek to impose unduly harsh interpretations of certain sections of the statute, and these interpretations may be held constitutionally infirm in such a setting. In such a situation, raising constitutional issues may result in assuring more reasonable interpretations.

SUPERFUND:

KEY LIABILITY ISSUES

December, 1982

CHEMICAL MANUFACTURERS ASSOCIATION

DAVID F. ZOLL
Vice President
General Counsel

SUPERFUND: KEY LIABILITY ISSUES

The purpose of this book of six, interrelated chapters, is to assist members of the Chemical Manufacturers Association in conducting Superfund settlement negotiations and/or in litigating key Superfund liability issues.

It is CMA's policy that the national inactive waste site problem can and should be solved through reasonable and fair implementation of Superfund. We believe that this book will promote such implementation by providing our members with basic research and drafting assistance to defend themselves in the courts in cases where efforts to obtain reasonable settlements fail.

The book is written from an advocacy perspective and its sections are basically in the style of an adversarial brief before a court. The book does not generally include the types of discussions a counsel would use in presenting a confidential assessment of the relative strengths and weaknesses of positions and alternatives.

The firm of Kirkland & Ellis prepared these six chapters for the members of CMA under the guidance and direction of the CMA Ad Hoc Superfund Litigation Group and my legal department staff. The "Ad Hoc Group" is comprised of numerous CMA member company attorneys with expertise in Superfund liability issues. The members are:

Chairman: Robert Reichert, E. I. du Pont de Nemours & Company

Vice-Chairman: Phocion Park, Monsanto Company

Steering Committee: David Graham, Velsicol Chemical Corporation
William Hood, Ashland Chemical Company
David Sigman, Exxon Chemical Company
Cornelius Smith, Union Carbide Corporation
Messrs. Reichert and Park

(over)

Other members:

Scott Ferguson, Olin Corporation
Kenneth Fitzpatrick, The Dow Chemical Company
Ellen Friedell, Rohm and Haas Company
David Giannotti, Occidental Chemical Corporation
Robert St. Aubin, FMC Corporation
Martin Teicher, American Cyanamid Company
Margaret Tribble, American Cyanamid Company
Harold Wallum, Allied Corporation
Peter Wynne, ARCO Chemical Company
Roger Zehntner, Stauffer Chemical Company

Richard G. Stoll, CMA's Deputy General Counsel, has assisted me in managing the activities of the Ad Hoc Group and the production of this book.

David F. Zoll
Vice President and
General Counsel

December 30, 1982

KIRKLAND & ELLIS

SUPERFUND:

KEY LIABILITY ISSUES

December 1982

SUPERFUND:

KEY LIABILITY ISSUES

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SUPERFUND:
KEY LIABILITY ISSUES

PREFACE

Hazardous waste sites throughout the country have received dramatically increased attention in recent months, principally under the influence of the Comprehensive Environmental Response, Compensation, and Liability Act,[1] which was enacted in December 1980 and which is popularly known as "Superfund." This attention has taken many forms, including hard-fought federal and state litigation and complex settlement negotiations -- both involving many parties and heretofore unresolved issues.

David F. Zoll, the Chemical Manufacturers Association's General Counsel, at the request of several member company counsel, formed an advisory group of company attorneys to guide the Association's efforts to analyze comprehensively the many unique, yet important legal issues that will flow from the government's implementation of Superfund's liability sections.

This book is a result of CMA's effort to assist in Superfund implementation. It is designed to analyze Superfund's liability provisions, principally from the standpoint

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[1] Pub. L. No. 96-510, 94 Stat. 2767 (1980), codified at 42 U.S.C. § 9601 et seq.

of off-site generators, and to provide a comprehensive and coherent analysis that can be used by the chemical industry in responding to governmental initiatives at the many hazardous waste sites throughout the country, be they settlement discussions or contested litigation.

Outline of Chapters

Perhaps the most controversial issue of Superfund is that of joint and several liability versus apportionment, which is addressed in chapter 1. Although at one time Congress considered imposing joint and several liability, it clearly rejected that result in the final Act, an outcome consistent with common law standards as well. Chapter 1 relates this rejection of joint and several liability, describes the factors that should be considered in apportioning damages, and outlines the scope of a defendant's right to contribution when he has paid more than his fair share of cleanup costs.

Chapter 2 focuses on another key issue -- the proper standard of liability under Superfund. Although a superficial reading of the legislative history has led some commentators to conclude that Superfund necessarily imposes strict liability on all defendants, a more careful analysis reveals that the answer is not so simple. As discussed in chapter 2, the appropriate standard is a hybrid one, allowing consideration of relative fault among multiple parties.

The nature of the causation requirement under Superfund is analyzed in chapter 3. As shown there, Superfund makes no radical changes in the traditional common law causation principles. Plaintiffs still must prove that named defendants were both the "cause-in-fact" and the "proximate cause" of the harm that plaintiffs seek to address.

Chapter 4 analyzes section 106, the "emergency" relief provision of Superfund. Although the government has taken a broad reading of section 106, perhaps to circumvent some of the restrictions of sections 104 and 107, we show that Congress intended section 106 to be a seldom used, extraordinary remedy. Thus, in typical cases, section 106 will be unavailable to the government.

Chapter 5 addresses the general requirements of section 107 of Superfund. Section 107, the statute's sole mechanism for recovering cleanup costs incurred by the government and others, is a particularly detailed provision, and this chapter takes the reader through the important limitations on the scope of relief available, available defenses and limits on liability, and the identity of proper plaintiffs and defendants. This chapter discusses the basic requirements of section 107 claims, but some of the key section 107 issues are addressed in detail in the preceding chapters.

Chapter 6, which analyzes the constitutional limitations on the scope of Superfund, takes a slightly different approach from the preceding chapters. In this chapter, we

outline the key factors in framing a constitutional challenge to a retroactive application of Superfund's liability provisions. Although a facial challenge to the entire statute is likely to be unsuccessful, chapter 6 shows how a properly tailored constitutional attack on the application of Superfund to specific facts can help defendants limit the government's potentially onerous interpretations of the Act's liability requirements.

It is our intent that each of these chapters largely stand on its own as a discussion of its respective subject area. Read together, however, they present a comprehensive discussion of the key liability issues under Superfund, which we believe will be helpful, especially to defendant generators.

* * *

Before turning to the detailed discussion of these key issues, the following overview of Superfund will provide a helpful context to the detailed analysis in chapters one through six.

Overview of Legislative Background

In Superfund, Congress addressed the problems presented by hazardous waste disposal sites throughout the country, many of them long-abandoned. A primary feature of the Act was the creation of a "Superfund" -- a $1.6 billion Trust Fund, which the government could use to "clean up" dangerous

dumpsites. Superfund's scope is broad while its specific terms are ambiguous in many instances, and its legislative history provides only limited guidance regarding many key statutory provisions.

Originally proposed in June 1979,[2] the Superfund concept was much-debated and underwent substantial revision before passage. The earlier Senate bill would have compensated individuals for medical costs and imposed automatic joint and several liability on many parties.

Following the November 1980 elections leading to a Republican Senate majority in the next Congress, proponents of Superfund frantically sought to pass a compromise bill in its lame-duck session. The more onerous provisions of earlier bills which had engendered bitter opposition, such as medical compensation and joint and several liability, were deleted in a compromise that passed the Senate. The House of Representatives promptly passed the Senate compromise language verbatim.

The resulting legislation, described by one court as "severely diminished" and by Congress as "pared down," raises many questions. Because the House and the Senate passed identical language under the pressure of the expiring session of Congress, there is no conference report to illuminate the meaning of Superfund's provisions. And because

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[2] See S. 1341, H.R. 4571, 96th Cong., 1st Sess. (1979).

the final legislation differed substantially from its predecessor bills, traditional sources of legislative history, such as committee reports, are of limited utility.

With language borne of hasty compromise and limited legislative history, some aspects of Superfund are indeed enigmatic. As we show below, however, a careful reading of the statutory text, combined with a tracing of the legislative history and reference to traditional common law concepts, offer considerable guidance in correctly interpreting the statute.

This work provides such guidance. It does not pretend to be a comprehensive discussion of all the provisions of Superfund -- such an effort would be far beyond the scope of even this relatively lengthy book. Thus, some significant provisions of the Act, such as its tax and recordkeeping requirements, are addressed only tangentially, where they are relevant to other provisions. Instead, the main focus throughout is on the liability provisions of Superfund, especially as they apply to persons who generate the materials that ultimately are deposited at a dumpsite.

TAB 1

CHAPTER 1:

APPORTIONMENT OF LIABILITY

INTRODUCTION AND SUMMARY OF CONCLUSIONS

When multiple parties are defendants, the standard common law approach is to "apportion" any damages due among the liable defendants, according to the proportional legal responsibility of each defendant. As with most issues, the plaintiff bears the burden of proving how much of his damage was caused by each defendant.

"Joint and several" liability is a departure from this practice, in which each of several defendants is liable for the entirety of plaintiff's damage award. Plaintiff may choose to enforce the whole award against any one defendant, whose only recourse lies in any right he may have to bring a separate action for "contribution" from other liable parties.

As discussed in this chapter, joint and several liability at common law arises in two distinct circumstances. First, where two or more people act culpably and in concert to injure another, liability may be joint and several. Even where it may be practicably possible to apportion damages (i.e., the cost of a broken arm to one party, a broken leg to another), the law, as a policy matter, elects not to do so. Joint and several liability serves to punish and deter this sort of culpable, conspiratorial behavior.

The second context where joint and several liability may apply is when there is no known means for dividing the damages among the defendants. Here the law has a practical concern that a meritorious plaintiff should not go uncompensated because he cannot prove which defendant did what damage. Because solely pragmatic reasons underlie this rule, its practical effect is simply to shift the burden of proving apportionment onto defendants. If defendants can successfully bear this burden, damages are not "indivisible," and there is no longer any basis for joint and several liability.

Among the most controversial issues that the courts will be called upon to decide under Superfund is whether liability for response costs should be apportioned or joint and several. Although this question is presented most directly by the liability provisions of section 107, essentially the same considerations also apply when the government brings an "imminent and substantial" abatement action under section 106.[1] Before addressing this issue in the context of a multi-generator waste site, however, it is useful to summarize briefly the nature and development of joint and several liability at common law.

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[1] See chapter 4 at IV-16.

A. The Nature and Development of Joint and Several Liability at Common Law.

The concept of joint and several liability originated in 17th century English cases where a group of individuals banded together to commit an intentional, and usually criminal, act. The theory behind the imposition of joint liability on each member of the group was that because "all [are] coming to do an unlawful act, . . . the act of one is the act of all."[2] Traditionally, these cases involved a common purpose, with mutual aid in carrying it out. Prominent examples included group assault or group trespass.[3]

Where concerted action was proved, courts eventually extended joint and several liability to jointly negligent actions. A classic example involved two defendants engaged in a horse race on a crowded street, and when one of the defendants injured a bystander, both defendants were held to be jointly and severally liable. Hanrahan v. Cochran, 42 N.Y.S. 1031, 1032-33 (1896). The court reasoned that the race itself was a negligent creation of risk, and defendants' joint participation rendered them both fully responsible. Id. at 1033.

Even in the absence of concerted action, courts at about the same time extended joint and several liability to

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[2] See Sir John Heydon's Case, 77 Eng. Rep. 1150 (1613), and other English cases cited in Prosser, The Law of Torts 291.

[3] Prosser at 291-92.

defendants having a common duty that they negligently failed to discharge. Here, the classic case involved landowners who failed to maintain a party wall, causing it to fall and injure a third party. See, e.g., Simmons v. Everson, 25 N.E. 911 (N.Y. 1891).

More recently, the doctrine has been extended to cover multiple defendants not acting in concert or in violation of a common duty, where their actions independently created an indivisible harm. The rationale of these cases is that the plaintiff may be confronted with an impossible task of identifying the damages for which each defendant is responsible and that, consequently, he may be denied recovery unless defendants are held jointly and severally liable. Such liability may be imposed "where either cause would have been sufficient in itself to bring about the result, as in the case of merging fires which burn a building."[4]

The "indivisible harm" theory has sometimes been applied in products liability cases, but, even there, the recurrent theme has been that the deserving plaintiff may not recover at all due to his inability to attribute a specific portion of his harm to each responsible defendant. In practical effect, then, these cases represent not so much a judicial dissatisfaction with apportionment as a shift of

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[4] Prosser at 316. See also Restatement (Second) of Torts, §§ 433A & 433B, illustrations; Seckerson v. Sinclair, 140 N.W. 239 (N.D. 1913).

the burden of proving apportionment from a plaintiff to defendants. See Borel v. Fibreboard Paper Products Corp.[5]

Even as the doctrine has more recently evolved, joint and several liability is appropriate under common law only when certain conditions are met. If defendants' actions were intentional, joint and several liability clearly applies. The same is true of concerted negligent action or defendants' failure to satisfy a common duty.

In other cases, however, application of the doctrine is much more problematical. The courts have applied the doctrine in the case of an "indivisible harm," but usually only in the context of providing recovery to a deserving plaintiff who otherwise might be denied recovery because he could not attribute specific portions of his harm to individual defendants. Nowhere does the common law provide for joint and several liability when defendants are not reckless or negligent, when they are distant in place and time from the actual harm suffered by plaintiff or where an industry-financed fund was created to ensure that plaintiff's harm does not go unrecompensed absent joint and several liability. These are, of course, precisely the circumstances the

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[5] 493 F.2d 1076, 1095 (5th Cir. 1973), cert. denied, 419 U.S. 869 (1974) (insulation worker suffering asbestosis recovered from asbestos insulation producers); see also Hall v. E.I. du Pont de Nemours & Co., 345 F. Supp. 353, 371 (E.D.N.Y. 1972), aff'd sub nom Ball v. E.I. du Pont de Nemours & Co., 519 F.2d 715 (6th Cir. 1975) (children injured by blasting caps recovered from explosive manufacturers).

courts will face in deciding whether to apply joint and several liability to Superfund defendants.

B. Possible Application of Joint and Several Liability to Multigenerator Hazardous Waste Sites.

Since the passage of Superfund, government officials have claimed that joint and several liability may be imposed against defendants in appropriate cases.[6] Moreover, Justice Department and EPA enforcement attorneys routinely assert joint and several liability against allegedly responsible parties, and the threat of joint and several liability is used as a strong bargaining lever to force settlements.[7]

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[6] See, e.g., Remarks of Carol E. Dinkins, Ass't Atty. Gen., Land and Natural Resources Division, U.S. Dept. of Justice, at Federal Bar Association Panel Presentation on "New Programs and Policies in the Department of Justice" 7 (Sept. 9, 1981). Ms. Dinkins did not suggest that joint and several liability was always appropriate. Id. at 7-8. Nevertheless, complaints filed to date have consistently alleged joint and several liability against all defendants. Note, Joint and Several Liability for Hazardous Waste Releases Under Superfund, 68 Va. L. Rev. 1157, 1190 n.127 (1982). EPA's Acting Director of Waste Programs Enforcement, Gene Lucero, also has indicated that joint and several liability will be asserted routinely. 10 Pest. & Toxic Chem. News, Nov. 3, 1982, at 17.

[7] Former EPA enforcement counsel William Sullivan argued that the threat of joint and several liability might play a "tremendous role" in settlement negotiations. 12 Env. Rep. (BNA) 1284 (1982). The threat of joint and several liability is implicit in EPA's "demand letters" seeking voluntary compliance. See Haz. Waste Lit. Rep. at 2376-90 (May 4, 1982). The states have been even more extreme in their

(Footnote [7] continued on next page.)

What would joint and several liability mean if it were applied to the typical dump site? In some cases, old disposal sites are located on the property of the company that generated the waste and, accordingly, only one party is responsible. More typically, however, many companies will have generated and shipped waste to a dump. Shipment may have occurred through a variety of transportation or disposal companies. And ownership and operation of the site itself may have changed hands several times.

The facts and circumstances applicable to this multitude of parties may be infinitely variable: generators will have deposited different wastes, of different toxicities, in different quantities, at different times. Generators may have been more or less careful in selecting transporters or waste disposal companies. Often they may have entered into contracts transferring liability to the disposal company. Transporters, in turn, may range from highly professional disposal operators to fly-by-night haulers. Operators may have run their site carelessly or well, often pursuant to state permits. Prior operators may have been careful and subsequent operators careless, or vice versa.

(Footnote [7] continued from previous page.)

assertion of joint and several liability. For example, in Ohio's letters regarding the Chem-Dyne site, the State expressly asks each potential defendant to pay the full cost of clean-up (in excess of $20 million). See letter from William J. Brown, Attorney General of Ohio re Chem-Dyne, Inc. (March 26, 1982).

Joint and several liability would make all of these distinctions irrelevant. All that would be required is that the government plead a valid cause of action under sections 106 or 107,[8] prove its case, and then enforce all or part of the judgment against any defendant[s] it chooses. Even if one assumes that the government would not enforce the judgment in a capricious manner, two critical issues are presented: (1) whether solvent responsible parties (who may or may not be at fault) should pay the share of absent or insolvent parties, or whether the federal Fund created under section 221 should pay, and (2) who should bear the burden of pursuing other responsible parties to make them pay their share once a solvent responsible party is found.

One solution is for the government to pursue all known responsible parties to secure payment of their fairly apportioned share and for the remainder to be paid by the Fund. Another is to permit joint tortfeasors who have been held fully liable to pursue other joint tortfeasors in contribution suits to recover their fair shares. Both of these approaches are discussed in detail in this chapter.

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[8] The government has argued that the standard of conduct under § 107 applies to § 106 abatement actions as well. See, e.g., Memorandum of Plaintiff United States of America in Opposition to Defendant Gould, Inc.'s Motion To Dismiss the Amended Complaint, filed in United States v. Wade, Civ. No. 79-1426 at 26-32, (Memorandum filed April 22, 1982).

C. Issues Addressed and Summary of Conclusions

The first question addressed by this chapter is whether Superfund itself provides for joint and several liability. The answer is that Superfund neither provides for nor permits imposition of joint and several liability. Such liability would be inconsistent with statutory provisions allowing claims against the Fund to prevent a partially responsible party from having to bear more than his fair share. Moreover, it is highly implausible that Congress would have imposed joint and several liability -- without even mentioning the term -- while simultaneously creating a Fund financed by taxes on industry to pay for response costs when private parties are absent or insolvent.

This conclusion is supported by the legislative history. Both the original House and Senate bills expressly provided for joint and several liability. Congress deliberately removed this language from the final bill as part of a compromise to secure passage of Superfund. In light of this legislative history, the only reasonable conclusion is that Congress opted for a more traditional apportionment approach instead of joint and several liability.

Nevertheless, scattered statements during the closing debates hint that joint and several liability, although deleted from Superfund as enacted, could still be applied by the courts under evolving common law doctrines. Assuming arguendo that these statements rather than the statutory

text and better reading of the legislative history were accepted, it would then be necessary to determine what source of law to consult in deciding when to apply apportionment or joint and several liability. Regardless of whether admiralty law, state common law, or federal common law derived from these sources were employed, liability for clean-up of old dump sites should still be apportioned.

The final question addressed by this chapter is whether, assuming joint and several liability were imposed, a right of contribution exists under Superfund. As we show, both the statute and common law provide for such a contribution action. The basis for contribution generally will be relative causation, but considerations of fault may also play a role.

I. NEITHER THE STATUTORY TEXT NOR ITS LEGISLATIVE HISTORY PROVIDES FOR JOINT AND SEVERAL LIABILITY.

A. The Statutory Text Is Inconsistent with Joint and Several Liability.

Read as a coherent whole, even without resort to the legislative history, the statutory text suggests that Congress intended apportionment rather than joint and several liability. First and most obviously, joint and several liability is nowhere mentioned in the statute. The only even arguably relevant reference, section 101(32), incorporates the standard of liability under section 311 of the Federal Water Pollution Control Act. But as discussed infra

section 311 provides little guidance on the issue of joint and several liability for generators under Superfund.

Looking beyond these general considerations, the $1.6 billion Response Fund eliminates any reason for joint and several liability. The basis for such liability, to ensure that an innocent plaintiff is compensated, Huddell v. Levin, 537 F.2d 726, 746 (3d Cir. 1976) (Rosenn, J., concurring), is absent where the Fund is available to reimburse plaintiff's damages. Members of the chemical industry are required to contribute to the Fund precisely so that there will be resources to pay for response costs in the absence or insolvency of responsible parties and so that other defendants will not be forced to bear costs for which they are not responsible.

The inconsistency of joint and several liability and the Act's Response Fund is further demonstrated by the claims procedures of sections 111 and 112. Where a private party has incurred cleanup costs, section 111(a)(2) provides that the Fund shall be used to pay "any claim for necessary response costs incurred by any other party [not the government] as a result of carrying out the national contingency plan." And section 112 sets forth the procedure for private parties to bring such claims, with subsection (a) requiring that claims "be presented in the first instance to the owner, operator or guarantor of the vessel or facility from which a hazardous substance has been released." In

cases where "a liable party is unknown or cannot be determined," section 112(b) provides for recovery from the Fund.

The claims procedures of sections 111 and 112 demonstrate two important principles of the Act. First, they indicate that one party should not be required to pay all cleanup costs from a site where multiple parties are partially responsible. To the contrary, section 112 strongly implies that each party will be required to pay only his fair share. Second, where some responsible parties cannot be identified, section 112 makes clear that the Fund is to pay their share. The basic thrust of joint and several liability is precisely to the contrary -- that is, to make one responsible party potentially liable for the entire burden for all responsible parties, including those that are absent or insolvent.

B. The Legislative History Shows That Congress Deliberately Rejected Joint and Several Liability.

The omission of joint and several liability from the statutory language was no accident, as the legislative history amply demonstrates. The question of joint and several liability was among the most controversial issues debated in connection with Superfund.[9] Bills considered by the Senate

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[9] See, e.g., 126 Cong. Rec. S15004 (remarks of Sen. Helms), id. at S15008 (remarks of Sen. Stafford) (daily ed. Nov. 24, 1980).

and passed by the House would have provided expressly for joint and several liability, tempered by statutory provisions for apportionment of damages among defendants in certain situations. As discussed below, however, even the advocates of this severe liability regimen conceded that such provisions were widely regarded as extreme and punitive and could not be enacted.

1. Both original House and Senate bills provided expressly for joint and several liability.

Bills considered by both the House and the Senate would have imposed joint and several liability on Superfund defendants. The bill reported by the Senate Committee on Environment and Public Works provided that specified persons "shall be jointly, severally, and strictly liable," subject to certain defenses. S. 1480, § 4(a). Similarly, H.R. 7020, the bill originally passed by the House, provided that "liability shall be joint and several" among persons who "caused or contributed to" a release. H.R. 7020, § 3071(a)(1).

Even S. 1480 and H.R. 7020, however, would not uniformly have imposed joint and several liability in all cases. Rather, both bills provided for some apportionment of liability although their provisions differed substantially, with S. 1480 providing a far more limited exception to joint and several liability. Compare H.R. 7020 § 3071(a)(3) with S. 1480 § (4)(f).

Under the House bill, joint and several liability was mitigated by two provisions for apportionment. First, if a defendant established that "only a portion of the total costs . . . are attributable to hazardous waste" that he generated, transported, treated, stored, or disposed of, the defendant could be held liable only for that portion of the costs. H.R. 7020, § 3071(a)(3)(A). Second, if apportionment was not established by the defendant under subparagraph (A), the court could apportion liability among the parties "based upon evidence presented by the parties as to their contribution," considering several additional factors including the relative quantity and toxicity of the parties' wastes, and the defendants' relative culpability. H.R. 7020, § 3071(a)(3)(B). With these provisions for apportionment, H.R. 7020 passed the House.

S. 1480 also would have provided that a defendant's liability "shall be limited to that portion of the release or damages to which such person contributed," but only where the defendant could show by a preponderance of the evidence that his contribution could be distinguished or apportioned, and that his contribution was not a "significant factor" in causing or contributing to the release or damages. S. 1480, § 4(f)(1) (emphasis added).[10] In addition, S. 1480 would

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[10] In addition, the Senate Report held out the prospect of apportioning liability even among "significant contributors." Thus, the Report notes that "courts have exercised

(Footnote [10] continued on next page.)

have established a right of contribution for any defendant held jointly and severally liable. S. 1480, § 4(f)(2). On its face, however, the "significant factor" test in the Senate bill was so limiting that few defendants could have qualified for statutory apportionment.

2. The liability provisions of both bills were rejected as too "punitive."

Despite these mitigating provisions for apportionment and contribution, the Senate concluded that the liability provisions of both H.R. 7020 and S. 1480 were too severe. Senator Stafford, the sponsor of the Senate bill and the ranking minority member of the Committee on Environment and Public Works, noted that many of his colleagues "perceive[d] [S. 1480] as punitive and unnecessarily rigorous."[11] Senator Helms emphasized that the earlier bill had received "well-deserved criticism," because the standards of liability were "grossly unfair."[12] Similarly, Senator Riegle

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(Footnote [10] continued from previous page.)

their equitable powers to occasionally limit liability even for significant contributors, and this discretionary power is likely to continue to be exercised." S. Rep. No. 848, 96th Cong., 2d Sess. 38 (1980).

[11] 126 Cong. Rec. S14967 (daily ed. Nov. 24, 1980) (emphasis added).

[12] Id. at S15004.

commended the compromise legislation, suggesting that the earlier bill had been "too burdensome or punitive."[13]

As a result, Senator Stafford, one of the key architects of both S. 1480 and the final Superfund legislation, conceded, "the fact remains that at this time and in this place S. 1480 cannot be enacted."[14] Thus, Stafford recognized the "strong concern and opposition" to the bill, which required "major concessions" by the bill's sponsors to obtain passage.[15] Accordingly, even with a mitigating provision for apportionment, the liability provisions of S. 1480 were considered too punitive, and Senator Stafford and other sponsors of the legislation turned to a compromise approach that did not employ joint and several liability.

The sponsors' original compromise, however, was insufficient, and "there remained strong concern and opposition to even that measure."[16] As a result, the sponsors undertook a "new round of negotiations." As described by Senator Stafford:

> With the approval of the distinguished majority leader . . . and with the strong support and cooperative spirit of the distinguished minority leader . . . who made available his office as well as

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[13] Id. at S15007 (emphasis added).

[14] Id. at S14968 (emphasis added).

[15] Id.

[16] Id. at S14967 (remarks of Sen. Stafford).

> his leadership and guidance, we met in extended sessions with a number of Senators and their staffs.
>
> During those meetings, a new compromise was shaped . . .[17]

That compromise bill dropping joint and several liability eventually passed the Senate.

Following Senate passage of the relaxed liability provisions of the compromise bill, the language was presented to the House as a fait accompli. As described in the House debate, the Senate presented the House with an "ultimatum" that the Senate bill be passed without amendments, or the Senate would "kill the whole product."[18] And the threat of losing the legislation controlled -- to avoid a conference committee, the House passed the Senate bill without any changes.

3. Congress intentionally eliminated joint and several liability to secure passage of the compromise bill.

Because the compromise bill arose in the Senate, greater weight should be ascribed to the Senate debates when attempting to determine what Congress intended. As described by Senator Stafford as well as other Senators, the

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[17] Id. The record is replete with references to the final bill as a compromise. See, e.g., id. at S14964 (remarks of Sen. Randolph), S15004 (remarks of Sen. Helms), S15008 (remarks of Sen. Stafford).

[18] 126 Cong. Rec. H11791 (comments of Rep. Harsha), H11792 (comments of Rep. Breaux) (daily ed. Dec. 3, 1980).

deletion of joint and several liability was deliberate and, indeed, essential to achieve enactment. In Senator Stafford's words:

> . . . I am a realist and know that many perceive [S. 1480] as punitive and unnecessarily rigorous. For that reason Senator Randolph and I introduced [a compromise bill] last week.
>
> * * *
>
> We eliminated the term joint and several liability.[19]

Likewise, Senator Cohen stressed that the elimination of any reference to joint and several liability was a "concession" essential to the passage of Superfund in the Senate.[20] Senator Helms made the same point, noting that "among the concessions in [the] Stafford-Randolph compromise" was the "eliminat[ion] [of] joint and several liability."[21] In the House debate, Representative Jeffords stressed that "this version of the superfund legislation is somewhat weaker with regard to imposing liability," than H.R. 7020, which nominally applied joint and several liability but which actually provided for apportionment in many situations.[22]

Senator Helms explained the problems with joint and several liability as follows:

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[19] Id. at S14967 (daily ed. Nov. 24, 1980).

[20] Id. at S14980.

[21] Id. at S15004.

[22] Id. at H11799 (daily ed. Dec. 3, 1980).

> Retention of joint and several liability in S. 1480 received intense and well-deserved criticism from a number of sources, since it could impose financial responsibility for massive costs and damages awards on persons who contributed only minimally (if at all) to a release or injury. Joint and several liability for costs and damages was especially pernicious in S. 1480, not only because of the exceedingly broad categories of persons subject to liability and the wide array of damages available, but also because it was coupled with an industry-based fund. Those contributing to the fund will frequently be paying for conditions they had no responsibility in creating or even contributing to. To adopt a joint and several liability scheme on top of this would have been grossly unfair.[23]

Consequently, Congress concluded that joint and several liability was unfair and should be eliminated:

> The drafters of the Stafford-Randolph substitute have recognized this unfairness, and the lack of wisdom in eliminating any meaningful link between culpable conduct and financial responsibility. Consequently, all references to joint and several liability in the bill have been deleted.[24]

In short, there can be little doubt why Congress eliminated joint and several liability. Even as tempered by apportionment provisions, the liability standards of earlier bills, including especially S. 1480, were considered too

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[23] Id. at S15004 (daily ed. Nov. 24, 1980).

[24] Id. (remarks of Senator Helms). Likewise, Senator Riegle praised the compromise as a "measure that represents a positive step toward insuring a safe environment without being too burdensome or punitive on our necessary and valuable chemical industry." Id. at S15007.

severe.[25] The rejection of joint and several liability necessarily invokes traditional apportionment principles, making each defendant liable only for that portion of the harm that he caused.

C. The Legislative History May Be of Assistance to the Courts in Apportioning Damages Under the Act.

Once it is determined that apportionment, not joint and several liability, is the rule, the question is how damages should be apportioned. Superfund provides no express guidance on this point, although the statutory framework itself may provide assistance. Causation is required for liability under section 107,[26] strongly suggesting that relative or proportional causation should be one basis for apportionment. Causation might permit apportionment in a "horizontal" setting among a group of generators but might be more difficult to apply in "vertical" setting between a generator and his disposal site owner or an operator. In a "vertical" situation (i.e., between a generator and either his transporter or the site owner), apportionment on the

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[25] Contrary statements in the House debate by Congressman Florio do not explain why joint and several liability was dropped and, in any event, cannot override the explicit statements of Senators Stafford, Helms, Cohen and others in the Senate debates. The compromise was brokered in the Senate and not in the House, and it is the Senate's explanation, not the post facto views of Congressman Florio, that provide the better source of legislative history.

[26] See chapter 3.

basis of relative fault would seem more practical, although no statutory language expressly dictates this result.[27]

In the absence of clear statutory direction, courts may wish to consider the legislative history of Superfund. Perhaps the best reference point in the legislative history is the apportionment scheme outlined in section 3071(a)(3)(A) of H.R. 7020. Although this provision never became law, it suggests that Congress considered apportionment to be practicable and provides one reasonable approach for dividing damages among liable defendants.

Under section 3071(a)(3)(A) of H.R. 7020, if a generator could have established by a preponderance of the evidence "that only a portion of costs . . . are attributable to hazardous waste generated . . . by him, such generator . . . shall be liable under this subsection only for such portion." As among generators, the bill apportioned damages based on that part of total response costs attributable or caused by each defendant's wastes.

The House bill recognized, however, that in some cases it would be impossible to link specific cleanup operations to a specific generator's wastes and thus went on to provide a secondary means for apportioning damages. In apportioning damages, therefore, the courts were directed to consider the following factors:

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[27] Fault will continue to play a role in assigning liability under Superfund. See chapter 4.

> (i) the ability of the parties to demonstrate that their contribution to a discharge, release, or disposal of a hazardous waste can be distinguished;
>
> (ii) the amount of hazardous waste involved;
>
> (iii) the degree of toxicity of the hazardous waste involved;
>
> (iv) the degree of involvement by the parties in the generation, transportation, treatment, storage, or disposal of the hazardous waste;
>
> (v) the degree of care exercised by the parties with respect to the hazardous waste concerned, taking into account the characteristics of the waste;
>
> (vi) the degree of cooperation by the parties with Federal, State, or local officials to prevent any harm to the public health or the environment.

H.R. 7020, § 3071(a)(3)(B).[28] Although part of a bill admittedly more stringent than the compromise eventually enacted, these criteria could provide guidance not only for apportioning damages among generators, but also among a generator, his transporter and the disposal site owner or operator.

Where some responsible parties are not before the court, either because they cannot be identified or they have gone out of business, the Fund would pay their share of the costs. This approach is supported by the House Report on H.R. 7020, which states that "if one of the parties is

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[28] The Senate bill was intended to employ these same factors in apportioning liability among "non-significant" contributors. S. 1480, § 4(f)(4).

ordered to take actions which result in his expenditure of more than that which he establishes is his proportionate share, he may recover the excess amount from the fund."[29] This policy is carried forward in Section 112(b) as enacted, which provides that when "a liable party is unknown or cannot be determined," a party may recover from the Fund.

In short, the apportionment provisions of H.R. 7020, while in no sense binding, suggest the following approach in apportioning damages. As among various generators sharing liability for a multigenerator site, costs should be apportioned based on that portion of the response costs caused by each defendant. In many cases, this may be determined simply by the quantity of wastes deposited by each generator at the site.[30] As among a generator, his transporter, and a site owner and operator, relative causation will be more difficult to measure, and, consequently, courts are likely to rely more heavily on relative fault in apportioning liability.

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[29] H.R. Rep. No. 1016, 96th Cong., 2d Sess. 29 (1980).

[30] Where one or more generators have been negligent, however, and thereby contributed more than their proportional share to the release or threat of release, courts are likely to consider the relative degrees of culpability of generators in apportioning damages. Such an approach is consistent with the legislative history and with the common law precedents, discussed infra at I-54.

II. EVEN IF THE ISSUE WERE LEFT OPEN BY SUPERFUND, COMMON LAW WOULD NOT PROVIDE FOR JOINT AND SEVERAL LIABILITY AMONG GENERATORS.

As summarized above, the best interpretation of the statutory text and the legislative history is that Congress explicitly rejected joint and several liability. Sponsors of the earlier bills, however, attempted to salvage joint and several liability by arguing in debate that the issue should be resolved by reference to the common law.

For example, Representative Florio noted that although joint and several liability was deleted from the bill, it might still be applied in "appropriate circumstances," such as "where several persons have often contributed to an indivisible harm."[31] Senator Randolph explained the deletion of joint and several liability not as a "rejection of the standards in the earlier bill," but rather as a "recognition of the difficulty in prescribing in statutory terms liability standards which will be applicable in individual cases."[32]

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[31] 126 Cong. Rec. H11787 (daily ed. Dec. 3, 1980). Representative Florio also introduced a letter from the Justice Department that concluded that the deletion of joint and several liability "does not in any way preclude courts from imposing joint and several liability where appropriate." Id. at H11788 (letter to Representative Florio from Alan A. Parker, Assistant Attorney General, Office of Legislative Affairs). See also id. at H11799 (remarks of Representative Waxman) suggesting the same result.

[32] Id. at S14964 (daily ed. Nov. 24, 1980). Senator Stafford also noted that automatic joint and several liability was deleted, but left open the possibility that joint and several liability might be imposed by reference to other sources of law. Id. at S15008.

Plaintiffs can be expected to rely on these floor statements as support for joint and several liability. But even if this version of Congress' actions were accepted, joint and several liability would not be the rule under Superfund, because it is contrary to the common law.

A. If the Issue Remained Open for Judicial Interpretation, the Courts Would Have To Evolve a Federal Rule or Defer to State Law in Deciding Liability and Apportionment Issues.

If, contrary to the discussion in Part I supra, the courts look beyond Superfund to fashion a common law standard of joint liability, they will confront questions of which source of law to employ. Would the courts attempt to fashion their own rule or would they rely on state tort law? And if they choose to develop a federal rule, what sources would they consult in devising such a rule? We now turn to these questions.

Courts fashion federal rules in two distinct circumstances: first, to fill undefined interstices in federal statutory schemes, and second, to create new remedies. Only in the former instance have courts generally been willing to formulate federal common law rules.

The distinction between filling in statutory gaps and creating new remedies is illustrated by the Supreme Court's recent decision in City of Milwaukee v. Illinois, 451 U.S. 304 (1981) (Milwaukee II). The Court in Milwaukee II addressed whether a federal common law nuisance action

existed following the 1972 amendments to the Federal Water Pollution Control Act. Although the Court had previously endorsed a federal common law nuisance action in the same case, 406 U.S. 91 (1972), it held that the 1972 amendments "occupied the field through the establishment of a comprehensive regulatory program," thus eliminating the need for federal common law. 451 U.S. at 317. In so holding, the Court stressed that there was no "interstice" in the statutory scheme "to be filled by common law." Id. at 323.

Where statutory gaps exist, however, federal common law has often developed. For example, in United States v. Little Lake Misere Land Co., 412 U.S. 580 (1973), the Court confronted contractual and property issues pertaining to the federal government's acquisition of land under the Migratory Bird Conservation Act. Stressing that the acquisition was "one arising from and bearing heavily on a federal regulatory program," id. at 592, the Court ruled that federal, rather than state, common law applied because "interstitial federal lawmaking is a basic responsibility of the federal courts." Id. at 593.

The fact that Superfund is a federal statute does not, however, necessarily mean that unresolved questions must be settled by a federal rule.[33] Rather, federal common law

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[33] See United States v. Yazell, 382 U.S. 341 (1966) (applying state common law to issues surrounding a Small Business Administration loan); Wallis v. Pan American Petroleum Corp., 384 U.S. 63, 69-71 (1966) (applying state common law under the Mineral Leasing Act of 1920).

is appropriate only: (1) when there is a need for a uniform national standard or (2) when paramount federal policies are at stake that should be effectuated by federal courts.

The former concern has been used as a reason for federal common law in cases involving United States commercial paper. For example, in Clearfield Trust Co. v. United States, 318 U.S. 363 (1943), the Court fashioned federal common law to avoid "great diversity in results by making identical transactions subject to the vagaries of the laws of the several states." 318 U.S. at 367. And in D'Oench Duhme & Co. v. Federal Deposit Ins. Corp., 315 U.S. 447 (1942), Justice Jackson in a concurring opinion stressed that financial issues are not questions "to be answered from considerations of geography." Id. at 473.

The need for national uniformity on hazardous waste disposal liability is less compelling than for financial instruments moving in commerce throughout the country. Hazardous waste disposal site liability traditionally has been addressed by the state common law of nuisance, with no noticeable harm from a lack of uniformity. Indeed, in past cases, the Supreme Court has held that land-related issues are local in character and do not call for federal common law. See Mason v. United States, 260 U.S. 545 (1923) (a suit by the U.S. over title to allegedly public lands);

Wallis v. Pan American Petroleum Corp., supra note 33 (involving oil and gas rights on federal lands).[34]

Federal common law might also be justified on the ground that Superfund involves fundamental federal policies and therefore requires uniform federal common law to ensure that the policies are fulfilled. The federal labor laws are an example where this rationale has justified the development of federal common law. Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957).[35]

One factor considered by courts in this connection is whether and to what extent the federal statutory scheme is comprehensive. Where the "policy of the law is so dominated by the sweep of federal statutes," courts have held that "legal relations which they affect must be deemed governed by federal law." Sola Electric Co. v. Jefferson Electric Co., 317 U.S. 172 (1942) (federal common law under the Sherman Act). Similarly, the First Circuit has ruled in O'Brien v. Western Union Telegraph Co., 113 F.2d 539, 541

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[34] But see United States v. Little Lake Misere Land Co., supra I-26, involving mineral rights in land and rejecting the application of state common law partly on the grounds that the specific state law was "aberrant" and "hostile to the interests of the United States." 412 U.S. at 596.

[35] See Note, Joint and Several Liability for Hazardous Waste Releases Under Superfund, 68 Va. L. Rev. at 1177, n.74 citing Lincoln Mills as an example where "[f]ederal courts have created federal common law based on a strong federal policy in cases with weaker statutory bases [than Superfund]."

(1st Cir. 1940), that in regulating telegraph companies Congress "occupied the field by enacting a fairly comprehensive scheme," and accordingly issues unresolved by that scheme "must be governed by uniform federal rules."

A reasonably strong case might be made for federal common law on these grounds. Not only are Superfund's liability provisions "fairly comprehensive," but the legislative history reflects Congress' concern that state laws and decisions might be inadequate to fulfill the federal policy giving rise to Superfund.

Congress' concern is best illustrated by the defeat of a proposal by then-Representative Stockman that would have given the states primary responsibility for cleanup activities. The Stockman alternative was overwhelmingly rejected by Congress, with Representative La Falce noting:

> We cannot have this comprehensive approach if we allow each State to work its own will and come up with some patchwork built across the entire United States of 50 differing laws . . . 50 differing laws dealing with every aspect of this problem.[36]

In the final debates, Representative Florio explicitly argued that "the bill will encourage the further development of a Federal common law."[37]

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[36] 126 Cong. Rec. H9445 (daily ed. Sept. 23, 1980).

[37] Id. at H11787 (daily ed. Dec. 3, 1980) (emphasis added).

Notwithstanding the comprehensive nature of the federal scheme for regulating hazardous wastes, however, it is a close question whether federal common law on liability and apportionment issues is appropriate.[38] Indeed, it is even difficult to say where defendants' interests lie on this question. For example, if state common law calls for apportionment of liability, then industry's interests would be served by application of state law, assuming that the issue were not deemed decided by the statutory text and legislative history discussed in Part I, supra. But if state common law in a specific case calls for joint and several liability, generators may themselves argue for a federal common law, since as discussed below there are good reasons for concluding that apportionment rather than joint and several liability would be the federal rule.

B. As Sources for a Federal Rule, Admiralty and State Law Would Not Impose Joint and Several Liability.

If a federal rule were to be developed, courts would be likely to turn first to admiralty precedents. The federal

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[38] To the contrary is a series of decisions holding that state statutes of limitations are to be applied to federal claims where Congress did not establish a specific limitations period. See, e.g., Rawlings v. Ray, 312 U.S. 96 (1941); Campbell v. Haverhill, 155 U.S. 609 (1895). These cases make clear, however, that the choice of a statute of limitations period "is ultimately a question of federal law," and the adoption of state statutes occurs only when "consistent" with national policies in the field. United Auto Workers v. Hoosier Cardinal Corp., 383 U.S. 696, 706 (1966).

common law of admiralty, deriving from the Constitution itself, has perhaps the longest tradition and offers the largest body of federal common law. See Texas Industries, Inc. v. Radcliff Materials, 451 U.S. 630, 642 (1981).

A second source for the development of a federal common law would be existing state tort precedents. For example, in the context of developing a federal common law in the labor area, the Supreme Court held that "state law, if compatible with the purpose of § 301 [of the Labor Management Relations Act] may be resorted to in order to find the rule that will best effectuate the federal policy." Textile Workers Union v. Lincoln Mills, 353 U.S. at 457. See also Illinois v. Milwaukee, 406 U.S. 91, 108 (1972) ("consideration of state standards may be relevant").[39] As summarized below, neither of these sources calls for the imposition of joint and several liability.

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[39] But see Chicago, Milwaukee, St. Paul and Pacific Ry. v. United States, 575 F.2d 839, 843 (Ct.Cl. 1978), discussing § 311 of the Water Act and concluding:

> We reject at the outset defendant's contention that the tort law of the State of Washington (which defendant asserts, holds that violation of a duty prescribed by statute is negligence per se) has any relevance whatsoever to our analysis. It is a federal statute we are construing.

1. Admiralty law would not impose joint and several liability.

If courts turn to admiralty precedents, damages would be apportioned. In collision cases, the most common admiralty fact pattern raising apportionment issues, courts have based damages on the relative fault of the parties.[40]

The proper apportionment of damages in admiralty cases was resolved definitively by the Supreme Court in United States v. Reliable Transfer Co., 421 U.S. 397 (1975). There, the Court ruled that liability "is to be allocated among the parties proportionately to the comparative degree of their fault." 421 U.S. at 411. The Court went on to hold that an "equal division of damages is a reasonably satisfactory result" in cases where "each vessel's fault is approximately equal and each vessel thus assumes a share of the collision damages in proportion to its share of the blame, or where proportionate degrees of fault cannot be measured and determined on a rational basis." 421 U.S. at 405. The Reliable Transfer case is especially helpful to generators, because it suggests that even where damages are practically indivisible they should be apportioned evenly among defendants.[41]

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[41] Gilmore & Black, The Law of Admiralty 492 (2d ed. 1975). See also Cooper Stevedoring Co. v. Kopke, Inc., 417 U.S. 106, 108 n.3 (1974).

[41] The principle of dividing damages equally in admiralty collision cases has a long tradition. See, e.g., The Schooner Catharine v. Dickinson, 58 U.S. 170 (1855); Weyerhauser S.S. Co. v. United States, 372 U.S. 597 (1963).

Even if courts were to ignore the admiralty precedents,[42] however, the existing body of state tort law strongly favors apportionment.

2. Because the common law favors apportionment of damages, joint and several liability would not be imposed unless damages cannot be apportioned.

Even at common law, joint and several liability was never the rule unless defendants caused an indivisible harm.[43] The courts generally favor apportionment of damages whenever possible. Prosser has noted that "entire liability will be imposed only where there is no reasonable alternative."[44] Similarly, the Restatement establishes the presumption that "[i]f two or more persons, acting independently, tortiously cause distinct harms or a single harm for which there is a reasonable basis for division according to

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[42] In the federal common law built up around the antitrust statutes, liability has been held to be joint and several. See Texas Industries, 451 U.S. at 646. In this case, however, the Supreme Court emphasized the punitive nature of the liability under the Sherman Act as justification for imposing damages in excess of those for which the defendant was responsible. Id. at 639. By contrast, under Superfund, there is no punitive purpose, and the Fund is intended to pay any excess, unapportioned damages.

[43] Restatement (Second) of Torts, §§ 879, 881.

[44] Prosser at 314. See, e.g., Hall v. Frankel, 197 N.W. 820 (Wis. 1924) (apportionment among separate repetitions of the same defamatory statement); Embrey v. Borough of West Mifflin, 390 A.2d 765 (Pa. 1978) (apportionment of traffic death damages between negligent traffic control and hospital malpractice).

the contribution of each, each is subject to liability only for the portion that he has caused."[45]

The key question then is whether there is any rational basis for dividing the damages among the defendants. The proof of the proportion caused by each defendant need not be exact. Prosser has stated:

> The requirements of proof usually have been somewhat relaxed in such cases, and it has been said that no very exact evidence will be required, and that general evidence as to the proportion in which the causes contributed to the result will be sufficient to support a verdict . . .. As a last resort, in the absence of anything to the contrary, it has been presumed that certain causes are equally responsible, and the damages have been divided equally between them.[46]

The acceptability of only rough apportionment of damages is illustrated by example in the Restatement:

> Five dogs owned by A and B enter C's farm and kill ten of C's sheep. There is evidence that three of the dogs are owned by A and two by B, and that all of the dogs are of the same general size and ferocity. On the basis of this evidence, A may be held liable for the death of six of the sheep and B liable for the death of four.[47]

By rough analogy, this example would suggest that damages might be apportioned among generators based on evidence of

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[45] Restatement (Second) of Torts, § 881.

[46] Prosser at 319. See, e.g., Miller v. Prough, 221 S.W. 159 (Mo. App. 1920); Wood v. Snider, 79 N.E. 858 (N.Y. 1907).

[47] Restatement § 433A, illustration 3.

their relative quantities of comparably toxic waste at a site.[48]

3. In pollution-related cases, damages have generally been apportioned.

The courts have generally followed the common law presumption favoring apportionment in pollution-related cases. Although few hazardous waste disposal cases have been decided at state common law, they too seem to favor apportionment. Taking the hazardous waste cases first, the court in United States v. Vertac Chemical Corporation, elected to apportion liability among two defendants partially responsible for discharging dioxin, but gave the defendants the opportunity first to negotiate a sharing arrangement. 489 F. Supp. 870 (E.D.Ark. 1980). Damages also were apportioned in New Jersey v. Chemical & Pollution Sciences, Inc., 2 Chem. & Rad. Waste Lit. Rep. 673 (N.J. Super. 1981), where the court distinguished the differing chemical identities of the wastes dumped by two defendants and, though noting that "there was some overlapping" of substances, the court concluded that "those overlappings tend to balance out." The

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[48] Whatever its other deficiences, the notorious decision Sindell v. Abbott Laboratories, 607 P.2d 924 (Cal.), cert. denied, 449 U.S. 912 (1980), also supports apportionment even in the case of an indivisible harm. In Sindell, mothers sued for injuries to their children caused by using DES. The court used a probability of causation basis to allocate liability among DES manufacturers according to their respective market shares, absent proof that a particular defendant's product caused the injury.

court further held, however, that other damages, from pollution that destroyed all beneficial use of a tract of land, were not divisible, thereby giving rise to joint and several liability. Id. at 679.[49]

But perhaps the clearest indication that cleanup costs are generally divisible, and therefore apportionable, is the settlement agreements signed to date by the government. For example, in the recent Woburn, Massachusetts, agreement between EPA and Stauffer Chemical, EPA agreed to "determine the proportionate responsibility of Stauffer and third parties for the costs incurred," based primarily on the relative quantities of wastes disposed at the site by various generators.[50] Similarly, the government's model settlement agreement in South Carolina Recycling and Disposal, Inc. calls upon settling defendants to pay their "pro rata share"

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[49] Apportionment was rejected in New Jersey v. Ventron, a case decided under a New Jersey statute explicitly providing for joint and several liability. 3 Chem. & Rad. Waste Lit. Rep. 197 (N.J. Super. 1981). That case involved a suit against a plant dumping mercury waste on-site. As between the two parties operating the mercury plant over the relevant time period, the court found joint and several liability. The court relied both on common law and the New Jersey statute that expressly imposed joint and several liability in hazardous waste cases. Although the court held that damages could not be apportioned due to indivisible harm, the significance of this holding is minimized by the fact that a state statute unambiguously required joint and several liability for clean-up costs.

[50] In the Matter of Stauffer Chemical Company, Westport, Connecticut, EPA Docket No. 82-1070 (May 25, 1982) at 14. See also id., attachments C and D, discussing the apportionment criteria to be employed.

of costs incurred.[51] These recent government settlement decisions have apportioned damages roughly in proportion to the parties' percentage of the volume of waste at the site.

The case for apportioning damages at hazardous waste sites is also significantly strengthened by analogous air and water pollution precedents. Common law pollution cases generally arise under the law of nuisance where pollution "is regarded by the courts as capable of some rough apportionment according to the extent to which each defendant has contributed, and [accordingly] . . . each will be liable only for his proportionate share of the harm."[52]

The Restatement adopts a similar position:

> apportionment is commonly made in cases of private nuisance, where the pollution of a stream . . . has interfered with the plaintiff's use or enjoyment of his land. Thus where two or more factories independently pollute a stream, the interference with the plaintiff's use of the water may be treated as divisible in terms of degree, and may be apportioned among the owners of the factories, on the basis of evidence of the respective

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[51] United States v. South Carolina Recycling and Disposal, Inc., Civ. No. 80-1274-6 (D.S.C.), "Settlement Agreement and Release" at 3. See also Settlement Agreement for the Chem-Dyne site (August 26, 1982), where the government apportioned damages among over 100 parties (see appendix A); Agreement between Inmont Corp. and EPA regarding the Santa Fe Springs, California site, in which the government maintains that the situation "may represent an 'indivisible harm'", but nonetheless provides that the United States will only hold generators liable for their "proportional share of the total costs incurred." Id. at 5.

[52] Prosser at 608.

> quantities of pollution discharged into the stream.[53]

Likewise, recent commentaries discussing the common law before Superfund have noted that "[e]nvironmental damage, such as pollution of a stream by several manufacturers, has been held to be theoretically divisible thus precluding application of joint and several liability."[54]

The possibility of joint and several liability was also rejected in William G. Roe & Co. v. Armour & Co.,[55] 414 F.2d 862 (5th Cir. 1969), where fluorine gas emitted from defendant's plant combined with a spring freeze to damage plaintiff's citrus crop. The Court of Appeals held that the district court was correct to apportion damages, noting that in "the absence of concert of action or the breach of a joint duty," joint and several liability will

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[53] Restatement (Second) of Torts, § 433A, comment d. See Midland Empire Packing Co. v. Yale Oil Corp., 169 P.2d 732 (Mont. 1946); Somerset Villa, Inc. v. City of Lee's Summit, 436 S.W.2d 658 (Mo. 1969); Snavely v. City of Goldendale, 117 P.2d 221 (Wash. 1941). See also Neville v. Mitchell, 66 S.W. 579 (Tex. 1902) (apportionment among noise pollution sources).

[54] Note, Superfund: Conscripting Industry Support for Environmental Cleanup, 9 Ecol. L.Q. 524, 535 (1981).

[55] The court in Roe distinguished cases involving automobile collisions by noting that "defendants who independently pollute the same stream are liable only severally for the damages individually caused." 414 F.2d at 870. In support of apportionment, the court emphasized that the intermingling of otherwise independent tortious acts does not make the torts joint: "such union or intermingling of consequences did not cause the injury by intermingling or contact." Id. (emphasis in original).

not be imposed "simply because two or more causes concur to produce the plaintiff's injuries." Id. at 869.

Notwithstanding the view of commentators and the available precedents, a letter from the Justice Department introduced into the congressional debates by Representative Florio asserted that "common law provides for joint and several liability where the act or omission of two or more persons results in an indivisible injury."[56] Analogizing to water pollution cases, the letter argued that such an "indivisible harm is frequently the situation at hazardous waste sites where many parties have contributed to the contamination or other endangerment and there are no reliable records indicating who disposed of the hazardous wastes (or in what quantities)."[57]

In support of its argument, however, the Justice Department letter cites two Indiana cases, from 1895 and 1904, in which joint and several liability was imposed on defendants in water pollution cases.[58] In both cases, the courts noted that damages normally would be apportioned in water pollution cases, but they found that the action was a public nuisance and that joint and several liability always

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[56] 126 Cong. Rec. H11788 (daily ed. Dec. 3, 1980).

[57] Id.

[59] Id.

applied in public nuisance cases.[59] Not only are these cases against the weight of precedent, but it is highly questionable whether they still constitute good law. Prosser discussed the precedents cited by the Justice Department as follows:

> The distinction made in West Muncie Strawboard Co v. Slack . . . between a public and a private nuisance in this respect [joint and several liability] has nothing to recommend it and was rejected in City of Mansfield v. Brister, 1907, 76 Ohio St. 270, 81 N.E. 631, and Mitchell Realty Co. v. City of West Allis, 1924, 184 Wis. 352, 199 N.W. 390.[60]

In sum, the common law precedents, not to mention hazardous waste cases and the Justice Department's growing practice of apportioning damages, weigh heavily against joint and several liability. Accordingly, even if the issue

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[59] City of Valparaiso v. Moffit, 39 N.E. 909 (Ind. App. 1895); West Muncie Strawboard Co. v. Stack, 72 N.E. 879 (Ind. 1904).

[60] Prosser at 608 n.7. The weight of precedent suggests that pollution damages are divisible and capable of apportionment. These holdings have not been unanimous, however, and there is a possibility of joint and several liability. See, e.g., Landers v. East Texas Salt Water Disposal Co., 248 S.W.2d 731 (Tex. 1952) (plaintiff's lake contaminated by release of saltwater from disposal company's pipeline and oil from oil pipeline held to be indivisible); Phillips Petroleum Co. v. Hardee, 189 F.2d 205 (5th Cir. 1951) (where several companies had discharged saltwater into a creek used for irrigating plaintiffs' rice fields and crop damages were held indivisible). Under the latter case, at least, apportionment was denied because there was no evidence concerning the relative contributions of defendants to the contamination. Id. at 212. In general, the water pollution precedents suggest that Superfund damages should be apportioned.

were not resolved by Superfund's statutory text and legislative history and even if there were need to develop a federal common law rule, that rule would be to apportion damages.

A related issue is who bears the burden of proof that damages are apportionable. Although traditionally the burden of proof on this issue was on plaintiffs, the Restatement has shifted it to defendants.[61] The Restatement goes on to provide that "when the defendant does not sustain his burden of proof as to the extent of his own contribution (see § 433B), he is liable for the entire harm."[62] This principle has been applied in several cases.[63]

The Restatement approach of shifting the burden of proof, however, has not been accepted by many courts.[64] Moreover, "[m]ost courts have refused to apply it where less than all the possible tortfeasors are before the court or where not all have been proved negligent."[65] In addition,

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[61] Restatement (Second) of Torts, § 433B.

[62] Restatement (Second) of Torts, § 840E, comment c.

[63] See, e.g., Borel v. Fibreboard Paper Products Corp., 493 F.2d at 1095 (occupational exposure to asbestos); Michie v. Great Lakes Steel Division, Nat'l Steel Corp., 495 F.2d 213, 218 (6th Cir.), cert. denied, 419 U.S. 997 (1974) (air pollution).

[64] Prosser at 319-20.

[65] See Ginsberg & Weiss, Common Law Liability for Toxic Torts: A Phantom Remedy, 9 Hofstra L.Rev. 859, 898 n.157 (Spring 1981) and cases cited therein.

the proof requirements for apportioning damages have been defined very loosely (see p. I-34 supra), and the significance of which party bears the burden of proof on this issue is therefore lessened.

4. Joint and several liability may be more likely between generators and site owners than among generators.

The strongest policy and practical grounds for apportionment exist among generators sharing a disposal site. The same grounds may not always apply with equal force as between a generator and a waste disposal site owner found liable under Superfund. There are several reasons for this difference. First, as detailed in chapter 3 and elaborated above, relative causation is generally available as a basis for apportionment among generators in a "horizontal" relationship. By contrast, it is likely to be more difficult to apportion cleanup costs on a causation basis for the various parties in a contractual or quasi-contractual "vertical" relationship. And since strict liability is the statute's nominal liability rule,[66] courts may be reluctant to apportion liability based on relative fault in such situations.

Moreover, the common law provides a somewhat weaker argument for joint and several liability in such a "vertical" situation -- although even here the courts have not rejected apportionment. Thus, a plaintiff might argue under

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[66] See chapter 3 at III-29.

common law that a generator should be liable for the torts of his disposal site owner, based on the Restatement, which imposes a duty to inquire about the contractor's practices and reputation as well as a higher duty for more dangerous activities.[67] Plaintiffs also may maintain that generators should be held responsible under the principle that one cannot contract away responsibility for an inherently dangerous activity. To be inherently dangerous under this rule, an activity must present a "peculiar risk of injury . . . unless special precautions are taken."[68]

So far this argument has been unavailing to plaintiffs. The one case to address the issue in the hazardous waste context, Ewell v. Petro Processors of Louisiana, Inc., 364 So.2d 604, 606 (Ct. App. La. 1978), held defendant generators not liable for waste disposal sites run by independent contractors, because such activity is not "inherently or intrinsically dangerous." Rather, the Ewell court emphasized that the contractor "received no instructions as to the method of carrying out the assigned task or the disposal of the waste material," and therefore was not within the control of the generator. Id.[69]

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[67] Restatement (Second) of Torts § 411, comment a.

[68] Prosser at 472. See, e.g., Loe v. Lenhardt, 362 P.2d 312 (Ore. 1961) (spraying pesticides). See also Restatement (Second) of Torts § 427.

[69] The Ewell court did, however, find one generator liable for the nuisance created by the disposal site owner, because

(Footnote [69] continued on next page.)

Still, Ewell is likely to be only the first in a long line of cases to argue for joint and several liability based on ultrahazardous activity and the reckless or negligent conduct of a site owner and operator. And although Ewell points in the opposite direction, plaintiffs will probably rely upon the nominal strict liability standard of Superfund to argue that Congress has essentially defined hazardous waste disposal an ultrahazardous activity. The legislative history, however, is contrary to this view.[70] But even if the argument were to prevail, it would provide joint and several liability only for those in a "vertical" rather than a "horizontal" relationship, as is typically the case among the numerous generators at a multigenerator waste site.

(Footnote [69] continued from previous page.)

that generator had visited the site and therefore was "aware of the leakage at the pits and continued to dump hazardous material at that site." Id. at 608 For the one generator deemed to be liable at all, his liability with the site owner was held to be joint and several. Id.

[70] S. 1480 declared generation and disposal of hazardous waste to be ultrahazardous (see § 3(a)(1)), but this provision was deleted in the final compromise legislation. Although this deletion was not discussed in the Senate debates, it creates the strong inference that Congress considered the issue and intentionally chose not to declare such waste disposal ultrahazardous.

C. Congress' Reference to Section 311 Does Not Provide for Joint and Several Liability.

Plaintiffs may also argue that Superfund's reference to section 311 of the Water Act supports joint and several liability.[71] Congress apparently intended the section 311 reference to apply only to the strict liability/negligence controversy,[72] but even assuming that section 311 has a bearing on joint and several liability, it provides no grounds for imposing such liability on off-site generators.

Before analyzing the cases, two critical differences between section 311 and section 107 must be stressed. First, potentially liable parties under section 311 include only a vessel's owner and operator -- not any other person, such as shippers of materials or generators of the substances spilled. See section 311(f)(1). Second, unlike section 107, section 311 is not supported by a large,

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[71] Of course, section 101(32) of Superfund incorporates section 311 as the Act's standard of liability. Representative Florio suggested that this reference might provide for joint and several liability "under appropriate circumstances." 126 Cong. Rec. H11767 (daily ed. Dec. 3, 1980). Representative Florio's remarks may be discounted, however, since the controlling legislative history regarding joint and several liability is found in the Senate debates. See n.25, supra.

[72] See, e.g., 126 Cong. Rec. S15008 (daily ed. Nov. 24, 1980) (remarks of Senator Stafford); S14964 (remarks of Senator Helms); S14964 (remarks of Senator Randolph); H11787 (remarks of Representative Florio).

industry-financed Response Fund to pay the costs of site cleanup.[73]

The first clear section 311 decision bearing on this point, United States v. M/V Big Sam, 505 F. Supp. 1029 (E.D. La. 1981), aff'd in part, rev'd in part, 17 E.R.C. (BNA) 2169 (5th Cir. 1982), recently held that liability was joint and several for an owner and an operator, largely due to the court's fear that one of these parties might be insolvent and that cleanup costs might go unpaid. 17 E.R.C. at 2174. But neither section 311 nor the court's reasoning in Big Sam provide any guidance regarding whether or not generators -- as opposed to owners and operators -- may be jointly and severally liable under Superfund.

The only parties potentially liable under section 311 -- and the parties held jointly and severally liable in Big Sam -- are a vessel's owner and operator. The Big Sam court stressed that "owner or operator" was a "term of art," describing a specific, very close and usually long-standing "vertical" relationship, characterized by such factors as sharing of insurance against liability from a release. Id. at 2174. These facts, as well as the distinct possibility that cleanup might not be achieved without holding both the owner and operator liable, led to Big Sam's joint and several liability ruling.

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[73] Section 311's "equivalent" of the Response Fund is very small and financed through such limited sources as civil penalties. See Section 311(k)(1).

Applying joint and several liability in these circumstances is nothing more than a logical outgrowth of the "concert of action" or "joint duty" rationales, previously discussed. See pp. I-2 to I-6, supra. It says nothing about whether generators having no relationship to one another should be held jointly and severally liable. To the contrary, the absence of the many factors noted in Big Sam as supporting joint and several liability would seem to weigh heavily against such liability for off-site generators.

Even if Big Sam has application for owners and operators under sections 107(a)(1) and (2), there is no basis for extending this rationale to section 107(a)(3), which potentially imposes liability on generators much further removed from the scene and from the causes of a release. Because section 311 exempts generators from liability altogether, it is implausible to argue that section 311 provides the basis for expanding generator liability under Superfund.

There is still less reason for applying joint and several liability among different generators at a multi-generator site. In such situations, there generally is not even the most remote hint of concert of action, no privity whatsoever, and certainly no "term of art" such as relied on in Big Sam to warrant such an expansion of liability.

The Big Sam case itself illustrates this distinction. There, the vessel owner was causally linked to one hundred

percent of the spill requiring cleanup, because his ship had been held "solely" responsible for the entire discharge. 17 E.R.C. at 2171. The owner had sought to avoid liability on negligence grounds, notwithstanding the nominal strict liability standard of section 311. While not ruling out entirely the relevance of fault considerations, the court held that where the negligent operator was insolvent, the owner must pay the bill. Id. In short, the court did no more than impose liability on a party who was causally responsible for the entire discharge.

By contrast, at a multigenerator site cleaned up under Superfund, any one generator typically will be responsible for only a small percentage of a release or threatened release.[74] Plainly there is a vast difference between imposing joint and several liability among parties such as the site owner and operator having a joint duty to their customers and the public and imposing such liability on generators who are distinct in time and place from the site and one another. The existence of the multi-billion dollar Response Fund provides yet another key reason why joint and several liability among generators is inappropriate and unnecessary under Superfund.

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[74] In United States v. South Carolina Recyclying and Disposal, No. 80-1274-6 (D.S.C.), for example, the government's own figures indicate that no defendant is responsible for more than 12% of the wastes sent to the site.

III. EVEN IF JOINT AND SEVERAL LIABILITY WERE THE RULE, CONTRIBUTION IS PROVIDED BY STATUTE.

To this point, this chapter has presented the arguments against joint and several liability. But if a court were to conclude that joint and several liability applies under Superfund, it would still be necessary to decide whether liable defendants are entitled to sue for contribution against other potentially liable persons.

As discussed below, a federal right to contribution exists under Superfund. The statute itself expressly provides such a right; but even if it did not, the legislative history supports an implied right of contribution. And even if a federal right of contribution did not exist, defendants would probably be entitled to contribution under most state laws.

A. There Is a Federal Right to Contribution Under Superfund.

On its face, section 107(a) of Superfund appears to provide a direct, statutory right of contribution. Thus, section 107(a)(4)(B) makes certain statutorily-defined defendants (including generators, transporters and site operators) liable for response costs "incurred by any other person consistent with the national contingency plan." Section 101(21) defines person broadly to include, inter alia, "an individual, firm, corporation, association, partnership, consortium, joint venture, [or] commercial entity

. . ." and section 101(25) defines response costs to include any removal or remedial actions, which may be taken under section 104.

This reading of the Act was challenged in City of Philadelphia v. Stepan Chemical, 544 F. Supp. 1135 (E.D. Pa. 1982). There, defendants argued that the term "'other person' refers unmistakably to persons other than liable persons" under section 107.[75] The court, however, rejected this interpretation:

> In the context in which it appears, then, the term "any other person" is quite conceivably designed to refer to persons other than federal or state governments and not, as defendants argue, to persons other than those made responsible under the act.[76]

Thus, the only decision to address this issue held that potentially liable parties may employ section 107 of the Act to recover from other liable parties.[77]

This interpretation is further supported by other provisions of section 107, including sections 107(i) and (j)

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[75] See Memorandum in Support of Defendants' Motion for Judgment on the Pleadings, reprinted in 3 Chem. & Rad. Waste Lit. Rep. 517, 521 (1982).

[76] 544 F. Supp. at 1142.

[77] There is some basis for distinguishing this decision from the contribution context. Later in the opinion, the court noted that "the dispositive consideration is that the City did not operate a hazardous waste disposal facility on the premises and it asserts that it did not voluntarily permit the placement of the hazardous substances on its property." Id. at 1143. There seems to be little basis, however, for relying on this distinction in the definition of "other party" in the Act.

(which retain pre-existing common law rights) and section 107(e)(2) (which expressly preserves to liable parties any actions based on "subrogation or otherwise against any person.") Likewise, sections 111(a)(2) and 112(a) provide explicitly for suits under section 107 "for payment of any claim for necessary response costs incurred by any other person as a result of carrying out the national contingency plan . . .."

These provisions, taken together, provide persuasive evidence that Congress intended a federal right of contribution if there are any cases where joint and several liability applies.[78] This conclusion is further bolstered by section 112(c)(2), which provides that "any person" who pays for "damages or costs resulting from a release of a hazardous substance shall be subrogated to all rights, claims, and causes of action for such damages and costs of removal that the claimant has under this Act or any other law." Although less than crystal clear, when read together

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[78] Some will argue, of course, that Superfund does not create a federal right of contribution, but simply requires parties to exhaust any pre-existing state rights of contribution before making a claim on the Fund. This reading seems strained, however, and the language in section 112 providing that "the claimant may elect to commence an action" is inconsistent with such an interpretation. The "authorization" for such an action would be redundant if a party had to rely on pre-existing rights. Moreover, if the purpose of § 112 were to require exhaustion of private remedies, the section would specifically have so required. Read in conjunction with § 107(a), therefore, a federal right of contribution seems intended.

with the subrogation provision of section 107(e)(2), section 112(c)(2) suggests that a person held liable for response costs may employ the provisions of the Act, including section 107, to recover his costs from other responsible parties.

But even if the statute did not provide for contribution, such a right would still exist under federal or state common law. In some circumstances, such as under the federal securities laws, courts have implied a federal common law cause of action for contribution.[79]

Although the Supreme Court's two most recent decisions on the issue declined to create a federal common law right of contribution,[80] the Court commented favorably on the

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[79] See, e.g., In re National Student Marketing Litigation, 517 F. Supp. 1345 (D.D.C. 1981); Globus Inc. v. Law Research Service, Inc., 318 F.Supp. 955 (S.D.N.Y. 1970), aff'd, 442 F.2d 1346 (2d Cir.), cert. denied, 404 U.S. 941 (1971). A federal common law right of contribution also exists under the Interstate Commerce Act. Gordon H. Mooney, Ltd. v. Farrell Lines, Inc., 616 F.2d 619, 625-26 (2d Cir.), cert. denied, 449 U.S. 875 (1980).

[80] In Texas Industries, Inc. v. Radcliff Materials, supra p. I-31, the Court held that a jointly and severally liable defendant has no right to contribution from co-conspirators under the Sherman Antitrust Act. Likewise in Northwest Airlines v. Transport Workers Union of America, 451 U.S. 77 (1981), the Court ruled against such a right of contribution under either the Equal Pay Act or the Civil Rights Act of 1964.

equity of establishing such a right.[81] The Court's decisions were based entirely on its review of the legislative history of the statutes in queston.

In Texas Industries, the Court held that "Congress neither expressly nor implicitly intended to create a right to contribution." 451 U.S. at 640. Similarly, in Northwest Airlines, the Court noted:

> The ultimate question in cases such as this is whether Congress intended to create the private remedy -- for example, a right to contribution . . .. Factors relevant to this inquiry are the language of the statute itself, its legislative history, the underlying purpose and structure of the statutory scheme . . ..

451 U.S. at 91.

By contrast, creation of a federal contribution right is strongly supported by Superfund's legislative history. For example, a letter introduced in the House debates from the Justice Department suggests that Superfund defendants have "the right to seek contribution from any other person responsible for a release or a threat of release."[82] Representative Florio also suggested that "the bill will

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[81] See Northwest Airlines, 451 U.S. at 88: "Recognition of the right reflects the view that when two or more persons share responsibility for a wrong, it is inequitable to require one to pay the entire cost of reparation, and it is sound policy to deter all wrongdoers by reducing the likelihood that any will entirely escape liability."

[82] 126 Cong. Rec. H11788 (daily ed. Dec. 3, 1980).

encourage the further development of a Federal common law."[83]

Finally, as discussed above, a right of contribution would be consistent with the underlying purpose of the Act, which seeks to impose liability on parties only in proportion to the damages that they have caused. This distinguishes Superfund from the Sherman Act, interpreted in Texas Industries, which has primarily punitive purposes. 451 U.S. at 639.

B. Superfund's Statutory Contribution Right Would Divide Damages Based on Relative Causation and Fault Among the Parties.

The details of Superfund's right of contribution must eventually be supplied by the courts. For the reasons discussed in I-C supra, Superfund and its legislative history provide some guidance regarding the appropriate division of damages in contribution actions. The courts must then fill in the interstices of the statute by reference to section

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[83] Id. at H11787. If these statements are credited by courts in imposing joint and several liability, they also should be used to imply a right of contribution. In addition, the Clean Water Act's section 311(h) contains a preservation of remedies provision which has been held to provide for contribution. Valley Towing Service v. SS American Wheat, Civ. No. 75-363, (E.D. La., Jan. 23, 1980) at 3.

311 cases,[84] admiralty law,[85] state common law,[86] or federal common law developed by reference to some or all of these sources.[87] See II-A supra. Under these precedents, relative causation and fault would be the principal standards for assigning liability in contribution actions.[88]

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[84] Under the section 311 cases, comparative fault would be the basis for dividing liability in a contribution action. See Valley Towing, id. at 3.

[85] In admiralty cases, liability is based on the relative fault of the parties. United States v. Reliable Transfer Co., p. I-32 supra.

[86] Forty-three states now recognize a right to contribution. See Robinson, Multiple Causation in Tort Law: Reflections on the DES Cases, 68 Va. L.Rev. 713, 716 n.12 (April 1982). The nature of a contribution right, however, varies widely from state to state. The majority of states appear to base contribution on the comparative fault of the parties. See, e.g., American Motorcycle Ass'n v. Superior Court, 578 P.2d 899, 907-12 (Cal. 1978); Packard v. Whitten, 274 A.2d 169, 179-81 (Me. 1971); Dole v. Dow Chemical Co., 282 N.E.2d 288 (N.Y. 1972); Bielski v. Schulze, 114 N.W.2d 105 (Wis. 1962); Mitchell v. Branch, 363 P.2d 969 (Ha. 1961). In addition, fourteen states have statutorily provided that contribution should be based on relative fault. 12 U.L.A. 53, 61 (1982 pocket part).

[87] Federal common law of apportionment of liability has developed in cases involving torts in the Virgin Islands. There, the Third Circuit has ruled that liability should be imposed upon joint tortfeasors "in proportion to their comparative negligence." Gomes v. Brodhurst, 394 F.2d 465 (3d Cir. 1967). Even in strict liability cases, the courts have applied a "system of pure comparative fault" for apportionment of responsibility. See e.g., Murray v. Fairbanks Morse, 610 F.2d 149, 162 (3d Cir. 1979).

[88] In strict liability cases, where no party may be at all blameworthy, courts have often relied on a principle of "comparative causation." Sun Valley Airlines v. Avco-Lycoming Corp., 411 F.Supp. 598, 603 (D. Id. 1976). Even

(Footnote [88] continued on next page.)

In a horizontal relationship, such as between two generators, both relative causation and fault should apply. In vertical relationships, such as between a generator and an owner operator, causal responsibility may be difficult to divide and relative fault is likely to be the determinative apportionment factor in many cases.

(Footnote [88] continued from previous page.)

courts ruling on "comparative fault" principles have often focused largely on comparative causation. One court observed:

> In many of the cases adopting a "comparative fault" approach to strict liability, there has been a frank realization what is being compared is not fault, but cause.

Stueve v. American Honda Motors Co., 457 F.Supp. 740, 760 D. Kan. 1978). Furthermore, six states have adopted the provision of the Uniform Contribution Among Joint Tortfeasors Act that provides that relative damages shall not be based on fault. 12 U.L.A. 52, 61 (1982 pocket part). Although the Act is not explicit, presumably damages would be apportioned based on relative causation.

TAB 2

CHAPTER 2:

THE STANDARD OF LIABILITY

INTRODUCTION AND SUMMARY OF CONCLUSIONS

Some commentators have argued that the standard of liability under Superfund is one of strict liability.[1] While strict liability may in fact be imposed in some cases, a more careful examination of the statute and its legislative history indicates that the answer is not always so clear.

Superfund's predecessor bills contained an explicit strict liability standard, which was deleted in the Senate compromise in favor of the standard of liability under section 311 of the Water Act. The legislative history indicates that Congress considered this change to be a relaxation of Superfund's liability standards.

The section 311 cases nominally employ a strict liability test, but actually consider the relative fault of parties before imposing liability. This hybrid approach should be of considerable assistance to non-negligent generators in cases where a solvent transporter or site owner acted negligently. Indeed, the section 311 cases suggest strongly that

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[1] See, e.g., Hinds, Liability Under Federal Law for Hazardous Waste Injuries, 6 Harv.Env.L.Rev. 1, 26 (1982); Note, Superfund: Conscripting Industry Support for Environmental Cleanup, 9 Ecol.L.Q. 524, 541 n.119 (1981).

there may be circumstances where non-negligent defendants might escape liability altogether under Superfund.

Part I of this chapter discusses the nature and development of strict liability at common law. As will be shown, application of strict liability to non-negligent generators would be a substantial departure from common law standards of liability.

Part II discusses the legislative history of Superfund. In order to obtain passage, Congress cut back on the liability standards of the earlier bills and adopted the standard of liability under section 311.

Part III examines the liability standards of section 311. As discussed there, the nominal standard of liability is strict liability, but it has been tempered in numerous situations by considerations of culpability. The result is a hybrid standard that imposes liability on negligent parties and exonerates non-negligent parties, at least in some circumstances.

I. STRICT LIABILITY AT COMMON LAW

Traditionally, a defendant was not liable in tort for harming another unless the harm resulted from the defendant's intentional, reckless or negligent action causing harm to the defendant.[2] Thus, a party was not liable

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[2] Restatement (Second) of Torts § 6.

unless he failed to conform to a certain, legally defined standard of conduct designed to protect others against unreasonable risks.[3] Strict liability, by contrast, imposes liability without regard to culpability, i.e., without regard to whether defendant's action was intentional, reckless, or negligent.[4]

Plaintiffs have maintained that Superfund imposes strict liability on defendants, including generators.[5] But as discussed below, common law strict liability has been narrowly limited, and accordingly, routine application of strict liability to generators in Superfund cases would be a radical change from common law principles.

The classic departure from a standard of negligence to strict liability occurred in a nineteenth century English case, Rylands v. Fletcher. 3 H.L. 330 (1868). There, the defendant mill owners constructed a reservoir upon their

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[3] Restatement (Second) of Torts § 282. For a discussion of factors relevant to defining standards of conduct, see Amaya v. Home Ice, Fuel & Supply Co., 379 P.2d 513 (Cal. 1963). See also Prosser at 143, 325-27.

[4] The Restatement contrasts strict liability by observing that the "fact that negligence as here defined is conduct which falls below the standard of behavior established by law for the protection of others carries with it the idea of social fault." Restatement (Second) of Torts § 282, comment f. Prosser, however, notes that, where strict liability has been applied, the defendant's "conduct is still so far socially questionable that it does not justify immunity," e.g., blasting operations. Prosser at 495.

[5] See, e.g., Complaint, Ohio v. Georgeoff, No. C-81-1961, ¶ 35 (N.D. Ohio) (filed October 1, 1981).

property, which subsequently flooded an adjoining coal mine. The House of Lords decision held defendants strictly liable as a result of their "non-natural" use of the land. 3 H.L. at 338. The decision in Rylands focused on the liability of the landowner, noting that "the true rule of law is that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril." Id.

The rule in Rylands v. Fletcher has evolved in America into the doctrine of strict liability for "ultrahazardous activity." An activity has been deemed ultrahazardous if it necessarily involves a high risk of serious harm and is inappropriate to the place where it is carried on.[6] There has been "general recognition . . . that the relation of the activity to its surroundings is the controlling factor," and, consequently, strict liability generally has been imposed on the owner of the land on which the ultrahazardous activity is taking place.[7] In addition, the common law has

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[6] See, e.g., Yommer v. McKenzie, 257 A.2d 138 (Md. 1969). For a discussion of the factors relevant to a determination that an activity is ultrahazardous, see Restatement (Second) of Torts § 520.

[7] Prosser at 513. Contrast Alonso v. Hills, 214 P.2d 50 (Cal. 1950) (blasting in developed area is ultrahazardous) with Houghton v. Loma Prieta Lumber Co., 93 P. 82 (Cal. 1907) (blasting in deserted area is not ultrahazardous). See also State Dept. of Environmental Quality v. Chemical Waste Storage & Disposition, Inc., 528 P.2d 1076 (Ct. App. Ore. 1974) (hazardous waste disposal in remote site is not ultrahazardous).

imposed strict liability only when a defendant is aware of the ultrahazardous condition and has permitted it to continue.[8]

Neither of these conditions apply in the case of generators sending materials to a hazardous waste site. Thus, except for a generator who deposits wastes on his own property, generators do not create a hazard as in Rylands v. Fletcher or engage in waste disposal activity normally considered "ultrahazardous." Moreover, generators may be unaware of where their materials are deposited, much less whether the site is "ultrahazardous." Accordingly, even where the site owner may knowingly permit an ultrahazardous condition to continue, generators should not be held strictly liable under common law precedent.

The case that most directly addresses this question, Ewell v. Petro Processors of Louisiana, Inc., 364 So.2d 604 (Ct. App. La. 1978), is fully consistent with the common law rules summarized above. In Ewell, the court held that generators were not strictly liable for waste disposal sites run by independent contractors, because the activity is not "inherently or intrinsically dangerous." Id. at 606. The court stressed that the generators were unaware of the

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[8] See Zampos v. U.S. Smelting, Ref. & Min. Co., 206 F.2d 171 (10th Cir. 1953); Hunt v. Hazen, 254 P.2d 210 (Ore. 1953), see also Prosser at 517 n.98.

condition of the site and that the site owner "received no instructions as to the method of carrying out the assigned task or the disposal of the waste material." Id. Although generators were not held strictly liable, the court did hold one generator liable based on his negligence, because he was "aware of the leakage" yet continued to use the site. Id.

In addition to the limitations discussed above, strict liability does no more than relieve plaintiffs of the burden of proving negligence. To maintain a cause of action, a plaintiff must still prove that a legally-protected interest of plaintiff's has been invaded, that the defendant's conduct is a legal cause of the invasion, and that the plaintiff has not so conducted himself in a manner that precludes his claim (e.g., assumption of risk).[9] Thus, the existence of strict liability rather than negligence does not relieve plaintiffs of the need to prove all other elements of a tort claim.[10]

Indeed, when a defendant may be found strictly liable, courts generally have held plaintiffs to a stricter standard on other elements of proof. Thus, Prosser noted:

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[9] See Restatement (Second) of Torts § 281.

[10] See, e.g., United States v. Tex-Tow, Inc., 589 F.2d 1310, 1313 (7th Cir. 1978) ("causation is required even under a strict liability statute").

> Just as liability for negligence has tended to be restricted within narrower boundaries than when intentional misconduct is involved, there is a visible tendency to restrict it still further when there is not even negligence.[11]

For example, when strict liability might be applied, courts have made it easier to escape liability on the basis of intervening causes.[12]

In short, application of strict liability, although available, was severely limited under common law. First, strict liability generally applied only to landowners and even then only if they were fully aware of the risk presented by the hazardous condition on their land. The doctrine of ultrahazardous activity is an extension of these principles, but as the Ewell decision suggests, it should not normally apply to generators. Moreover, even where proof of negligence has been dispensed with under common law, the courts have generally required a higher standard of proof of other elements of a cause of action.

By contrast, some have argued that Superfund would impose strict liability on non-landowners, unaware of the

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[11] Prosser at 517.

[12] See, e.g., Golden v. Amory, 109 N.E.2d 131 (Mass. 1952) (no liability where extraordinarily heavy rainfall contributed to release of water); Kaufman v. Boston Dye House, 182 N.E. 297 (Mass. 1932) (intervening act of stranger released oil from truck); Davis v. Atlas Assur. Co., 147 N.E. 913 (Ohio 1925) (employee released gas vapors resulting in fire).

risk addressed, without regard to the magnitude of the hazard presented by specific substances, and would make the standard of proof for a cause of action more lenient than at common law.[13] This contention goes far beyond the common law and in any event is contrary to Superfund and its legislative history, as well as the case law under section 311 of the Water Act.

II. THE STATUTE AND ITS LEGISLATIVE HISTORY INDICATE THAT CONGRESS "PARED DOWN" THE STRICT LIABILITY STANDARDS OF EARLIER BILLS.

The original Superfund bills provided expressly for strict liability. S. 1480, § 4(a); H.R. 7020, § 3071(a). As discussed in greater detail in chapter 1, these earlier bills were unacceptable to Congress, largely because their liability standards were regarded as too severe.[14] Consequently, a compromise bill was drafted in the Senate and adopted by the House.

The Senate compromise bill deleted the explicit requirement of strict liability and replaced it by "specifying the

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[13] The complaint in Georgeoff, supra n.5, explicitly or implicitly makes all these claims.

[14] See, e.g., 126 Cong. Rec. S14967 (daily ed. Nov. 24, 1980) (remarks of Senator Stafford) (noting that many of his colleagues "perceive[d] [S. 1480] as punitive and unnecessarily rigorous"); Id. at Rec. S15004 (remarks of Senator Helms) (stating that S. 1489 had received "well-deserved criticism" because its liability standards were "grossly unfair").

standard of liability under Section 311 of the Clean Water Act."[15] Senator Stafford explained:

> As reported by the Committee, S. 1480 and its accompanying report set the standard of liability as one of joint, several and strict liability. However, to avoid confusion over new language the compromise bill simply defers to existing law in Section 311 of the Clean Water Act which already provides a liability standard for recover of costs for response and remedial actions . . .[16]

At least some members of the Senate seemed to believe the section 311 standard to be one of strict liability. Thus, Senator Randolph referred to the standard of liability under "[s]ection 311 of the Federal Water Pollution Control Act," which "I understand . . . to be a standard of strict liability."[17]

Senator Stafford, one of the key architects of the compromise bill, also emphasized, however, that the strict

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[15] Id. at S14964. Section 302(d) of the Act also indicates that strict liability should not be automatically applied. That section provides that

> this Act shall not be considered, interpreted, or construed in any way as reflecting a determination, in part or whole, of policy regarding the inapplicability of strict liability, or strict liability doctrines, to activities relating to hazardous substances, pollutants, or contaminants or other such activities.

[16] 126 Cong. Rec. S15008 (daily ed. Nov. 24, 1980).

[17] Id. at S14964. The House debate reflects a similar conclusion. 126 Cong. Rec. H11787 (daily ed. Dec. 3, 1980) (comments of Representative Florio).

liability system should be tempered by considerations of fault, at least in some circumstances. He explained that S. 1480 "had strict liability provisions, but they were severely pared down."[18] According to Stafford, the compromise bill was "not an embodiment of other forms of no fault liability or innovative Federal intrusion into the law now developing within individual state jurisdiction[s]."[19]

Furthermore, Congress carefully declined to find that hazardous waste disposal was an ultrahazardous activity. S. 1480 contained an explicit declaration that this activity was "ultrahazardous" (§ 3(a)(1)), but this language was deleted in the final compromise. Although this deletion was not discussed in the debates on the final bill, it creates a strong inference that Congress considered the issue and intentionally chose not to declare hazardous waste disposal to be ultrahazardous.

III. THE STANDARD OF LIABILITY UNDER SECTION 311, AND THEREFORE SUPERFUND, IS A HYBRID ONE, WITH STRICT LIABILITY TEMPERED BY CONSIDERATIONS OF FAULT.

Congress' intended relaxation of the strict liability standard was accomplished through the adoption of the section 311 standard of liability. As Congress suggested, the nominal standard of liability under section 311 is strict

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[18] 126 Cong. Rec. S15008 (daily ed. Nov. 24, 1980).

[19] Id. at S14967.

liability. See Steuart Transportation Co. v. Allied Towing Corp., 596 F.2d 609, 613 (4th Cir. 1979) (section 311 of "[t]he final bill embodied the Senate's strict liability proposal"); United States v. Hollywood Marine, 16 E.R.C. 2180, 2182 (S.D. Tex. 1981); Sabine Towing and Transportation Co. v. United States, 16 E.R.C. 2081, 2082 (Ct. Cl. 1981). Thus, in a simple factual situation with one discharger and no intervening third parties, liability will be strict.

When several parties may share responsibility for a discharge, however, section 311 cases have generally imposed liability based on the relative negligence of the parties. The importance of negligence considerations under section 311 is illustrated by Valley Towing Service, Inc. v. SS American Wheat, Civ. No. 75-363, slip op. (E.D. La., Jan. 23, 1980). There, the court observed that Section 311 "clearly provides that the owner or operator may be liable for clean-up costs," id. at 7 (emphasis in original), but found that the operator of several oil barges was largely at fault for a collision and subsequent discharge of oil. After concluding that the owner, as distinguished from the operator, was blameless, the court ruled that cleanup costs were owed only by the operator of the barges. Id.

The courts' concern with culpability is further illustrated by United States v. M/V Big Sam, 505 F.Supp. 1029 (E.D. La. 1981), aff'd in part, rev'd in part, 17 E.R.C. (BNA) 2169 (5th Cir. 1982). In Big Sam, an oil-carrying

barge spilled part of its cargo as a result of a collision with another, negligent vessel. The government did not attempt to recover from the non-negligent barge but proceeded against the negligent vessel.

In the action against the negligent vessel, the government sought to recover from both its owner and its operator. The court imposed liability on the negligent operator but held that the owner of the vessel was not at fault and therefore not liable. 505 F.Supp. at 1033. Accordingly, even though the owner was a proper party defendant under section 311, he was not judged on a strict liability basis and indeed was immunized from damages because he was not negligent.

The government did not appeal this part of the lower court's decision, but the Fifth Circuit addressed it nonetheless, and held that the owner was properly liable. 17 E.R.C. at 2174. The court came to this conclusion based primarily on its fear that the operator would be insolvent and there would be no liable party to pay for cleanup. Id. This holding is consistent with the conclusions at p. II-14 infra, that strict liability will be imposed when it is essential to finance cleanup costs.[20]

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[20] The decision in Big Sam also was based in large part on the close vertical relationship between an owner and operator, described by the court as a "term of art." 17 E.R.C. at 2174. Generators under Superfund stand in a different position, and, as discussed at pp. II-15 to II-16 infra, there are strong policy reasons why strict liability should not apply to generators.

Section 311 liability has been based on the fault of the parties in at least three other contexts. First, when a negligent third party has contributed to a spill, courts have imposed liability on a defendant only after a finding that the defendant was also negligent and that his negligence was a more significant cause of the spill. See Tug Ocean Prince, Inc. v. United States, 436 F. Supp. 907 (S.D.N.Y. 1977), aff'd in part, rev'd in part on other grounds, 584 F.2d 1151, 1161 (2d Cir. 1978) (government's ineffective navigation aids are no defense where tug boat employees were negligent); Steuart Transportation Co. v. Allied Towing Corp., 596 F.2d at 613 (alleged negligence of tug is no defense when barge was not seaworthy).

In another case, a non-negligent barge spilled oil due to the negligence of its tug. The government sued both the barge and tug owners, but the court imposed liability only on the negligent tug, even though both would be liable under a pure strict liability standard. Tug Ocean Prince, Inc. v. United States, 436 F. Supp. at 926. Two courts have reached a contrary result in these factual circumstances, but both appear to have imputed the negligence of the tug to the barge owner, on a theory similar to respondeat superior. United States v. LeBeouf Bros. Towing Co., 621 F.2d 787 (5th Cir. 1980); Burgess v. M/V Tamano, 564 F.2d 964 (1st Cir. 1977). As among multiple generators using a common waste

disposal site, there would be no basis for imputing negligence in this manner.

Third, section 311(h) of the Water Act has been held to preserve a right of contribution against another party "whose fault contributed to a discharge." United States v. Bear Marine Services, 15 E.R.C. 1953 (E.D.La. 1980) (citing Valley Towing Service, Inc. v. SS American Wheat).[21] Although distinct from the issue of strict liability, preservation of this right is yet another example of how culpability considerations are applied by the courts determining liability under section 311.

Taken as a whole, the section 311 cases reflect a primary concern for financing the cleanup of discharges, and where strict liability is necessary to that end, it has been imposed. When imposing liability against multiple parties with varying degrees of responsibility, however, courts frequently have relied on negligence considerations.

These cases at first glance suggest that courts are simply apportioning damages. The significance of these

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[21] The culpability of the discharger also has been held to be the primary factor in the magnitude of civil penalties assessed under § 311(h). United States v. General Motors, 403 F. Supp. 1151, 1164 (D. Conn. 1975) (in which the court held that "where the defendant was not negligent or at fault" it would be an "abuse of discretion to impose more than a nominal penalty"); Tug Ocean Prince, Inc. v. United States, 436 F. Supp. at 926 (remanding with instructions "to permit the absence of culpability to mitigate the amount of the fine").

decisions, however, goes beyond apportionment to the underlying standard of liability. The "all-or-nothing" approach taken in these decisions is contrary to the apportionment cases, which typically divide damages among the liable parties.[22] Moreover, apportionment based on fault has typically been rejected in strict liability cases, in favor of apportionment based on a theory of causation. These cases have sought to determine what percentage of the damages were "caused" by each party and apportion liability accordingly.[23] Finally, the courts in the section 311 cases have not spoken of apportionment of liability, but rather have used fault concepts to exonerate defendants from liability in the first instance.

Superfund decisions to date do not resolve these issues. In United States v. Hardage, Civ. No. 80-1031-W (W.D.Okla. Setp. 29, 1982), the court cursorily held that the statute, on its face, imposes strict liability. Slip op. at 2. That decision did not, however, adjudicate the responsibility of specific parties on specific facts.

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[22] See Restatement (Second) of Torts, § 433a, illustrations. See, e.g., Valley Towing Service, Inc. v. SS American Wheat, slip op. at 3; Jackson v. Frederick's Motor Inn, 418 A.2d 168 (Me. 1980).

[23] See, e.g., Sun Valley Airlines v. Avco-Lycoming Corp., 411 F.Supp. 598 (D.Id. 1976); Stueve v. American Honda Motors Co., 457 F.Supp. 740 (D.Kan. 1978).

City of Philadelphia v. Stepan Chemical Company, 544 F. Supp. 1135 (E.D.Pa. 1982), considered the issue more thoroughly and its holding supports the above reading of strict liability tempered by fault considerations. There, the court noted that the nominal standard of liability under section 311, and therefore under Superfund, is strict liability. Id. at 1140 n.4. Judge Ditter went on, however, to quote approvingly from a law review article concluding that the application of strict liability should be limited:

> It is clear, however, that Superfund's strict liability standards should be confined to those parties who engaged in substantial and purposeful hazardous waste disposal activity for commercial profit after the enactment of this statute. Automatic application of strict liability to parties whose conduct was substantially unrelated to the present danger posed by the hazardous waste release or who did not obtain commercial benefit from their conduct, does not appear to be compelled by the environmental concerns which gave rise to Superfund.

Id. at 1143 n.10 (dicta).[24]

IV. CONCLUSION

The section 311 precedents discussed above should be of considerable assistance to generators under Superfund. In

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[24] The article quoted, Dore, The Standard of Civil Liability for Hazardous Waste Disposal Activity: Some Quirks of Superfund, 57 Notre Dame Lawyer 260, 276 (December 1981), stresses that findings of strict liability under section 311 "came in the context of determining the liability of parties intimately involved in the challenged pollution activity." Id. at 275.

many Superfund cases, potentially responsible generators will be remote in time and place from the site of the release and be wholly without fault. In a number of these cases, the negligence of a transporter or a site owner will have contributed to the release. The section 311 cases suggest that the non-negligent generator may escape liability, and the negligent party should be wholly liable.[25]

Plaintiffs can be expected to argue that such an interpretation is contrary to the specifically enumerated statutory defenses of section 107. Plaintiffs may claim that these defenses are the exclusive exceptions to liability. Such an argument is, however, unconvincing. Section 311 contains similar statutory defenses to liability, yet that has not stopped the courts from employing fault considerations in determining which parties are liable. Moreover, the section 311 cases are consistent with Superfund's legislative history, which indicates that Congress pared down the liability standards of the original bills.

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[25] As discussed in chapter 1, a non-negligent generator should not be liable even if the negligent site owner is not before the court or insolvent, because the Fund was designed to pay clean-up costs in these circumstances.

TAB 3

CHAPTER 3:

THE CAUSATION REQUIREMENT

INTRODUCTION AND SUMMARY OF CONCLUSIONS

Causation is certain to be a critical issue under Superfund. Old dumpsites inherently present thorny issues of causation among multiple generators and various owners and operators. Consequently, cause-in-fact and proximate cause will continually be raised, and courts will have to grapple with the scope of these defenses, especially in the context of multigenerator disposal sites.

As detailed in Part I, proof of causation is a fundamental and invariable prerequisite to tort liability at common law. Although poorly drafted, the liability provisions of Superfund preserve the traditional common law standards of causation by requiring proof that the defendant was both the cause-in-fact and proximate cause of the plaintiff's loss. This conclusion is strongly supported by judicial construction of analogous provisions of the Clean Water Act,[1] on which the Superfund liability provisions were modeled, and by the legislative history of Superfund.

Part II deals more explicitly with the causation requirements of Superfund. Specifically, Superfund plaintiffs must prove cause-in-fact by showing that the defendant

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[1] 33 U.S.C. §§ 1251, et seq. (hereinafter "Water Act").

caused a release or threatened release of a hazardous substance, and that such release caused the incurrence of response costs or natural resource damages. Mere evidence that the defendant disposed of hazardous substances at a multigenerator disposal site, without proof that the defendant's materials were released or threaten to be released or that such materials caused damage, is insufficient to give rise to liability.

Although fact patterns in Superfund cases are likely to vary widely, a few simple examples illustrate the potential importance of the cause-in-fact requirement in defending such cases. If ten generators sent identifiable drums of waste to a site, and only one generator's drums are involved in an actual or threatened release, the remaining generators are not liable because they did not cause the release. Similarly, if the defendant disposed of only chlorinated solvents at a site from which there is a release of some other compound, the defendant did not cause the release and should not be held liable.

Moreover, if the defendant caused a release which did not result in response costs or natural resource damages, there should no liability. For example, where monitoring reveals only trace amounts of defendant's material in groundwater, at levels which require no response, and cleanup actions are based on the presence of other compounds at high levels, the defendant's release did not cause the response.

Even where the defendant caused a release which resulted in response action, causation may provide an important mechanism for apportionment at multi-generator sites. If a dozen generators all disposed of the same substance at the site, for example, a defendant who contributed only 20% of the material did not cause all the damage and should not be liable for the entire response costs. In other cases, liability may be apportioned among defendants who disposed of different compounds, based on the varying response actions required for each.

As detailed in Part III, Superfund requires proof that the defendant was the proximate cause, as well as the cause-in-fact, of the plaintiff's loss. Although Superfund may modify the common law of proximate cause with respect to the acts of intervening third parties, other aspects of the complex and highly fact-specific proximate cause doctrine should provide important limitations on liability in appropriate cases.

Under Superfund, as at common law, plaintiffs bear the burden of proving causation by a preponderance of the evidence. Although, as summarized in Part IV, a few controversial decisions in common law products liability and personal injury cases have shifted the burden of proof on causation to defendants, those decisions provide no basis for reversing the congressional allocation of the burden of proof to plaintiffs in statutory actions under Superfund.

I. THE UNDERPINNINGS OF A CAUSATION REQUIREMENT

Tort law presents a fundamental tension between the need to protect and compensate members of society and the need not to abridge the freedom of those who act. As Dean Prosser has explained,

> The administration of the law becomes a process of weighing the interests for which the plaintiff demands protection against the defendant's claim to untrammeled freedom in the furtherance of his own desires, together with the importance of those desires themselves.[2]

This fundamental tension is reflected in a recurring doctrinal tug-of-war. On the one hand, society tends to feel that defendants should not be held liable unless they are at fault. Countering fault-based notions, however, is an equally strong view that those injured innocently should be compensated for their injuries. According to leading legal scholars, the common law has moved like a pendulum, swinging back and forth between these two doctrinal poles -- at first assigning liability without regard to the defendant's fault, then refusing to assign liability without fault, and, in the past several decades, returning to the no-fault pole, with various strict liability schemes.[3]

Even the strongest partisans of liberal compensation imposing liability without fault, however, have never

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[2] Prosser at 15.

[3] Prosser at 17-18.

advocated liability without causation. Indeed, our tort system is founded on causation as an invariable minimum requirement for assigning legal or moral responsibility.[4]

Fault and causation are similar in that both go to the issue of moral and legal responsibility. But causation asks whether the defendant, in fact, brought about the event. Fault assumes that the defendant caused the event, but goes further to ask whether the defendant's actions are "blameworthy" or violate societal norms. Our tort system sometimes assigns liability without fault, but never without causation.

The causation requirement furthers two fundamental objectives of tort law. First, the rules of tort law are designed, in part, to influence behavior outside the courtroom.[5] For example, holding a polluter liable for damages he has caused encourages abatement of the pollution and deters others from engaging in similar conduct. If liability were assigned without regard to causation, however, potential defendants would have little incentive to avoid

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[4] "An essential element of the plaintiff's cause of action for negligence, or for that matter for any other tort, is that there be some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered." Prosser at 236. "[A]ll agree that defendant's wrongful conduct must be a cause in fact of plaintiff's injury before there is liability." 2 F. V. Harper & F. James, The Law of Torts § 20.02, at 1110 (1956).

[5] See Calabresi, Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr., 43 U.Chi.L.Rev. 69, 78 (1975).

pollution because their conduct would have no bearing on their potential liability.

Second, for tort law to work, it must be accepted by society. Because liability is imposed only for damages caused by the defendants, tort law appears to the community as a rational, ordered, and just system -- one that the community will accept. Thus, in our society the causation requirement forms the outer boundary of the tort law system. Where it is necessary to compensate victims who cannot meet the causation standard of the tort law system, compensation becomes the function of a social welfare system.

At common law, causation encompasses two distinct concepts, "cause-in-fact" and "proximate cause." Broadly speaking, "cause-in-fact" involves a factual inquiry as to whether the defendant actually brought about the damage, and "proximate cause" involves a more policy-oriented inquiry as to whether the defendant should be held liable for the consequences of the events he caused in fact.

II. CAUSE-IN-FACT, INCLUDING BOTH "IDENTIFICATION" AND "DAMAGES," IS AN INVARIABLE REQUIREMENT FOR RECOVERY UNDER SECTION 107.

In actions brought under section 107, plaintiffs must prove that the defendant was the cause-in-fact of the response costs or natural resource damages for which recovery is sought. As detailed below, this means that Superfund plaintiffs must be required to prove "identification"

by showing that the defendant caused a release or threatened release of a hazardous substance, and "damage" by showing that such release caused the incurrence of response costs or natural resource damages. This causation requirement derives from the statutory text and legislative history of section 107, as well as the interpretation given by the courts to section 311 of the Water Act, after which section 107 was patterned.

A. Cause-in-Fact Has Always Been Required at Common Law.

Cause-in-fact is often dismissed by legal thinkers as a conceptually simple issue, even though it may present great factual complexity.[6] In most cases, the plaintiff will prove causation by showing that the damaging event would not have occurred "but for" the defendant's act or omission. As Prosser explains, "[t]he defendant's conduct is not a cause of the event, if the event would have occurred without it."[7]

In a number of cases, the traditional "but for" test has given way to the "substantial factor" test, which considers the defendant's conduct a cause-in-fact of an event

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[6] Harper and James note, for example, that "the cause in fact aspect of the requirement of legal cause gives little trouble, and it has been called a simple one." 2 F. V. Harper and F. James, Torts § 20.02, at 1110 (1956), cited in O'Toole, Radiation, Causation, and Compensation, 54 Geo. L.J. 751, 764 (1966).

[7] Prosser at 238-39.

if the conduct was a "substantial factor" in bringing about the event.[8] The "substantial factor" test arose because the "but for" test is not adequate to decide some cases of multiple causation. Under the "but for" test, if two antecedents concur to bring about a single event and either antecedent alone would have sufficed, neither antecedent can be called the cause-in-fact because the event would have occurred without it.[9]

For purposes of analysis, the cause-in-fact requirement can be broken down into two elements, both of which the plaintiff must prove in order to carry his burden. The first component is the "who" or "identification" component -- the plaintiff must show that it was the defendant, and not someone else, who acted or failed to act. The second component is the "what" or "damage" component -- the plaintiff must show that the injury was caused by the defendant's act or omission and not by something else.

For example, five generators may have disposed of five different hazardous substances at the same disposal site.

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[8] See Restatement (Second) of Torts § 431 (1965); Prosser at 239-40.

[9] For example, if two motorcycles simultaneously pass the plaintiff's horse, causing it to bolt, neither motorcyclist could be considered a "but for" cause. Under the "substantial factor" test, each motorcyclist would be considered a cause-in-fact. Corey v. Havener, 65 N.E. 69 (Mass. 1902).

State regulatory authorities detect only one of the substances in a river, construct dikes between the disposal site and the river, and sue one of the generators to recover the state's response costs. In order to show causation, the state would be required at common law to prove "identification" by showing that the defendant caused the release; that is, that the substance found in the river came from the defendant's deposits at the site and not from materials deposited by another generator at the same site, or even from a separate upstream facility. In addition, the state would be required to prove the "damage" element of causation by showing that the plaintiff's loss (the cost of constructing the dikes) was caused by the presence of the substance in the water at sufficient levels to require response.

In addition, the plaintiff at common law would be required to prove causation by a preponderance of the evidence. In other words, plaintiff must prove on both the "identification" and "damage" issues that the defendant more likely than not caused the injury for which recovery is sought. This test is not unique to the causation issue, but merely restates the traditional plaintiff's burden of proof to demonstrate each element of his claim by a preponderance of the evidence.[10]

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[10] The standard of proof is addressed in more detail at pp. III-26 to III-29, infra.

B. Proof of Cause-in-Fact Is an Essential Prerequisite To Recovery Under Superfund Section 107.

The cause-in-fact requirement is a fundamental element of liability under Superfund section 107, no less than in actions at common law. This is true even though section 107 relaxes both the "who" and the "what" to a degree by allowing recovery not only in the case of an actual release but also for a threatened release. Nonetheless, as detailed below, cause-in-fact is likely to constitute a potent defense in many section 107 actions.

1. The provisions of section 107 require proof of causation.

The liability provisions of Superfund section 107 should be interpreted to require strict proof of both "identification" and "damage."

Section 107(a), the basic liability section of Superfund, is far from a model of draftsmanship and needs to be read in its inelegant entirety. It provides that:

> Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section --
>
> > (1) the owner and operator of a vessel (otherwise subject to the jurisdiction of the United States) or a facility,
> >
> > (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility owned or operated by another party or entity and containing such hazardous substances, and
>
> (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for --
>
> (A) all costs of removal or remedial action incurred by the United States Government or a State not inconsistent with the national contingency plan;
>
> (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan; and
>
> (C) damages for injury to, destruction of, or less of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release.

Section 107(a) (emphasis supplied).

As drafted, section 107(a) requires some interpretive modification. Read literally, section 107(a) imposes liability only on certain transporters, under subsection (4). Subsections (1), (2), and (3), dealing with owners,

operators, and generators, contain no liability language. Accordingly, to achieve a sensible construction of the liability provisions, the language of subsection (4) which has been underlined above must be read as modifying each of subsections (1) through (4).

In the underlined language, the phrase "shall be liable for" supplies the liability language missing from subsections (1), (2), and (3). But reading only the phrase "shall be liable for" in conjunction with the earlier subsections would create the absurd result of imposing liability on parties having no connection whatsoever with the disposal site. Read this way, for example, the owners and operators of all vessels and facilities could be liable for response costs at any site anywhere in the United States. Thus, to achieve a rational construction of Section 107(a), liability under subsections (1), (2) and (3) as well as (4) must be limited to vessels or facilities "from which there is a release, or a threatened release which causes the incurrence of response costs. . .."

Section 107(a) expressly requires proof of the "damage" element of causation -- that the release or threatened release caused the response costs or natural resource damages for which recovery is sought. Liability accrues only upon "a release, or a threatened release which causes the incurrence of response costs. . .." § 107(a)(4) (emphasis supplied). In addition, damages may be recovered "for

injury to, destruction of, or loss of natural resources . . . resulting from such a release." § 107(a)(4)(C) (emphasis supplied).

The "identification" requirement that the defendant caused the release, though not stated explicitly in the statute, must also be met in actions brought under section 107. Absent such a requirement, a generator, transporter, or previous owner could be liable even though there was no connection whatsoever between his hazardous material or waste and the release. There is no indication that Congress intended to depart radically from the common law by abrogating the fundamental principle that a defendant can be held liable only where he caused (can be identified with) the harm complained of.

The fundamental role of causation, including "identification" causation, in Superfund liability determinations is demonstrated by the section 107(b) defenses, which excuse a defendant from liability where "the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by" an act of God, an act of war, or the act or omission of a third party. § 107(b) (emphasis supplied). The rationale of section 107(b) is simple: where another instrumentality caused the release, the defendant should not be held liable under section 107. Necessarily implicit in the language of this defense are the requirements that the defendant's liability is predicated on

his causal relationship to (identification with) the release, and that the causation of the release is an element of a prima facie case under section 107(a). If causation of the release were not required under section 107(a), it would make no sense to release the defendant from liability based on causation by another instrumentality under section 107(b).[11]

Moreover, the section 107(a) provisions hold generators and transporters liable only where they have engaged in affirmative acts that cause a release. For example, generators do not incur potential liability merely by producing hazardous wastes; they must have "arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment. . .." § 107(a)(3). Similarly, a transporter is not liable merely because he transported hazardous wastes to a site; he must have "accepted . . . hazardous substances for transport to disposal or treatment facilities or sites selected by such [transporter]. . .." § 107(a)(4). Without an identification requirement, there

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[11] Similarly, the identification element of the causation requirement is emphasized in section 107(c), which provides dollar limits on liability under section 107. These limits do not apply where the release or threatened release "was the result of willful misconduct or willful negligence within the privity or knowledge of" the defendant, or "the primary cause of the release" was a violation of safety, construction, or operating standards. Superfund § 107(c)(2)(A) (emphasis supplied). As with section 107(b), the causation concept in section 107(c)(2)(A) does not make sense unless causation of the release is required under section 107(a).

would be no reason to distinguish between generators who did arrange for disposal and those who did not, since in either case liability could be predicated on a release unrelated to the acts of the defendant. Similarly, the distinction between transporters who selected disposal facilities and those who did not makes sense only if liability is predicated on the defendant's causal relationship to the release.

In short, the provisions of section 107, while not a model of clarity, preserve the causation requirements applicable at common law and under the Water Act. Proof of "damage" causation is expressly required, and the "identification" causation requirement is necessary to a reasonable construction of the statute.

2. Causation is required by the courts under the Clean Water Act.

Superfund was modeled closely on section 311 of the Clean Water Act, which has been interpreted by the courts to require proof of cause-in-fact. Superfund provides that the term "liable" or "liability" "shall be construed to be the standard of liability which obtains under section 311 of the Federal Water Pollution Control Act." Section 101(32).[12]

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[12] This reference to section 311's standard of liability is helpful on causation questions, but provides little guidance on other issues, such as apportionment of liability. See Chapter 1 at I-45 to I-48.

But even absent this statutory reference, judicial construction of the Water Act would carry great weight in interpreting the Superfund provisions, because the latter was "modeled upon the experience with the Clean Water Act's spill response program."[13]

The provisions of the Water Act analogous to section 107 are contained in section 311(f), which nowhere expressly specifies that causation of the release or discharge is an element of plaintiff's case but which does provide a defense to liability where the defendant can show that the discharge "was caused solely by" another instrumentality.[14] With

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[13] 126 Cong. Rec. S14965 (daily ed. Nov. 24, 1980). See also S. Rep. No. 848, 96th Cong., 2d Sess. 1 (1980) (S. 1480, the Senate predecessor to Superfund, "has its roots in the liability and funding provisions provided in the Clean Water Act of 1972.")

[14] Section 311(f)(1) of the Water Act provides:

> Except where an owner or operator can prove that a discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party . . . such owner or operator of any vessel from which oil or a hazardous substance is discharged in violation of subsection (b)(3) of this section shall, notwithstanding any other provision of law, be liable to the United States Government for the actual costs incurred under subsection (c) of this section for the removal of such oil or substance. . ..

Sections 311(f)(2) and 311(f)(3) contain analogous liability provisions for the owners and operators of onshore and offshore facilities, respectively.

respect to causation, the liability and defense provisions of Superfund are closely analogous to these provisions of the Water Act.[15]

Despite the absence of an explicit causation requirement in section 311, the courts have required proof that the defendant caused the discharge in cases brought under the Water Act. In United States v. Tex-Tow, Inc., 589 F.2d 1310 (7th Cir. 1978), the court held that "causation is required even under a strict liability statute," and required proof that the defendant's actions were both the "cause in fact" and "legal cause" of a spill. Id. at 1313-14. In other Water Act cases, the government has used dye tests, testimony regarding the defendant's operations, engineering reports, and chemical, spectrographic, and chromatographic analyses to prove causation by showing that oil spills came from the defendant's facilities. See, e.g., United States v. Malitovsky Cooperage Co., 472 F. Supp. 454 (W.D. Pa. 1979); United States v. Slade, Inc., 447 F. Supp. 638 (E.D. Tex. 1978).

The causation requirement recognized under section 311 applies equally to actions under Superfund section 107.

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[15] The basic liability provisions of Superfund are contained in section 107, and are addressed in detail in Chapter 2. Like the liability provisions of section 311(f), Superfund section 107 does not expressly require proof of "identification" causation, but provides a defense where the defendant can show that a release "was caused solely by" another instrumentality. Section 107 expressly requires proof of "damage" causation, however, while section 311(f) does not.

Particularly since Congress modeled Superfund after the Water Act the courts should construe the analogous liability provisions of Superfund section 107 to require proof that the defendant caused the release, as well as proof that the release caused the response costs or natural resource damages for which recovery is sought.

C. The Legislative History of Superfund Confirms the Causation Requirement of Section 107.

The legislative history of Superfund reveals a consistent congressional intent to require strict proof of causation in actions to recover response costs and natural resource damages. The committee report on H.R. 7020, the bill originally passed by the House, shows that the bill's express causation requirement was intended to invoke "the usual common law principles of causation." H.R. Rep. No. 1016, Part I, 96th Cong., 2d Sess. 33 (1980).

Similarly, S. 1480, the bill reported out of committee in the Senate, required strict proof of both "identification" and "damage" causation. The Committee bill relaxed the causation requirement only in the context of actions to recover medical and rehabilitation expenses; it retained traditional causation requirements for all other claims.

Although S. 1480 was rejected because the liability provisions were perceived as onerous and unfair to defendants, the Senate developed and passed compromise Superfund

legislation which was accepted by the House without amendment. The causation requirements of the earlier bills were carried forward in section 107 of the final legislation, which modified the liability provisions of S. 1480 to ameliorate their harsh effect but retained the same basic grammatical structure.

1. The House bill required strict proof of causation under common law standards.

The Superfund bill initially passed by the House, H.R. 7020, explicitly required proof of causation by imposing liability on "any person who caused or contributed to the release or threatened release." H.R. 7020, 96th Cong., 2d Sess. § 3071(a)(1). In reporting the bill to the House, the Committee on Interstate and Foreign Commerce explained that "the usual common law principles of causation, including those of proximate causation, should govern the determination of whether a defendant 'caused or contributed' to a release or threatened release."[16] Under the House bill, therefore, plaintiffs were required to satisfy the normal common law requirement of showing a nexus between the defendant's acts and the plaintiff's injury.[17]

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[16] H.R. Rep. No. 1016, Part I, 96th Cong., 2d Sess. 33 (1980).

[17] In so construing H.R. 7020 the Committee specifically warned that liability should not be imposed merely on a

(Footnote [17] continued on next page.)

2. The Senate Committee bill also required strict proof of causation in most cases.

As introduced in the Senate, S. 1480 contained language on causation similar to that in H.R. 7020.[18] Although the "caused or contributed" language was not carried forward in the revised liability provisions drafted by the Committee on Environment and Public Works, the same common law standards of causation applicable under H.R. 7020 were to apply under the Committee's version of S. 1480.

With respect to causation, the liability provisions contained in section 4(a) of S. 1480 as reported out of

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(Footnote [18] continued from previous page.)

showing that the hazardous substances generated or transported by the defendant were found in the facility:

> The mere act of generation or transportation of hazardous waste, or the mere existence of a generator's or transporter's waste in a site with respect to which cleanup costs are incurred would not, in and of itself, result in liability under section 3071. The Committee intends that for liability to attach under this section, the plaintiff must demonstrate a causal or contributory nexus between the acts of the defendant and the conditions which necessitated response action under section 3041.

Id. at 33-34 (emphasis added).

[18] S. 1480, 96th Cong., 2d Sess. § 4(a) (1980). Section 4(a) as originally drafted would have imposed liability on the "owner or operator" of a vessel or facility, and "any other person who caused or contributed or is causing or contributing to" a discharge, release, or disposal. (emphasis supplied)

committee were grammatically similar to the provisions of Superfund sections 107(a) and (b) and Water Act section 311(f).[19] While section 4(a) did not expressly require proof that the defendant caused the release (identification), it provided a defense when the defendant could prove that the release "was caused solely by" an act of God or act of war.

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[19] As revised by the Committee on Environment and Public Works, section 4(a) provided in pertinent part:

> Except where the person otherwise liable under this subsection can prove that a discharge, release, or disposal was caused solely by an act of God or an act of war, and notwithstanding any other provision or rule of law --
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> (i) the owner or operator of a vessel or a facility,
>
> (ii) any person who at the time of disposal of any hazardous substance owned or operated any facility or site at which such hazardous substances are disposed of,
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> (iii) any person who by contract, agreement, or otherwise arranged for disposal, treatment, or transport for disposal or treatment by any other party or entity of hazardous substances owned or possessed by such person, at facilities or sites owned or operated by such other party or entity and containing such hazardous substances, and
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> (iv) any person who accepts any hazardous substances for transport to disposal or treatment facilities or sites selected by such person, from which a hazardous substance is discharged, released, or disposed of, or from which any pollutant or contaminant is released resulting in action under section 3(c)(1) of this Act, shall be jointly, severally, and strictly liable. . . .

Despite the absence of an express requirement that the defendant caused the release, similar proof of causation was plainly intended as an element of recovery under section 4(a). The Committee relaxed the causation requirement only for the limited purpose of recovering medical and rehabilitation expenses, and retained strict causation requirements for all other Superfund claims.

The Committee deliberations centered almost exclusively on whether strict common law causation requirements would apply in actions to recover medical and rehabilitation expenses.[20] As revised in Committee, S. 1480 provided a mechanism through which personal injury plaintiffs could establish a presumption "that defendant caused or significantly contributed to" the plaintiff's injury or disease. S. 1480, § 4(c)(3)(A).[21] The creation of such a presumption necessarily implies that the Committee intended to

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[20] S. 1480 would have created a new right of action to recover, among other things, medical expenses due to personal injury caused by a release. S. 1480, § 4(a)(2)(F).

[21] Even under the medical expenses presumption, however, the Committee did not relax the requirement for strict proof that the defendant caused the release (identification); only the standard of proof for showing that the release caused the plaintiff's injury (damage) was lightened. In order to establish the presumption, the plaintiff would have been required to prove exposure "to a hazardous substance found in a discharge, release, or disposal which the defendant caused or to which he contributed. . . ." S. 1480, § 4(c)(3)(A)(i) (emphasis supplied). The standard of proof for showing that the release caused plaintiff's injury was relaxed, however, through introduction of a "reasonable likelihood" standard. S. 1480, § 4(c)(3)(A)(ii), (iii).

require proof of causation in Superfund actions, for without such a requirement, the presumption would have been superfluous.

The relaxed standard of causation applied only for "the limited purpose of recovering out-of-pocket medical expenses and rehabilitation costs." S. Rep. No. 848, 96th Cong., 2d Sess. 43 (1980). Traditional common law standards of causation remained applicable to other costs and damages recoverable under S. 1480:

> To recover for other injuries (or for costs other than out-of-pocket medical and rehabilitation expenses), an injured party must utilize the methods of proof and evidence ordinarily applied by the courts in his or her jurisdiction.[22]

Under S. 1480, therefore, as under the House bill, plaintiffs were required to meet traditional standards of causation to recover response costs or natural resource damages.

3. Strict causation requirements were carried forward in section 107 of Superfund.

The basic grammatical structure of the S. 1480 liability provisions, and the requirement for proof of causation, were enacted in Superfund. Indeed, the modifications made in the liability provisions in developing the final Superfund bill were designed to ameliorate liability terms

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[22] S. Rep. No. 848, 96th Cong., 2d Sess. 43 (1980).

which the Senate found too severe -- not to make liability even more severe by limiting causation requirements.

For example, Senator Stafford, a sponsor of S. 1480 and the ranking minority member of the Committee on Environment and Public Works, conceded that many of his colleagues "perceive[d] [S. 1480] as punitive and unnecessarily rigorous."[23] Similarly, Senator Helms emphasized the "well-deserved criticism" directed at S. 1480, based on standards of liability which were "grossly unfair."[24] And Senator Riegle also described S. 1480 as "too burdensome or punitive."[25]

Due to this "strong concern and opposition," the bill's sponsors were required to make "major concessions" to pass any Superfund legislation.[26] Following a second round of negotiations, a "new compromise was shaped,"[27] which passed the Senate and was accepted by the House without amendment.[28]

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23 126 Cong. Rec. S14967 (daily ed. Nov. 24, 1980).

24 Id. at S15004.

25 Id. at S15007.

26 Id. at S14968 (remarks of Senator Stafford).

27 Id. at S14967 (remarks of Senator Stafford).

28 See 126 Cong. Rec. H11791 (daily ed. Dec. 3, 1980) (remarks of Rep. Harsha); id. at H11792 (remarks of Rep. Breaux).

Having rejected earlier liability provisions as excessively onerous, despite the incorporation of strict causation requirements, Congress certainly did not dilute the causation requirements of H.R. 7020 and S. 1480 in developing the compromise Superfund legislation.[29] Accordingly, Superfund's legislative history confirms that the strict causation requirements applicable at common law must be satisfied in actions brought under Superfund section 107.

D. The Cause-in-Fact Requirement Substantially Limits Superfund Liability.

In order to prove cause-in-fact under Superfund, plaintiffs must show (1) that it is more likely than not that the defendant was a substantial factor in causing a release or threat of release, and (2) that it is more likely than not that the release or threat of release caused the incurrence of response costs or damage to natural resources. Even where plaintiffs are able to make the requisite showing, causation provides a mechanism for apportioning damages among defendants. Accordingly, the cause-in-fact requirement substantially limits potential liability under Superfund.

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[29] Indeed, the causation requirement was reaffirmed on the Senate floor during debate on the final compromise legislation. See p. III-26 infra (remarks of Senator Helms).

1. Superfund plaintiffs must bear the burden of proof.

Superfund plaintiffs bear the burden of proving causation as an element of a prima facie case. Plaintiffs must show both "identification" and "damage" causation by a preponderance of the evidence. Thus, mere evidence that the defendant has some vague association with a disposal site is an insufficient basis for recovery.

The Senate debate on the final compromise Superfund legislation recognized that the burden of proof rests with Superfund plaintiffs:

> The Government can sue a defendant under the bill only for those costs and damages that it can prove were caused by the defendant's conduct.[30]

No exceptions to this rule were even suggested in the debate.

Indeed, even the relaxed medical causation provision developed in the Senate Committee's version of S. 1480, but dropped before final passage, emphasized that the burden of proof remains with the plaintiff:

> The presumption . . . affects only the burden of going forward with the presentation of the case. Nothing in this paragraph shall affect the burden of proof which shall remain with the claimant in accordance with Rule 301 of the Federal Rules of Evidence.

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[30] 126 Cong. Rec. S15004 (daily ed. Nov. 24, 1980) (remarks of Senator Helms) (emphasis added).

S. 1480, § 4(c)(3)(B). No provision of Superfund purports to modify either the burden of going forward with the evidence, or the ultimate burden of proof. To the contrary, Congress specifically recognized that plaintiffs would bear the burden of proof under the Superfund liability provisions, considered modifying the burden of going forward in the discrete context of medical expense claims and left the burden of proof ultimately with plaintiffs in all circumstances.

In order to sustain their burden of proof, plaintiffs must prove causation by a preponderance of the evidence. As Dean Prosser has emphasized, a mere possibility that the defendant caused the injury is inadequate to support liability.[31] Similarly, where the plaintiff fails to show

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[31] According to Prosser,

> [Plaintiff] must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a substantial factor in bringing about the result. A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or where the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant.

Prosser at 241.

which of several possible causes was responsible for his injury, the courts have denied recovery.[32]

For example, in a case such as a groundwater cleanup involving an actual release, Superfund plaintiffs cannot recover merely by showing that a defendant disposed of a hazardous substance at a multi-generator site and, therefore, might have caused a release. If the plaintiff is unable to show that it is more likely than not that the defendant caused the release, or is unable to show that it is more likely than not that the release caused the response or natural resource damages for which recovery is sought, no recovery will be allowed.

To prove that a defendant caused a release at a multi-generator site, plaintiffs must prove at a minimum that the wastes deposited at the site by the defendant include the hazardous substances involved in the release or threatened release. For instance, where the plaintiff proves that carbon tetrachloride has been released from a site, he must

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[32] As the court held in Ingersoll v. Liberty Bank of Buffalo, 14 N.E.2d 828 (N.Y. 1938),

> Where the facts proven show that there are several possible causes of an injury, and it is just as reasonable and probable that the injury was the result of one cause as the other, plaintiff cannot have a recovery as he has failed to prove that the negligence of the defendant caused the injury.

also prove that the defendant sent carbon tetrachloride to the site. Absent such proof, the plaintiff could only speculate that the defendant caused the release, and no recovery should be allowed.

Similarly, a mere possibility that the defendant's release caused response costs or natural resource damages is insufficient to support recovery. Rather plaintiff must show by a preponderance of the evidence that the defendant's release caused the response taken at the site.[33]

The government's problem may be simplified when surface cleanup is involved, and the causation issue is centered on a threat of release. Linkage between a defendant's waste and a release will be unnecessary. But it will still be necessary for the government to show that defendant's waste was present at the site, thereby posing a threat of release that required cleanup.

2. Causation provides a mechanism for apportionment in Superfund cases.

Even where plaintiffs are able to prove that a defendant more likely than not was a "substantial factor" in causing a release, causation provides a useful mechanism for

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[33] For example, if the defendant's release was completely cleaned up by removing his drums of waste and a few inches of topsoil from the site, the defendant's release did not cause an extensive subsurface response program, and the defendant should not be liable for the subsurface costs.

apportioning liability at multi-generator sites. Apportionment is required in Superfund cases because Superfund does not provide for joint and several liability, and indeed Congress explicitly rejected the imposition of joint and several liability.[34]

In most cases at common law, pollution has been "regarded by the courts as capable of some rough apportionment according to the extent to which each defendant has contributed, and it is held that each will be liable only for his proportionate share of the harm."[35] The Restatement establishes the presumption that "[i]f two or more persons, acting independently, tortiously cause distinct harms or a single harm for which there is a reasonable basis for division according to the contribution of each, each is subject to liability only for the portion that he has himself caused."[36]

Where the defendant's wastes are only part of the hazardous substances involved in a release, his liability should be limited to that portion of the response costs or resource damages caused by his waste. A company should bear no liability for another generator's larger or more toxic release, based merely on the unfortuitous disposal of wastes at the same site. In addition, where several generators

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[34] See chapter 1 at I-17 to I-20.

[35] Prosser at 608.

[36] Restatement (Second) of Torts, § 881 (1979).

each contributed the same or similar types of waste, in substantial quantities, causation provides a responsible mechanism for apportioning damages fairly among the defendants.

III. PROOF OF PROXIMATE CAUSE IS ALSO REQUIRED UNDER SUPERFUND.

The concept of proximate cause encompasses a variety of legal policy considerations limiting recovery where the injury is so unforeseeable or remote from the defendant's acts that it is unfair to impose liability. Congress incorporated common law proximate cause standards in Superfund, although it limited their application in cases involving the intervening acts of third parties. The courts have also recognized the proximate cause requirement under section 311 of the Water Act. Accordingly, the proximate cause requirement may provide an important limitation on Superfund liability.

A. The Proximate Cause Requirement at Common Law.

Proximate cause is not a question of physical causation at all, but rather a question of the extent of a defendant's liability for events which he caused in fact. Like the ripples caused by a pebble falling in a pond, the effects of a defendant's act spread out in time, space and directness. How far the defendant's liability for his act should run is

a legal policy question, not a factual one, and is the subject of inquiry in proximate cause issues. Thus, "[p]roximate cause . . . is merely the limitation which the courts have placed upon the actor's responsibility for the consequences of his conduct."[37]

No single formula can determine whether A was the proximate cause of B. Instead, proximate cause presents "a series of distinct problems, more or less unrelated, to be determined upon different considerations"[38] which can be conveniently summarized in the form of five questions: (1) Was the damage that occurred foreseeable? (2) Was the plaintiff who was harmed foreseeable? (3) Was the damage that occurred direct? (4) Was there a significant intervening cause? (5) Was there no other person on whom the defendant was free to leave the burden of protecting the plaintiff?[39]

Thousands of cases have addressed these questions, and hundreds of books and law review articles have probed the issues further. As a general rule, however, in unintentional torts, the defendant may be excused from liability on the basis of any of the five basic proximate cause issues

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[37] Prosser at 236.

[38] Id. at 249.

[39] See id. at 249-50 for a similar analysis, which also treats the issues of "cause-in-fact" and apportionment of damages among causes as aspects of proximate cause.

outlined above. Thus, defendants are not responsible if the damage[40] or the plaintiff[41] was unforeseeable, if the damage was indirect or remote,[42] if there was an intervening cause[43] or if there was another person to whom the defendant could have left responsibility.[44] Proximate

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[40] E.g. Hassett v. Palmer, 12 A.2d 646 (Conn. 1940) (Defendant railroad which failed to post sign or guard near exposed electrical wire was not liable for injuries to workmen when steel measuring tape fell, striking the wire and workmen simultaneously and causing a shock, since that damage was unforeseeable).

[41] E.g. Palsgraf v. Long Island R. Co., 162 N.E. 99 (N.Y. 1928) (Railroad employees, who helped a passenger board a moving train and dislodged the passenger's wrapped package, were not liable for injuries to woman standing on station platform when fireworks in the package exploded, overturning scales which fell on the woman, since harm to the woman was unforeseeable).

[42] E.g. Petition of Kinsman Transit Co., 388 F.2d 821 (2d Cir. 1968). (Vessel broke loose from moorings and struck second vessel which in turn broke loose from moorings, and both vessels drifted downstream and crashed into bridge which collapsed and together with two vessels formed dam causing flooding and ice jam. Damage sustained by owner of cargo aboard vessel berthed in harbor below bridge, as result of inability to unload cargo at point above collapsed bridge, and damages incurred by company engaged in unloading cargo from vessel located above bridge, in having to rent special equipment to unload vessel because of ice jam, were too tenuous and remote to permit recovery).

[43] E.g. Richards v. Stanley, 271 P.2d 23 (Cal. 1954) (Where defendant left key in ignition of unlocked parked car and thief stole the car and ran down the plaintiff, defendant was not liable because the thief was an intervening cause).

[44] E.g. Jessup v. Sloneker, 21 A. 988 (Pa. 1891) (Defendant laborer, hired to excavate in street, was not liable for injuries to passers-by who fell into unmarked hole, since laborer was entitled to leave it to his employers to set out a lantern).

cause is exceedingly complex, highly fact-specific, and in some areas greatly confused. The rule expressed above, then, is subject to many exceptions.

Although the above analysis arose in the context of negligence cases, a strict liability regimen poses the same need for determining proximate cause.[45] Moreover, the proximate cause standard may be higher in a strict liability regimen than in a negligence regimen. In a negligence case, the plaintiff must show both that the defendant caused the harm and that the defendant was negligent. As a matter of equity, if causation is to be the sole basis for liability, it seems appropriate to require a more rigorous showing of causation.

This analysis is supported by tort law's differential treatment of intentional and unintentional torts. Defendants are generally held liable for the unforeseeable consequences of their intentional torts, but not for the unforeseeable consequences of their unintentional torts.[46] Blameworthiness seems to be considered an independent basis for liability; as that basis diminishes, the courts insist

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[45] "The same practical necessity for the restriction of liability within some reasonable bounds, which arises in connection with problems of "proximate cause" in negligence cases, demands [in strict liability cases] that some limit be set." Prosser at 517.

[46] E.g., Derosier v. New England Tel. & Tel. Co., 130 A. 145 (N.H. 1925).

on a fuller showing of the other basis for liability -- causation. Following this pattern, the courts should insist on rigorous proof of causation in strict liability cases, which require no showing of blameworthiness.

B. Superfund Plaintiffs Must Prove Proximate Cause.

Proof of proximate cause, under the standards developed at common law, is a prerequisite to recovery under Superfund section 107. As set forth above, both the language of section 107 and judicial interpretation of the analogous provisions of the Clean Water Act confirm that causation is essential in Superfund liability determinations. See pp. III-10 to III-18, supra.

As the legislative history shows, Congress intended to incorporate common law standards of proximate cause in Superfund. For example, in explaining the liability provisions of the House Bill, H.R. 7020, the Committee on Interstate and Foreign Commerce emphasized that "the usual common law principles of causation, including those of proximate causation, should govern the determination of whether a defendant 'caused or contributed' to a release or threatened release."[47]

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[47] H.R. Rep. No. 1016, Part I, 96th Cong., 2d Sess. 33 (1980) (emphasis supplied).

Similarly, S. 1480, the bill reported out of committee in the Senate, applied traditional legal standards to causation issues, except with respect to the recovery of medical expenses.[48] In explaining the relaxed standard for proving medical causation, the Senate Committee on Environment and Public Works was careful to note that a plaintiff seeking other recovery "must utilize the methods of proof and evidence ordinarily applied by the courts in his or her jurisdiction."[49] Thus, section 107, which retained the basic structure of the S. 1480 liability provisions, requires proof of proximate cause under traditional common law standards.

Moreover, judicial interpretation of the analogous liability provisions found in section 311(f) of the Water Act provides strong confirmation that proximate cause is required under section 107. For example, in United States v. Tex-Tow, Inc., the court held that plaintiffs under section 311(f) must prove that the defendant's actions are the "legal cause," as well as the cause-in-fact, of a spill covered by section 311. 589 F.2d at 1314. Although Tex-Tow did not apply a rigorous proximate cause standard, the

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[48] The medical causation presumption contained in the committee version of S. 1480, which was not carried forward into the final Superfund legislation, is addressed at pp. III-22 to III-23, supra.

[49] S. Rep. No. 848, 96th Cong., 2d Sess. 43 (1980).

court's recognition of the proximate cause requirement under section 311 strongly reaffirms proximate cause as an essential element under section 311.

Only with respect to the intervening acts of third parties -- a distinct subset of proximate cause issues -- did Congress alter the basic common law standards for proving proximate cause. Section 107(b)(3) provides a defense where the defendant can show that the release and resulting damages were caused solely by

> an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant . . ..

Since at common law the defendant would not be the proximate cause of an injury caused solely by the intervening act of a third party in a contractual relationship with the defendant, this provision represents a congressional modification of common law standards. In addition, section 107(b) may shift the burden of proof to the defendant where the intervening acts of third parties are at issue. But Superfund does not change the common law of proximate causation in other respects.

IV. ABERRANT THEORIES OF CAUSATION

The foregoing analysis demonstrates that Superfund was intended to require strict proof of causation by plaintiffs,

in accordance with the standards developed at common law and under section 311 of the Clean Water Act. Where Superfund plaintiffs fail to satisfy the burden of proof on causation, however, they may argue that the burden should be shifted to defendants on the basis of a few common law decisions which departed from tradition by requiring defendants to prove that they did not cause the plaintiff's injury. The few decisions which have so held provide no basis for altering the congressional allocation of the burden of proof in Superfund, fail to show a consistent rationale for changing common law standards and have not been widely accepted. In addition, the reasoning of those decisions does not apply well in the Superfund context.

In statutory actions under Superfund, the courts are not free to tinker with the burden of proof assigned to plaintiffs by Congress. Congress could have provided a mechanism for shifting the burden of proof on causation issues to defendants. But as set forth above, the only congressional effort to relax Superfund causation requirements, the medical causation presumption of S. 1480, did not relax the "identification" requirement and affected only the burden of going forward, not the ultimate burden of proof. Even this modest retreat from strict causation requirements

was deleted from the final Superfund legislation, leaving the burden squarely on plaintiffs to prove causation.[50]

Moreover, no consistent rationale has been developed for shifting the burden of proof on causation to defendants. For example, in Summers v. Tice, 199 P.2d 1 (Cal. 1948), where two hunters independently and negligently fired their guns in the plaintiff's direction, the plaintiff was unable to identify which defendant fired the shot that caused injury. The court held that because the defendants, both negligent, "brought about a situation where the negligence of one of them injured the plaintiff . . . it should rest with them each to absolve himself if he can." 199 P.2d at 4.

A different theory of liability was applied in Hall v. E.I. DuPont de Nemours & Co., 345 F.Supp. 353 (E.D.N.Y. 1972), aff'd sub nom., Ball v. E.I. Dupont de Nemours & Co., 519 F.2d 715 (6th Cir. 1975), where some plaintiffs were unable to identify the specific manufacturer of blasting caps which exploded and caused their injuries. In an action against six manufacturers "comprising virtually the entire blasting cap industry" of the United States, id. at 391, the

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[50] The burden-shifting cases are also inconsistent with the liability scheme Congress mandated in Superfund because, with at least one notable exception, those decisions have imposed joint and several liability on defendants. Superfund does not provide for joint and several liability, and indeed, Congress considered and rejected such liability under Superfund. See chapter 1.

Hall court held that joint liability could be predicated on alleged joint control of risk under a conscious agreement among defendants not to place warnings on blasting caps. The court held that the burden of proof on causation could be shifted to defendants "[i]f plaintiffs can establish by a preponderance of the evidence that the injury-causing caps were the product of some unknown one of the named defendants, that each named defendant breached a duty of care owed to plaintiffs, and that these breaches were substantially concurrent in time and of a similar nature." Id. at 380. Other Hall plaintiffs who alleged that a specific manufacturer produced the injury-causing cap were not permitted to proceed on a joint liability theory, and their claims against other manufacturers were dismissed.[51]

In Bichler v. Eli Lilly and Co., 436 N.Y.S.2d 625 (1981), aff'd, 450 N.Y.S.2d 776 (1982), plaintiff's injuries were caused by her mother's ingestion of the prescription drug DES during pregnancy. Although plaintiff was unable to identify the manufacturer of the DES used by the mother, and thus had not proved that Eli Lilly made the pills which caused plaintiff's injury, no other manufacturers were named

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[51] 345 F.Supp. at 381-84. Ironically, the Hall decision left the plaintiffs who alleged an ability to prove causation against a specific manufacturer in a worse position than those who alleged they were unable to identify a specific manufacturer who caused the injury.

as defendants. The court held Eli Lilly jointly and severally liable, based on a finding that Eli Lilly had engaged in concerted action with other manufacturers through cooperation and pooling of information, agreement on the basic chemical formula, adoption of Lilly's literature as a model for package inserts, and "conscious parallel activity thereafter." 436 N.Y.S.2d at 633-34.

Sindell v. Abbott Laboratories, 607 P.2d 924 (Cal.), cert. denied, 449 U.S. 912 (1980), another DES case, specifically rejected the "concert of action" theory applied in Bichler, as well as the "enterprise liability" theory of Hall. 607 P.2d at 931-35. In addition, the Sindell court recognized that the "alternate liability" theory of Summers, developed in a case where one of two negligent defendants caused plaintiff's injury, would be unfair if applied in a case where "there is a possibility that none of the five defendants . . . produced the offending substance and that the responsible manufacturer . . . will escape liability." 607 P.2d at 936-37; see id. at 930-31. The Sindell court held that the burden of proof could be shifted to defendants only if the manufacturer of a "substantial share" of the DES market were joined in the action, and limited each defendant's liability to its market share:

> [e]ach defendant will be held liable for the proportion of the judgment represented by its share of that market unless it demonstrates that it could not

> have made the product which caused plaintiff's injuries.

Id. at 937.

Other courts have firmly rejected the burden-shifting theories advanced in these controversial cases. For example, in Ryan v. Eli Lilly & Co., 514 F.Supp. 1004 (D.S.C. 1981), the court refused to apply Sindell under South Carolina law. Judge Chapman held that:

> The unequivocal law of South Carolina is the plaintiff in a negligence action has not only the burden of proving negligence but also the burden of proving that the injury or damage was caused by the actionable conduct of the particular defendant . . .. Application of this burden-shifting theory would violate established public policy and fundamental principle of tort law and procedure in this state in a variety of ways.

Id. at 1018-19.

The Ryan decision was followed in another case under South Carolina law, Mizell v. Eli Lilly & Co., 526 F.Supp. 589 (D.S.C. 1981). In Mizell, Judge Hawkins refused to apply Sindell, observing that:

> By removing the traditional requirement that the plaintiff identify the responsible manufacturer, the doctrine destroys the nexus between production of a defective item and the plaintiff's injury. As a result, liability is placed on defendants bearing no responsibility for the defective product.

Id. at 596.

Similarly, in Starling v. Seaboard Coast Line R. Co., 533 F.Supp. 183 (S.D. Ga. 1982), the court carefully

reviewed Hall and Sindell, concluding that "these theories have no basis in Georgia law." Id. at 189. The court observed that burden-shifting is contrary to Georgia's product liability rules because it tends to make every manufacturer an insurer of the safety of all generically similar products; that the legislature, and not the courts, should decide this fundamental issue; and that the market share approach of Sindell is unfair if market share is not equivalent to the harm caused. Id. at 190-91.

Whatever their status at common law, the reasoning of Sindell, Bichler, Hall and Summers is inapposite in Superfund cases. The conditions which a few courts believe warranted burden-shifting in those cases are absent in Superfund litigation.

First, decisions shifting the burden of proof on causation issues in common law actions have been influenced by the prospect that an innocent, injured party would be left without a remedy, a problem that will not arise under Superfund. The court in Summers, for example, wrote that "the innocent wronged party should not be deprived of his right to redress." 199 P.2d at 5. Similarly, in Bichler, the court stated that "[p]laintiffs should not be without a remedy merely because defendants' conduct has made it difficult or impossible to prove which defendant was the actual tortfeasor." 436 N.Y.S.2d at 630.

Under Superfund, however, Congress has provided an industry-financed Fund to pay cleanup costs and natural resource damages where the responsible parties cannot be identified, or are insolvent. Superfund plaintiffs will not be left without a remedy merely because they are unable to establish causation. Moreover, imposing the cost on the Fund distributes the cost throughout the industry, a much more equitable result than imposing the cost entirely on one or more defendants with no demonstrable causal relationship to the harm.

Second, the basis for shifting the burden of proof has been the defendant's negligence or violation of a duty of care, shifting the loss from an innocent plaintiff to defendants who are at fault. For example, the Sindell court emphasized that "as between an innocent plaintiff and negligent defendants, the latter should bear the cost of the injury."[52] In Summers the trial court found both defendants negligent,[53] and in Sindell plaintiffs alleged negligence in the manufacture and marketing of a drug without adequate testing.[54] Similarly, in Hall the court held that plaintiffs are entitled to shift the burden of proof on

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[52] 607 P.2d at 936.

[53] 199 P.2d at 5.

[54] 607 P.2d at 926.

causation only if they can prove, inter alia, "that each named defendant breached a duty of care owed to plaintiffs."[55] In Shunk v. Bosworth,[56] however, the Sixth Circuit refused to shift the burden of proof under the Summers rule in a case where fault had not been shown. Shunk involved a hunting accident similar to the facts of Summers, except that "[t]here was no evidence from which inferences could be drawn that either or both of the defendants were guilty of negligence . . . ."[57]

Where Superfund plaintiffs rely on theories of liability which do not require proof of wrongdoing or breach of a duty of care, the causation requirement should not be relaxed. Absent proof of fault on the part of the defendants, there is simply no basis for shifting the burden of proof from a Superfund plaintiff to defendants, particularly in light of the plaintiff's alternate recourse to the Fund.

Third, the Hall, Bichler, and Sindell decisions are particularly inapposite because they involved efforts to impose industry-wide liability on defendants manufacturing fungible goods, where any one of the defendants could have

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[55] 345 F.Supp. at 380. Even in Bichler, nominally a strict liability case, the defendant was found to have marketed an "unreasonably dangerous drug," and was described as a "wrongdoer." 436 N.Y.S.2d at 634.

[56] 334 F.2d 309 (6th Cir. 1964).

[57] Id. at 312. But see Litzmann v. Humboldt County, 273 P.2d 82 (Cal. 1954), a lower level California decision which apparently has never been followed.

been the cause of plaintiff's injury. By contrast, at most dumpsites, generators did not dispose of uniform and fungible wastes. Instead, generators are likely to have disposed of a wide variety of materials, of varying toxicity, solubility and persistence. Thus, there is no basis for believing that each defendant contributed equally to the risk, or that, as the Sindell court argued, "each manufacturer's liability would approximate its responsibility for the injuries caused by its own products." 607 P.2d at 937. Similarly, because there is no uniformity of conduct among generators, the "concerted action" theory applied in Bichler, and the "joint control of risk" theory applied in Hall, are inapplicable to waste disposal cases under Superfund.

Accordingly, there is no basis for shifting the burden of proof on causation to Superfund defendants. When plaintiffs fail to show causation by a preponderance of the evidence, recovery should be denied.

TAB 4

CHAPTER 4:

SUBSTANTIVE STANDARDS
UNDER SECTION 106 OF SUPERFUND

INTRODUCTION AND SUMMARY OF CONCLUSIONS

EPA's policy to date has been to utilize section 106 and similar emergency enforcement provisions of other statutes routinely whenever EPA seeks to require industry cleanup of hazardous wastes.[1] This policy has resulted in more than sixty suits under "imminent and substantial endangerment" provisions, including many cases containing counts under section 106 of Superfund.[2] So long as this policy continues, section 106 may be the key provision that generators will be required to deal with under Superfund.

This chapter addresses and discusses the limits on EPA's authority under section 106. Part I is a discussion of the overall scheme of Superfund and how section 106 fits

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[1] For example, in EPA's Interim Superfund Removal Guidance (July 28, 1981), on-site coordinators are instructed to "request" or "compel" private parties to clean up before resorting to Response Fund money. Furthermore, EPA's Acting Director of the Office of Solid Waste Enforcement Programs has said that the EPA prefers issuing orders to using the Fund's resources. See 10 Pest. & Tox. Chem. News, No. 26 at 17 (May 12, 1982).

[2] Remarks of Carol Dinkins, Asst. Atty. General, Land and Natural Resources Division, Department of Justice, at annual meeting of ABA Section of Corporation Banking and Business Law (August 9, 1982) at 8. Many of these cases have been settled. Id.

into that scheme. Part II discusses whether section 106 is substantive or merely jurisdictional, and, if it is substantive, what criteria govern liability. It will be difficult to maintain that the section is merely jurisdictional; however, the primary source for interpreting section 106 should be the statutory requirements of section 106 itself and prevailing equitable principles -- not the new liability regime established by section 107 of Superfund.

Part III discusses in greater detail what these substantive limitations are. Part III-A begins with the "imminent and substantial endangerment" requirement, which the statute, its legislative history, and court decisions under analogous statutes indicate was intended to limit application of section 106 to extraordinary circumstances, where the normal operation of Superfund would not suffice to protect the public.

Part III-B addresses who may be proper parties defendant under section 106. Even though a wide range of possible defendants theoretically might be liable for post-cleanup damages under section 107, the statutory framework and equitable principles suggest that many of these parties, including generators, will not generally be proper defendants under section 106. Under this interpretation, generators may be enjoined only when they participated directly in waste site management or knowingly contributed wastes to an unsafe site.

Part III-C then discusses the additional section 106 requirement that the government demonstrate that it lacks an adequate remedy at law as a prerequisite to obtaining injunctive relief. Like the imminent and substantial endangerment requirement, this condition underscores Congress' intent that in the ordinary situation the government should employ its section 104 cleanup authority and seek recovery under section 107 rather than forcing the courts to decide the need for and scope of remedy in an enforcement action for injunctive relief.

Assuming that the government establishes an "imminent and substantial endangerment," the equitable principles governing section 106 place significant limits on the nature and scope of cleanup that can be required. As discussed in Part IV, both the Act and its legislative history mandate that cleanup orders be consistent with the National Contingency Plan (NCP). Moreover, remedies that might be appropriate under section 104 are not necessarily appropriate under the equitable principles that govern section 106.

I. SECTION 106 IS AN EMERGENCY PROVISION DESIGNED TO SUPPLEMENT THE PRINCIPAL CLEANUP PROVISIONS OF SECTIONS 104 AND 107.

Superfund represents a sharp break with the past, because for the first time the government is authorized to carry out hazardous waste site cleanup activity on its own and then seek recovery from potentially responsible parties.

In this regard, the key provision is section 104, which establishes the government's authority to engage in various kinds of cleanup activity and which imposes certain limits on the kinds of activity that may be appropriate.

Section 105, in turn, provides further and more detailed control over authorized cleanup operations. In particular, that section requires publication of a National Contingency Plan that provides the criteria for determining the sites needing cleanup and what the nature of cleanup operations at those sites should be.

Under section 105, the NCP is to provide criteria to assess the risks presented by various sites (§ 105(8)(A)) and to establish a list of priority sites to be cleaned up (§ 105(8)(B)). The NCP must also set forth "methods and criteria for determining the appropriate extent of removal, remedy and other measures authorized by this Act," (§ 105(3)) and a means of assuring that these measures are "cost-effective" (§ 105(7)).

The authority, resources and procedures for accomplishing and funding the cleanup under section 105 are provided not only by section 104, but also by sections 107, 111 and 112 of the Act. Section 107 provides a means for the government to recover its costs incurred for hazardous waste (but not other) cleanup authorized by section 104, provided that such costs are "not inconsistent with the NCP." Under section 107, private parties may be liable for

hazardous waste cleanup costs that can be linked to their conduct. The list of potential defendants under section 107 is expansive, including at least some generators.[3] Moreover, the standard of liability under section 107 may, in many instances, be strict liability.[4]

In contrast to sections 104 and 107, which permit the government to undertake certain forms of cleanup and recover its costs, section 106 authorizes EPA to seek abatement relief directly when it "determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility." In addition, the Administrator may take "other action," including the issuance of "such orders as may be necessary to protect public health and welfare and the environment."[5] Failure to comply with a section 106 order

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[3] See Chapter 5 for a detailed discussion of potentially liable parties.

[4] For a detailed analysis of section 107 liability issues, see Chapters 2 and 5.

[5] The text of section 106(a) is as follows:

> In addition to any other action taken by a State or local government, when the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he may

(Footnote [5] continued on next page.)

is potentially punishable by a $5,000 fine for each day of non-compliance,[6] and by treble damages if the government uses Response Fund money to clean up the release after the responsible party refuses without justification to do so.[7]

By its terms, section 106 is intended to be used only when the normal cleanup regime established by sections 104, 105 and 107 will not suffice. Thus, section 106 expressly is referred to as an "emergency response authority" and section 106(c) requires EPA to issue guidelines to coordinate its action under this provision with that under other "imminent hazard, enforcement and emergency response authorities." Moreover, section 106 is directed only at "imminent and substantial endangerment," a limitation that does not

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(Footnote [5] continued from previous page.)

> require the Attorney General of the United States to secure such relief as may be necessary to abate such danger or threat and the district court of the United States in the district in which the threat occurs shall have jurisdiction to grant such relief as the public interest and the equities of the case may require. The President may also, after notice to the affected State, take other action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and welfare and the environment.

42 U.S.C. § 9606(a).

[6] Superfund § 106(c), 42 U.S.C. § 9606(c).

[7] Superfund § 107(c)(3), 42 U.S.C. § 9607(c)(3).

apply to all actions under section 104. And unlike sections 104 and 107, the existence and scope of the authorized remedy under section 106 is defined expressly in terms of "the public interest and the equities of the case."

II. ALTHOUGH SOME ARGUE THAT SECTION 106 IS SOLELY JURISDICTIONAL, THE COURTS ARE LIKELY TO FIND SUBSTANTIVE REQUIREMENTS AND EMPLOY EQUITABLE AND COMMON LAW PRINCIPLES IN CONSTRUING SECTION 106.

Some have argued that section 106 imposes no substantive limits and is instead merely a grant of federal jurisdiction to permit the courts to enforce federal common law remedies. In light of the statutory text and the Milwaukee II decision (City of Milwaukee v. Illinois, 451 U.S. 304 (1981)), however, courts eventually are likely to reject this position and instead view section 106 as establishing substantive standards, interpreted in light of prevailing equitable and common law principles.

A. The Courts Are likely To Construe Section 106 as Substantive Rather than Solely Jurisdictional.

In section 106 cases to date, defendants have argued that section 106 does nothing more than provide a grant of federal jurisdiction to enforce existing common law nuisance remedies.[8] Certainly the statutory text of section 106

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[8] See, e.g., Motion of Defendant Gould, Inc. to Dismiss the Amended Complaint, United States v. Wade, No. 79-1246 at 8, (E.D. Pa. 1982) (motion filed Feb. 4, 1982); Memorandum in Reply to Plaintiff's Response to Motion to Dismiss, United States v. Outboard Marine Corp., No. 78-C-1004 at 2, 8, (N.D. Ill. 1982).

does not answer this question definitively either way. To be sure, section 106 is considerably more detailed than the normal jurisdictional provision establishing a federal cause of action.[9] Nevertheless, several courts (at least prior to Milwaukee II) have held that a similar emergency provision under RCRA was solely jurisdictional.[10]

The legislative history is silent on the issue. None of the predecessor bills contained a provision closely comparable to section 106,[11] and since there was no conference report on the compromise bill, the only relevant legislative history is the floor debate on the compromise. But with the exception of a brief discussion of the damages for disobedience of a section 106 order,[12] there was no mention of section 106 on the House or Senate floor.

The argument that section 106 is solely jurisdictional thus rests almost exclusively on two decisions under section

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[9] Compare 28 U.S.C. § 1331 (federal jurisdiction); § 1337 (antitrust action); and § 2201 (declaratory judgment).

[10] See, e.g., U.S. v. Midwest Solvent Recovery, Inc., 484 F. Supp. 138 (D. Ind. 1980); U.S. v. Solvents Recovery Service of New England, 496 F. Supp. 1127 (D. Conn. 1980).

[11] For example, the predecessor bills had no "imminent and substantial danger" requirement, did not authorize injunctive relief, and contained no direction that a court should "grant such relief as the public interest and the equities of the case may require." See S. 1480, § 3(b); H.R. 7020, § 3041(a)(2).

[12] See 126 Cong. Rec. S15008 (daily ed. Nov. 24, 1980) (remarks of Senator Stafford).

7003, the comparable provision of RCRA also enacted by the 96th Congress.[13]

The first, United States v. Midwest Solvent Recovery, Inc., 484 F. Supp. 138, 143-44 (D.Ind. 1980), held that the "imminent and substantial endangerment" provision of RCRA section 7003 was simply an evidentiary prerequisite, providing federal jurisdiction and allowing the government to prosecute actions under federal common law. The second case, United States v. Solvents Recovery Service of New England, 496 F. Supp. 1127 (D.Conn. 1980), reached a similar conclusion, holding that section 7003 was too vague to serve as a source for substantive standards:

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[13] Section 7003(a) reads:

> Notwithstanding any other provision of this Act, upon receipt of evidence that the handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste may present an imminent and substantial endangerment to health or the environment, the Administrator may bring suit on behalf of the United States in the appropriate district court to immediately restrain any person contributing to such handling storage, treatment, transportation or disposal to stop such handling, storage, treatment, transportation or disposal or to take such other action as may be necessary. The Administrator shall provide notice to the affected State of any such suit. The Administrator may also after notice to the affected State, take other action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and the environment.

(emphasis added). Compare with § 106(a), supra n.5.

> Section 7003 provides a jurisdictional basis and an enforcement device for the government . . .. However, section 7003 does not itself establish standards for determining the lawfulness of the conduct of those sued by the United States. In an appropriate case, those standards might be found elsewhere in RCRA or in the regulations promulgated pursuant to RCRA, or in the federal common law of nuisance, which is evolving to meet a variety of pollution problems.

496 F. Supp. at 1133-34.

The argument that sections 106 or 7003 are merely jurisdictional is much more difficult to maintain, however, in the wake of the Supreme Court's decision in Milwaukee II. There, the Court held that the federal common law of nuisance no longer exists for the water pollution issues presented in that case, because a comprehensive regulatory program was adopted by Congress in the Federal Water Pollution Control Amendments of 1972.

The only section 106 case to address this issue squarely since Milwaukee II, United States v. Outboard Marine Corp., 18 E.R.C. (BNA) 1087 (N.D. Ill. 1982), held that the section carried "certain substantive requirements." 18 E.R.C. at 1090. The court recognized that section 106 was vague but held that the interpretation that the section was solely jurisdictional "seems to be foreclosed by Milwaukee II." Id. United States v. Wade, 546 F. Supp. 785 (E.D. Pa. 1982), though not directly addressing the issue, also implicitly treated section 106 as substantive.

Section 7003 cases decided since Milwaukee II have also held that provision to be substantive as well as jurisdictional. The leading case is United States v. Price, 523 F. Supp. 1055, 1069 (D.N.J. 1981), aff'd, No. 82-5030, slip op. (3d Cir. September 14, 1982), which relied expressly on Milwaukee II in dismissing a federal common law nuisance claim and attributing substantive standards to section 7003. Similarly, in United States v. Diamond Shamrock Corp., 17 E.R.C. (BNA) 1329, 1332-33 (N.D. Ohio 1981), the court dismissed a claim for injunctive relief based on the federal common law of nuisance, observing that since Milwaukee II federal common law remedies are unavailable in fields like RCRA, which are occupied by federal legislation. The court upheld a section 7003 claim, expressly finding the section to be both jurisdictional and substantive.[14]

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[14] Several other pre-Milwaukee II decisions have granted relief under section 7003 without reference to common law concepts, implicitly regarding section 7003 as a source of substantive standards. See, e.g., United States v. Hardage, No. Civ-80-1031-W, slip op. (W.D.Okla. Sept. 29, 1982); United States v. Vertac Chemical Corp., 489 F. Supp. 870 (D.Ark. 1980). Moreover, even if section 7003 were held to be jurisdictional only, section 106 may be substantive. For example, the court in Midwest Solvent Recovery, in holding section 7003 jurisdictional only, relied primarily on the fact that section 7003 is among the "miscellaneous" provisions of RCRA, rather than among the "group of provisions which sets down duties." 484 F. Supp. at 143. Section 106, by contrast, appears to be an integral part of the statutory scheme of Superfund. Thus, the recent opinion in United States v. Reilly Tar & Chemical Corp., observes that "[s]ection 106(a) is broader in scope than section 7003 of RCRA." 546 F. Supp. 1100, 1113 (D. Minn. 1982). The court there did not decide the jurisdictional/substantive issue, holding instead that even if section 106 were only jurisdictional, it should not be limited to interstate effects, the only controversy in the defendant's motion to dismiss. Id.

It may matter little to the ultimate resolution of cases, however, whether or not section 106 is substantive as well as jurisdictional. In Solvents Recovery Service, which found section 7003 to be jurisdictional only, the court suggested that substantive standards should be filled in by reference to the remainder of the Act and the federal common law. 496 F. Supp. at 1134. But as discussed below, notwithstanding Milwaukee II, these same sources almost certainly will be employed to define the contours of section 106 even if it is held to be substantive.

B. Courts Will Rely on Statutory Requirements and General Equitable Principles To Elaborate the Substantive Standards of Section 106.

The remainder of this chapter details the substantive standards likely to be employed by the courts under section 106. As an introduction to the subsequent discussion, those standards are briefly summarized below.

1. Substantive standards for section 106 are found in the statutory requirement of "imminent and substantial endangerment," general equitable principles, the requirement that relief be consistent with the "public interest and equities of the case," and the NCP.

Section 106's substantive standards derive directly from the statutory text and established principles of statutory construction. The first such standard, found on the face of section 106, is that the government demonstrate that

there is or may be an "imminent and substantial endangerment" at the site. As discussed in Part III-A below, Congress intended that this "imminent and substantial endangerment" requirement limit the use of section 106 to extraordinary situations.

A second substantive requirement of section 106 derives from general equitable principles. As discussed in parts III-B and III-C below, the Supreme Court has stressed that statutory injunctive authority, such as section 106, is always governed by the traditional requirements for equitable relief. These traditional equitable requirements preclude suit against generators in most instances and require in all cases that the government show that its legal remedies are inadequate.

The third prerequisite to use of section 106 is that the requirements of the National Contingency Plan be satisfied. This restriction is dealt with in Part IV-A, which describes how the statute and its legislative history limit section 106 injunctive authority to actions in accordance with the NCP.

The fourth and final major substantive requirement of section 106 is that relief be consistent with the "public interest and the equities of the case." This limitation

reinforces the need to apply general equitable principles[15] and invokes public interest balancing considerations, such as those found in the state common law of nuisance.[16] These principles are addressed in Parts IV-B and IV-C. Taken together, these substantive standards provide a coherent, although relatively limited, role for section 106 in the overall statutory scheme.

2. The same substantive standards also apply to section 106 administrative orders.

Section 106 does not unambiguously apply the standards noted above to administrative orders, but imposing such requirements is the only reasonable construction of section 106.

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[15] See, e.g., Pepper v. Litton, 308 U.S. 295, 304-05 (1939), using the term "equities of the case" in the Bankruptcy Act as support for courts to apply "the principles and rules of equity jurisprudence." See also Manufacturers Trust Co. v. Becker, 338 U.S. 304, 310 (1949).

Likewise, the "public interest" is a traditional criterion of equity. See, e.g., Yakus v. United States, 321 U.S. 414, 441 (1944); Virginia Ry. Co. v. System Federation, 300 U.S. 515, 552 (1937).

[16] This point was expressly made in the recent Reilly Tar decision where the court observed that the "portion of the statute granting the court the power to grant such relief as 'the equities of the case may require' may suggest that reference to federal common law nuisance principles is appropriate." 546 F. Supp. at 1113. The use of nuisance law principles also finds support in the legislative history of section 7003 of RCRA. See S. Rep. No. 172, 96th Cong., 1st Sess. 5 (1979).

First, section 106 explicitly refers to administrative orders as "other action under this section," thereby directly incorporating the requirements of section 106 outlined above.

Second, the administrative order authority of section 106 is potentially a summary, ex parte proceeding. As such, it logically should have a higher threshold requirement, reserved for cases where a site presents such a dire emergency that immediate action is required.

Finally, failure to apply the general section 106 standards to administrative orders would raise grave constitutional issues under the delegation doctrine. Absent the standards noted above, there would be no "intelligible principle" to guide administrative decisions and to serve as a basis for judicial review. See Panama Refining Co. v. Ryan, 293 U.S. 388, 430 (1935); Industrial Union Dep't v. American Petroleum Institute, 448 U.S. 607, 685-87 (1980) (concurring opinion of Justice Rehnquist).[17]

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[17] The better course would be for the courts to follow the usual canons of construction by construing section 106 reasonably to avoid having to decide the unconstitutional delegation issue. See, e.g., Industrial Union Dep't v. API, 448 U.S. at 646; Nat'l Cable Television Ass'n v. United States, 415 U.S. 336, 341-43 (1974).

III. SECTION 106 MAY BE USED ONLY IN CASES OF "IMMINENT AND SUBSTANTIAL ENDANGERMENT" AND WHEN THE GOVERNMENT MEETS THE TRADITIONAL EQUITABLE REQUIREMENTS FOR INJUNCTIVE RELIEF.

A. The "Imminent and Substantial Endangerment" Requirement Limits Section 106 to Extraordinary Circumstances.

The Justice Department has consistently maintained that sections 104 and 106 are alternative tools available to the Administrator and that the availability of section 104 in no way limits the availability of section 106.[18] But both the language and legislative history of Superfund, as well as comparisons with other environmental statutes, show precisely the contrary -- namely that that Congress purposefully established a higher threshold for section 106 actions than for section 104 cleanup. Consequently, section 106 should be reserved for situations of extraordinary endangerment.

1. The statutory scheme indicates that section 106 deals only with extraordinary risks.

The plain language of Superfund mandates a higher threshold for section 106 than for section 104. Section 104 is triggered: "[w]henever . . . any hazardous substance is released or there is a substantial threat of such a release

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[18] Plaintiff's Memorandum Opposing Motion to Dismiss Claim, United States v. Outboard Marine Corp., supra n.8, at 12-13.

into the environment."[19] "Hazardous substance," in turn, is defined statutorily to include a list of chemicals specifically designated as hazardous or toxic by the EPA.[20] Thus, section 104 requires only that the released substance be "hazardous."[21] Section 106, by contrast, requires both that the chemical be a "hazardous substance" and that its release or threatened release may pose an "imminent and substantial endangerment" -- on its face a much higher standard than contained in section 104.

The far more detailed provisions of sections 104 and 107, as opposed to section 106, provide further support for a narrow reading of the latter section. Thus, section 104 treats in extreme detail the nature and scope of authorized cleanup operations, while section 107 sets forth a detailed

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[19] Section 104 also is triggered with "there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare . . .." 42 U.S.C. § 9604(a)(1).

[20] Superfund defines "hazardous substances" to include substances designated hazardous or toxic under § 311(b)(2)(A) of the Clean Water Act, § 3001 of the Solid Waste Disposal Act, § 307a of the Clean Water Act, § 112 of the Clean Air Act, and § 7 of the Toxic Substances Act. 42 U.S.C. § 9601 (14).

[21] A different reading of § 104 has been suggested, in which the imminent and substantial endangerment requirement is read to modify not only "any pollutant or contaminant" but also "hazardous substances." The one court to address this issue, however, held that "imminent and substantial endangerment" did not modify "hazardous substances" under section 104. United States v. Hardage, supra n.16.

scheme of private liability for government cleanups, including specifications of who may be potential defendants and what are the available defenses. By contrast, section 106 is terse and cryptic, containing none of the elaboration provided by sections 104 and 107. Under these circumstances, it is difficult to imagine that Congress intended section 106 as a parallel provision to be utilized by EPA whenever it chooses not to use Fund financing to clean up a site.[22]

2. The legislative history confirms that section 106 should be reserved for extraordinary circumstances.

Although the statutory structure and context imply strongly that section 106 was intended for extraordinary rather than routine use, much of the debate may turn on what Congress meant by "imminent and substantial endangerment." Unfortunately, the legislative history of Superfund does not definitively resolve this issue. What legislative history

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[22] This approach has been followed under the Clean Water Act, with EPA proceeding almost exclusively under its detailed cleanup authority of § 311(c), rather than the injunctive authority of §§ 311(e) and 504. See pp. IV-40 to IV-41 infra.

The narrow scope intended for section 106 is also demonstrated by the provision for treble damages for violation of a section 106 order. § 107(c)(3). Such provisions are rare and generally reserved for "exceptional circumstances." See, e.g., Columbia Broadcasting System v. Zenith Radio Corp., 537 F.2d 896, 899 (7th Cir. 1976) (patent infringement case).

there is, however, does suggest that section 106 was not intended for routine cleanup operations and that the "imminent and substantial endangerment" test was added to the compromise as a major substantive limitation on injunctive actions.

As noted in chapter 1, the final act was the product of a hasty compromise on the Senate floor.[23] In the compromise, the Senate added the "imminent and substantial" condition to the "endangerment" requirement of the predecessor of section 106. Compare section 106(a) and S. 1480, § 3(d). This revision itself signifies Congress' intent that section 106 be limited in scope, for otherwise there would have been no reason to add the qualifying modifier "imminent and substantial."

The floor debates are virtually silent with respect to section 106. Some useful legislative history exists in the House and Senate Committee reports on H.R. 7020 and S. 1480, even though these reports apply to early versions of Superfund and not to the final Act. For example, the Senate Report indicates that the predecessor of section 104, authorizing the use of Fund monies to clean up sites, would be

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[23] One commentator described this compromise as the "last minute scrambling of a lame-duck Congress." Vernon and Dennis, Hazardous-Substance Generator, Transporter and Disposer Liability under the Federal and California Superfunds, 2 J. Env. Law 67, 78 (1981). Similarly, the court in City of Philadelphia v. Stepan Chemical Co., 544 F. Supp. 1135 (E.D. Pa. 1982), described the Act as "a severely diminished piece of compromise legislation." Id. at 1142.

the principal, if not exclusive, means by which cleanup would take place.[24]

Moreover, Congress' general silence regarding section 106 is itself significant. Had Congress intended section 106 to be used in typical circumstances, it surely would have fleshed out the contours of that provision. Instead, Congress' reticence can reasonably be explained only by an expectation that section 106 would not be invoked absent extraordinary circumstances.

To be sure, there are some passages in the Committee reports that EPA might rely on to support a broader reading for section 106. For instance, the House Report suggests that the "imminent and substantial endangerment" standard contained in the predecessor of section 104 should be "flexible," and that the Administrator should have the power to clean up sites even where there is no conclusive proof of an emergency.[25] Likewise, the Senate Report emphasizes that the "paramount purpose" of the predecessor of section 104 was "the protection of the public health, welfare, and the environment," and that it is therefore "preferable to err on the side of protecting public health, welfare, and the environment."[26] Similarly, the Senate Report notes that

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[24] S. Rep. No. 848, 96th Cong., 2d Sess. 18 (1980).

[25] H.R. Rep. No. 1016, (Part I), 96th Cong., 2d Sess. 28 (1980).

[26] S. Rep. No. 848, 96th Cong., 2d Sess. 56 (1980).

the standard for cleanup under section 104's predecessor provision "is intended to be a flexible one," and authorizes administrative action before conclusive proof of endangerment is available.[27]

All these comments, however, refer to the early versions of section 104 (section 3041(a)(1) in the House and section 3(c)(1) in the Senate) and not to the early versions of section 106 (section 3041(a)(2) in the House and section 3(d) in the Senate). The intent that the government have considerable "flexibility" and latitude in cleaning up sites with Fund money was carried forward in the final version of section 104. But that says nothing about what Congress intended in the context of injunctive relief under section 106. To the contrary, the very fact that Congress broadened EPA's own cleanup authority using Fund money inevitably tends to make section 106 injunctive actions less necessary.

3. Similar provisions in related statutes also support a restriction of section 106 to extraordinary circumstances.

One possible explanation for Congress' relative silence about the meaning of the phrase "imminent and substantial endangerment" in Superfund is that nearly identical language is found in provisions of RCRA,[28] the Clean Water Act

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[27] Id.

[28] § 7003, 42 U.S.C. § 6973 (1976), as amended by Solid Waste Disposal Act Amendments of 1980, § 25, Pub. L. No. 96-482, 94 Stat. 2334 ("may present an imminent and substantial endangerment to health or the environment").

(CWA),[29] Clean Air Act (CAA),[30] and Safe Drinking Water Act (SDWA).[31] The legislative history and judicial construction of these provisions have consistently limited the government's authority to bring injunctive actions. Moreover, the fact that other statutes do not contain governmental authority and resources comparable to Superfund may be why Congress could have envisioned less need for injunctive actions under Superfund.

The most helpful discussion of "imminent and substantial endangerment is contained in the legislative history of the SDWA. By "imminent," the House Report noted, the actual health harm, as opposed to the exposure to the harmful substance, need not be imminent. Hence, there is an imminent and substantial endangerment "when there is an imminent likelihood of the introduction into drinking water of contaminants that may cause health damage after a period of latency."[32]

Congress went on to give examples of harms that it considered "substantial:"

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[29] § 504, 33 U.S.C. § 1364 (1977) ("is presenting an imminent and substantial endangerment to the health of persons").

[30] § 303, 42 U.S.C. § 7603 (1977) ("is presenting an imminent and substantial endangerment to the health of persons").

[31] § 1431, 42 U.S.C. § 300(i) (1976) ("may present an imminent and substantial endangerment to the health of persons").

[32] H.R. Rep. No. 1185, 93rd Cong., 2d Sess. 36 (1974).

> (1) a substantial likelihood that contaminants capable of causing adverse health effects will be ingested by consumers if preventive action is not taken; (2) a substantial statistical probability that disease will result from the presence of contaminants in drinking water; or (3) the threat of substantial or serious harm (such as exposure to carcinogenic agents or other hazardous contaminants).[33]

To trigger the section, however, the exposure to harmful substances must be significant as well as imminent. Consequently, the "emergency" authority of SWDA should not be used "in cases where the risk of harm is remote in time, completely speculative in nature, or de minimis in degree."[34]

This legislative history may be construed as comporting with the recent decision in Reilly Tar, where the court accepted as true the allegations of plaintiffs' complaint to the effect that the

> wastes disposed of by Reilly Tar are carcinogens and toxic [and that] . . . [f]or over fifty-five years these wastes were spilled, leaked and discharged directly into the ground at the site, and from there entered and continue to enter the groundwater which is used as a water supply for the City of St. Louis Park and the surrounding area. The City of St. Louis Park has already closed five wells and the City of Hopkins has closed one. Unless preventative measures are taken, the contaminants will

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33 Id. (emphasis added).

34 Id.

> continue to move through the leaching and migration of groundwater into the drinking water for the Minneapolis-St. Paul metropolitan area.[35]

Under these circumstances, the court ruled that "it cannot be said with positive assurance that there exists no imminent and substantial endangerment."[36]

Decisions under other statutes provide guidance as to the meaning of "imminent and substantial endangerment." The two leading cases, Ethyl Corp. v. EPA[37] and Reserve Mining Co. v. EPA,[38] were not decided under an "imminent and substantial endangerment" standard, but rather under a simpler "endangerment" standard.[39] Both Ethyl and Reserve Mining acknowledge that the "term 'endangering' . . . connotes a lesser risk of harm than the phrase 'imminent and substantial endangerment to the health of persons'. . .."[40] Thus,

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[35] 546 F. Supp. at 1110.

[36] Id. at 1114.

[37] 541 F.2d 1 (D.C. Cir. 1976).

[38] 514 F.2d 492 (8th Cir. 1975).

[39] Ethyl was decided under § 211(c)(1)(A) of CAA, authorizing the Administrator to "control or prohibit the manufacture, introduction into commerce, offering for sale, or sale of any fuel or fuel additive . . . if any emission products of such fuel or fuel additive will endanger the public health or welfare." 42 U.S.C. § 1857f-6c(C)(1)(A). Reserve Mining was decided under §§ 1160(c)(5) and (g)(1) of the 1970 Federal Water Pollution Control Act, authorizing action "in the case of pollution of waters which is endangering the health or welfare of persons . . .."

[40] Reserve Mining, 514 F.2d at 528 (dicta); see also Ethyl, 541 F.2d at n.36 (dicta).

the standard of section 106 of Superfund is stricter than the standard enunciated in Ethyl and Reserve Mining, and the conditions which satisfy the "endangerment" standard in Ethyl and Reserve Mining are necessary but not sufficient to satisfy the "imminent and substantial endangerment" standard of section 106.

According to these decisions, endangerment is "something less than actual harm. When one is endangered, harm is threatened; no actual injury need occur."[41] The courts and Congress agree that endangerment requires proof of risk of harm, not proof of actual harm.[42]

But how great a risk must exist for there to be imminent and substantial endangerment? The courts, in setting down broad guidelines, have held that endangerment is composed of two elements: "risk and harm, or probability and severity."[43] Probability and severity are reciprocally related, so that "the public health may properly be found endangered both by a lesser risk of a greater harm and by a greater risk of a lesser harm."[44]

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[41] Ethyl, 541 F.2d at 13 (emphasis in original). See also Reserve Mining, 514 F.2d at 529; United States v. Vertac Chemical Corp., 489 F. Supp. 870, 885 (E.D. Ark. 1980).

[42] See, e.g., Ethyl, 541 F.2d at 17; Reserve Mining, 514 F.2d at 528; Vertac, 489 F. Supp. at 885; H.R. Rep. No. 1185, 93rd Cong., 2d Sess. 35-36 (SDWA provision designed to prevent hazardous conditions).

[43] Ethyl, 541 F.2d at 18. See also Reserve Mining, 514 F.2d at 520.

[44] Ethyl, 541 F.2d at 18.

The reciprocal relationship of risk and harm was central to the decision in United States v. Vertac Chemical Corp.[45] There, the leak of a relatively small amount of dioxin -- a highly toxic substance -- into the environment, was found to be imminent and substantial endangerment because: "While there may be a low probability of harm from dioxin as defendants contend, there is a serious and dire risk from exposure to dioxin should the hypothesis advanced by the plaintiffs prove to be valid."[46]

Under this analysis, the more toxic the substance involved, the smaller, or less likely to spread, the actual or threatened release must be. The court noted in Ethyl, however, that this inverse proportional rule "must be confined to reasonable limits." 541 F.2d at n.32. Citing Carolina Environmental Study Group v. United States,[47] the court said that even in the case of a possible nuclear reactor accident, "a disaster of ultimate severity and horrible consequences," some amount of risk must be shown. Conversely, "even the absolute certainty of de minimis harm might not justify government action." Id.

Taking these decisions together, one thing is clear -- some meaningful exposure to toxic substances must be shown.

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[45] See note 41 supra.

[46] 489 F. Supp. at 885.

[47] 510 F.2d 796 (D.C. Cir. 1975).

This is supported even by the Vertac decision, where the court emphasized the importance that "the extent of exposure" be considered and accordingly held that even relatively high dioxin readings in unburied containers did not present an "imminent and substantial endangerment," because there was little if any likelihood of contamination from these containers. 489 F. Supp. at 879, 876.

While Congress has never provided a precise formula for quantifying imminence and substantiality in determining whether the endangerment standard is met, the legislative history of the Clear Air Act and the Safe Drinking Water Act provides further guidance as to the intended meaning of "imminent." Thus, imminence should be considered with respect to the amount of time required to prepare administrative orders or court papers, to file and prosecute suits, and to permit issuance and enforcement of administrative or court orders.[48] Some courts have added that imminence does not always mean immediacy -- that the "imminence of a hazard does not depend on the proximity of the final effect, but may be proven by the setting in motion of a chain of events which could cause serious injury."[49]

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[48] H.R. Rep. No. 294, 95th Cong., 1st Sess. 328 (1977) (CAA); H.R. Rep. No. 1185, 93rd Cong., 2d Sess. 36 (1974) (SDWA).

[49] United States v. Hardage, supra note 16. See also Environmental Defense Fund v. EPA, 465 F.2d 528, 535 (D.C.

(Footnote [49] continued on next page.)

One of the most helpful judicial constructions of the phrase "imminent and substantial endangerment" is found in United States v. Hardage.[50] There, the court interpreted RCRA section 7003, the provision most similar to section 106, to establish a high threshold, defining "imminent and substantial endangerment" to mean "that sort of emergency situation in which application of the general provisions of the Act would be too time-consuming to effectively ward off the threatened harm to health or environment." Slip op. at 3 (emphasis added).

Assuming Hardage is correct, the "imminent and substantial danger" requirement in Superfund should be stricter than in the analogous acts, because Superfund provides effective alternate emergency remedies.[51] Although the

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(Footnote [49] continued from previous page.)

Cir. 1972). Fletcher v. Bealey, 28 Ch. 688 (1885), an English common law nuisance case, held that the "danger" from a waste disposal site "is not imminent, because it must be some years before any such quantity of the liquid will be found issuing from the heap as would pollute the Irwell to the detriment of the Plaintiff." The court also stressed the absence of evidence that release was probable and the ability to promptly discover and respond to any release that did occur. See Fiss, Injunctions 5, 8 (1972).

[50] See note 16 supra.

[51] This narrowing of section 106 is disputed by the decision in Reilly Tar, which held that "the availability of other response authorities for dealing with chronic and recurring pollution problems does not preclude the simultaneous invocation of the imminent hazard provision of section

(Footnote [51] continued on next page.)

Ethyl court used the interpretation of endangerment in one statute to help interpret another statute,[52] that process seems less compelling in the case of section 106. In most of the other environmental statutes, there is but one emergency provision, triggered by imminent and substantial endangerment.[53] Superfund, however, has two emergency provisions: sections 106 and 104. The standard for invoking section 106 should be higher than the standard in the other statutes, since there is an alternative means of dealing with emergencies. Even if a section 106 action is not available, releases can be cleaned up under section 104.

Consequently, many releases or threatened releases will not rise to an "imminent and substantial endangerment" invoking section 106. This issue is heavily fact-dependent, however, and the facts surrounding abandoned dump sites will often be murky. It may therefore sometimes be difficult to sustain this issue in pretrial motions. By contrast, the following sections focus on substantive requirements that

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106." 546 F. Supp. at 1114. Nor did Outboard Marine, where the court gave § 106 a "broad reading," discuss the availability of § 104 cleanup. See 18 E.R.C. at 1091. In United States v. Wade, however, the court held that the presence of section 104 cleanup authority significantly limited the scope of section 106. See pp. IV-30-31, 37 infra.

[52] Ethyl, 541 F.2d at 17.

[53] See, e.g., 42 U.S.C. § 6928 (RCRA); 42 U.S.C. § 7603 (CAA); 42 U.S.C. § 300i (SDWA).

raise primarily legal issues that generators may successfully maintain in motions to dismiss.

B. Under Equitable Principles, Generators Usually Will Not Be Proper Party Defendants.

Generators who do not own or operate a site should not be subject to section 106 cleanup injunctions. United States v. Wade, the only case to explore this issue in any detail, held that generators should seldom, if ever, be proper defendants in section 106 actions. In Wade, the court began by analyzing RCRA and ruled that "a court may not base a decision to impose liability on such a potentially vast group of defendants as off-site generators of hazardous waste on the basis of the conflicting and fragmentary legislative history of section 7003." 546 F. Supp. at 791.

Section 106, of course, provides even less guidance as to proper defendants than section 7003 of RCRA. The Wade court thus stressed that there was "no case in which these provisions [§§ 106 & 7003] have ever been used to confer liability on past off-site generators, parties who generated hazardous wastes which were transported to a dump site by others." Id. at 787. In short, "[t]he language of section 106 gives no hint of an intent to confer liability on past generators. Like section 7003 of RCRA, and, significantly, unlike section 107, it is written in the present tense." Id. at 794.

To provide a "harmonious" interpretation of Superfund as a whole, the Wade court recognized that "Congress intended each provision to serve a specific purpose." Id. And "[w]here Congress after extensive debate, has clearly designated [in section 107] its choice of a method for obtaining money damages from past off-site generators whose waste products have contributed to the critical problem posed by abandoned chemical dumps, it is the role of EPA and this Court to carry out the unambiguous legislative intent." Id. The court went on to hold, "on the basis of the statutory language, its context, and the legislative history, that past off-site generators are not proper defendants" under section 106. Id. at 787.[54]

The Wade decision is consistent with general equitable principles, which are best illustrated by Naughton v. Bevilacqua, 605 F.2d 586 (1st Cir. 1979). There, a resident in a mental hospital brought suit against the director of the hospital and others to enjoin a drug treatment plan. The court dismissed the suit against the director, noting that he had "never prescribed, administered, or directed the administration of any drug" to the plaintiff and therefore bore only a "remote relationship" to the complained-of

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[54] But see U.S. v. Reilly Tar & Chemical Corp., 546 F. Supp. at 1113: "Section 106(a) of CERCLA contains no limitations on the classes of persons within its reach." The requirements of equity, were not raised in Reilly Tar, however, and its holding applied only to a prior site owner and not an off-site generator.

conduct. 605 F.2d at 588-89. The court thus held that a party could not be enjoined where he had "no knowledge or control" over the incidents giving rise to the complaint. 605 F.2d at 589.[55]

Likewise, in the securities context, a defendant director "may be enjoined . . . [only] if such person had an affirmative duty to know what was occurring with respect to corporations in which he had a position of control and if his action or inaction had a tendency to aid or abet the violation." SEC v. National Bankers Life Insurance Co., 334 F. Supp. 444, 456 (N.D. Tex. 1971), aff'd, 477 F.2d 920 (5th Cir. 1973). See also SEC v. Coffey, 493 F.2d 1304, 1317 (6th Cir. 1974); SEC v. Advance Growth Capital Corp., 470 F.2d 40, 52 (7th Cir. 1972).

In sum, general equitable considerations support the holding in Wade that a defendant may not be enjoined where he bears a "remote relationship" to and has not participated directly in the objectionable conduct. In most instances under Superfund, the hazardous condition at the site will be

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[55] A similar result limiting enjoinable parties was reached in United States v. Clarksdale King & Anderson Co., 288 F. Supp. 792 (N.D. Miss. 1965). A property owner had leased a restaurant to another party, which violated the Civil Rights Act, and the Justice Department sued both the operator and the property owner. The court refused to enjoin the property owner for the discriminatory practices of the restaurant, because he "had disassociate[d] [him]self from participation in [its] operation." 288 F. Supp. at 796.

unrelated to a generator's conduct and accordingly, such generators should be immune from injunctive relief.[56]

On similar grounds, courts have been reluctant to enjoin defendants who do not own the operations at which an injunction would be directed. Thus, in United States v. Gulf-State Theaters, 256 F. Supp. 549 (N.D. Miss. 1966), the government sued to halt racially discriminatory practices by local theater owners and the regional chain that provided "a major portion of the ordinary managerial functions" of the theaters. Id. at 553. The court refused to enjoin the chain, because it did "not own any theaters, nor does it have any proprietary interest of any kind in, or any power of control over, any theaters." Id.

A similar result was reached in Greenhouse v. Greco, 368 F. Supp. 736 (W.D. La. 1973), where the superintendent

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[56] This result is consistent with the decision in Ewell v. Petro Processors of Louisiana, 364 So.2d 604 (Ct. App. La. 1978). There, the court declined to hold a number of generators liable in nuisance and stressed that the record did "not support the conclusion that the work done by Petro Processors cannot be done safely." Id. at 607.

The court in Ewell went on to examine the degree of generator participation in the hazard. With respect to all but one generator, the court found that the site operator "received no instructions as to the method of carrying out the assigned task or the disposal of waste material," and therefore held them not liable. Id. at 606. One generator, however, was "aware of the leakage at the pits and continued to dump hazardous material at that site." Id. The court found this knowledge sufficient to hold the generator liable. Whether such a generator would be subject to an injunction under section 106 of Superfund remains an open question.

of parochial schools, the local diocese and others were sued to compel integration. The action was dismissed against the superintendent and the diocese, with the court stressing that neither "owns or controls any school properties or equipment or has any independent authority to operate any parochial schools." Id. at 738. Rather:

> Since each of the individual church corporations has legal title to the properties and equipment and the sole authority and financial responsibility for the day-to-day operation of each school, only the individual church corporation can respond to the judicial mandate sought in this proceeding . . ..

Id. at 739.

The Justice Department, of course, may argue for other sources of law, such as section 107, where generators are more likely to be considered proper defendants. Section 107(a) explicitly includes at least some generators as potential defendants and, if courts were to rely on this provision, generators might be amenable to suit under section 106. But the failure to reference section 107 in section 106 and the inability of such generators to control action at inactive sites strongly suggests that generators are not proper parties in most abatement actions under section 106.

C. Equitable Principles Limit Section 106 Injunctions to Those Rare Instances When Section 104 Cleanup Authority Is Inadequate.

In addition to limiting parties who may be proper defendants, equitable principles also preclude use of section 106 injunctions where the government has an adequate remedy at law. As discussed below, the government's section 104 cleanup authority should generally prove an adequate remedy at law and preclude injunctive relief under section 106.

1. Equitable relief may issue only where the government has demonstrated the inadequacy of its legal remedies.

Under equitable principles, an injunction may issue only when a plaintiff has demonstrated the inadequacy of his legal remedies.[57] In Weinberger v. Romero-Barcelo, 102 S.Ct. 1798 (1982), the Supreme Court held that this requirement applies even when a federal statute authorizes injunctive relief, as in section 106. Under this principle, the

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[57] For section 106 purposes, the basic legal standards will be comparable whether the government is seeking a preliminary injunction, as will often be the case, or a permanent injunction. For both forms of relief, the government must show the absence of an adequate remedy at law. For a preliminary injunction, the government also must show its likelihood of eventual success on the merits and that relief is in the public interest, requirements that parallel the conditions for permanent relief. See, e.g., Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921 (D.C. Cir. 1958); SK&F, Co. v. Premo Pharmaceutical Laboratories, Inc., 625 F.2d 1055 (3d Cir. 1980).

burden is squarely on the government to show that its legal remedies are inadequate -- a burden that will be difficult to satisfy in most cases, given EPA's broad authority under sections 104 and 107.

In construing the injunctive relief provisions of the Clean Water Act, the Supreme Court stressed in Romero-Barcelo that it "has repeatedly held that the basis for injunctive relief in the federal courts has always been irreparable injury and the inadequacy of legal remedies." 102 S.Ct. at 1803. See also Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944); U.S. v. Price, 523 F. Supp. at 1066-68.

The private plaintiffs in Romero-Barcelo sought an injunction against the Navy, which was undeniably discharging wastes in violation of the CWA. Plaintiffs contended, in view of the statutory violation, that the statute's injunctive relief provision should be invoked automatically and that they were not required to meet the traditional equitable requirements for injunctive relief. The Court held, however, that it would uphold an injunction against the Navy's activity only if the plaintiffs met all the traditional equitable requirements, despite the statutory violation.

In so holding, the Court characterized an injunction as an "extraordinary remedy" and declined to issue an injunction due to the plaintiffs' failure to demonstrate irreparable injury. In this connection, the Court observed that:

> An injunction is not the only means of ensuring compliance. The FWPCA itself, for example, provides for fines and criminal penalties.

102 S.Ct. at 1804.[58] Since the plaintiffs had made no attempt to demonstrate the inadequacy of these remedies, injunctive relief was denied.

The adequacy of legal remedies under Superfund is even clearer than under the Water Act. CWA's fines and criminal penalties are, at best, incentives to undertake cleanup. The section 104 authority for the government to clean up is much broader and far more adequate. Indeed, under section 104 the government can accomplish everything that it could do under section 106. Moreover, the government will often be able to recover its costs in actions against responsible parties under section 107.

For these reasons, the availability of cleanup authority under section 104, along with recovery of costs incurred under section 107, generally should provide the

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[58] It is well-established that plaintiffs in equity must demonstrate the inadequacy of their legal remedies. See Beacon Theaters, Inc. v. Westover, 359 U.S. 500, 506-07 (1959); Hecht Co. v. Bowles, 321 U.S. at 329. Thus, "equitable relief will not be granted where an adequate remedy at law exists, [and] [m]oney damages if determinable with a reasonable degree of certainty constitute such an adequate remedy." SCM Corporation v. Xerox Corporation, 507 F.2d 358, 363 (2d Cir. 1974). See also Van Arsdel v. Texas A&M University, 628 F.2d 344, 346 (5th Cir. 1980); Fox Valley Harvestore, Inc. v. A.O. Smith Harvestore Products, Inc., 545 F.2d 1096 (7th Cir. 1976).

government with an adequate legal remedy, thereby significantly circumscribing the availability of injunctive relief under section 106.

Although not expressly invoking this doctrine, the court in Wade denied injunctive relief in part due to traditional equitable considerations. The government sought an injunction requiring defendants "to pay the cost of drawing up and implementing a plan" for cleanup, which the court described as "transparently a prayer for money damages." 546 F. Supp. at 792. Noting that a "plaintiff cannot transform a claim for damages into an equitable action by asking for an injunction that orders the payment of money," the court denied relief and directed the government to pursue its legal remedies if it sought such payment. Id.

In Price, the district court reached the same result on a similar request under section 7003, holding that "an order compelling defendants to fund such a study would not be an appropriate form of preliminary injunctive relief." 523 F. Supp. at 1067. The government in Price also sought to compel defendants to provide alternative safe water supply sources in the event of contamination, relief expressly provided by the SDWA. Nonetheless, the court held that this too was not appropriate for preliminary injunctive relief. Id. at 1068. The court thus noted that the true issue "is simply who will bear the cost of the alternate water supply," id., and denied relief on the grounds that such issues

were properly resolved in a subsequent decision granting or denying damages.

The Third Circuit affirmed this holding as an appropriate exercise of the district court's discretion, but provided a broader view of when injunctive relief was appropriate under section 7003 of RCRA. United States v. Price, No. 82-5030 (3d Cir. Sept. 14, 1982). Thus, according to the Third Circuit, "even though funding a diagnostic study would require payments of money, it may still be an appropriate form of preliminary relief if the traditional balancing process tips decidedly in favor of plaintiff." Slip op. at 15.

The circuit court criticized the automatic assumption that payment of money is per se unavailable in equity, and, while noting that such injunctions should be "rare," stressed that the "test is still one of balancing the competing interests." Slip op. at 14 (citations omitted). In so holding, the court reaffirmed that injunctive relief under RCRA must be guided by traditional principles. And although the Price court suggested that funding such a study might be appropriate under RCRA section 7003, it did not address the issue in the context of Superfund, where section 104 provides a viable alternative to injunctive relief.[59]

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[59] In some limited circumstances, of course, the government may lack an adequate remedy at law and section 106

(Footnote [59] continued on next page.)

2. The legislative history of section 106 and comparable provisions in other statutes confirm that injunctions should be limited to cases where section 104 is inadequate.

The language of section 106 must be read in the context of legislative intent. Congress drafted section 106 with a background understanding of how analogous provisions in other statutes had operated. The history of comparable provisions makes clear that "imminent and substantial endangerment" authority should be used sparingly for truly extraordinary hazards that cannot be dealt with by other provisions.

Superfund was patterned in substantial part on the CWA. In Senator Randolph's words, the Act is "modeled upon the experience with the Clean Water Act's spill response program."[60] The experience under the spill response program

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(Footnote [59] continued from previous page.)

would be available. As noted in Wade, section 106 may be used to enjoin ongoing disposal operations. In other cases a state cannot or will not meet the section 104(c) and (d) prerequisites for federally funded remedial action, or at some time in the future the Fund may be exhausted and the government may lack the necessary resources for a section 104 response action. The government's legal remedy may also be inadequate when a site is exclusively in the defendant's control and the defendant has a unique ability to effect cleanup. Absent proof of these or similar circumstances, however, section 104 will generally constitute an adequate remedy at law.

[60] 126 Cong. Rec. 14965 (daily ed. Nov. 24, 1980). See also S. Rep. No. 848, 96th Cong., 2d Sess. 1 (1980), stating that S. 1480 "has its roots in the liability and funding provisions provided in the Clean Water Act of 1972."

was that the "imminent and substantial endangerment" injunctive relief provision was used rarely, if at all. Between 1972 (when CWA was amended to give it the response provisions on which Superfund was based) and the 1980 congressional deliberations regarding Superfund, there were no reported cases in which the government sought to invoke CWA's "imminent and substantial danger" provisions to require a cleanup.[61]

Likewise, similar provisions in other statutes call for the same sparing use of "imminent and substantial endangerment" authority. The House Report on the Safe Drinking Water Act stressed the limits inherent in this term:

> In using the words 'imminent and substantial endangerment to the health of persons,' the Committee intends that this broad administrative authority not be used when the system of regulatory authorities provided elsewhere in the bill could be used adequately to protect the public health.[62]

The House Report on section 108 of the Clean Air Act, the original "imminent and substantial endangerment" provision, likewise emphasized that it was "not intended as a substitute procedure for chronic or generally recurring pollution

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[61] A possible exception is Vertac, which involved § 1364 as well as RCRA § 7003, but which was roughly contemporaneous with -- not prior to -- congressional deliberations. Though Reserve Mining was decided in 1975, it was decided based on the 1970 version of CWA.

[62] H.R. Rep. No. 1185, 93rd Cong., 2d Sess. 35 (1974).

problems, which should be dealt with under the other provisions of the Act."[63]

The court in Solvents Recovery applied this same interpretation to section 7003 of RCRA, holding that "situations which do not present time emergencies are better dealt with through the more comprehensive, if more cumbersome, provisions of RCRA and the EPA regulations promulgated thereunder than in an action under Section 7003." 496 F. Supp. at 1143 n.29. U.S. v. Hardage employed a similar interpretation of RCRA, limiting section 7003 to "that sort of emergency situation in which application of the general provisions of the Act" would be inadequate to protect the public health. Slip op. at 3.

This interpretation of section 106 of Superfund is strongly supported by the recent decision in United States v. Wade. There, the court found it "astonish[ing]" that "the government here has chosen to ignore those provisions of the statute which give it clear authority to remedy the pollution problem at the Wade site and recover its costs from Gould and the other off-site generators, and has instead chosen to sue under" section 106. 546 F. Supp. at 787.

In denying relief under section 106, the Wade court emphasized that "Congress intended each provision to serve a

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[63] H.R. Rep. No. 728, 90th Cong., 1st Sess. 119 (1967).

specific purpose," and that "Congress intended section 106(a) to be used . . . where hazardous waste was currently being discharged or threatened to be discharged 'from a facility' and where such discharge could be stopped by an injunction." Id. at 794. The court noted that this "reading of section 106 as applicable to current emergencies where responsible parties may be ordered to comply with an injunction renders the section a complement to section 104 and 107 which are so clearly addressed to the present health problems caused by abandoned sites." Id.[64]

In short, section 106 establishes three important preconditions for relief: the government must prove the existence of an "imminent and substantial endangerment," that named defendants are potentially liable in equity and that it lacks an adequate remedy at law. In most cases, the government will be unable to make these showings with respect to generators, and accordingly section 106 will not apply.

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[64] The recent decision in United States v. Reilly Tar appears to the contrary. The court there recognized that imminent and substantial endangerment provisions "should not become a substitute for other reasonably available and adequate response authorities." 546 F. Supp. at 1114. The court nonetheless held that section 106(a) may be used simultaneously with other statutory response authorities. Id. Reilly Tar, however, did not consider the limiting effect of equitable principles on section 106 actions and was limited to owner/operators.

IV. EVEN WHERE SECTION 106 INJUNCTIVE RELIEF IS APPROPRIATE, EQUITABLE PRINCIPLES WILL LIMIT THE LIABILITY OF GENERATORS AND THE SCOPE OF CLEANUP REQUIRED.

As discussed above, section 106 should be construed as giving rise to a cause of action for injunctive relief only in extraordinary situations. But even where the requisite threshold showing is made, the statutory and equitable principles already mentioned may limit the relief to which the government is entitled under section 106.

A. Section 106 Cleanup Must Be Consistent with the NCP.

Once the government has established the threshold requirements discussed above, any remedy granted must conform to the NCP. Both Superfund and its legislative history indicate that private response actions ordered pursuant to section 106 must be bounded by the NCP, including its risk assessment and cost-effectiveness provisions. Section 106(c) requires the Administrator to establish guidelines for the use of the section and mandates that "[s]uch guidelines shall to the extent practicable be consistent with the national hazardous substance response plan."[65]

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[65] The guidelines ultimately promulgated by EPA, however, are seriously deficient. See 47 Fed. Reg. 20664 (May 13, 1982). These guidelines reject cost-effectiveness as a consideration for private cleanup and offer no guidance on the type or degree of hazard needed to qualify as an "imminent and substantial endangerment." 47 Fed. Reg. at 20666.

Section 105 unequivocally requires, regardless of whether section 106 or section 104 is used, that "the response to . . . hazardous substance releases shall, to the greatest extent possible, be in accordance with the provisions of the plan." This point is reaffirmed in section 107, which specifies that private parties will be liable only for costs that are "consistent with" or, in some cases, "not inconsistent with" the NCP. Section 107(a)(4)(A) - (B).

In addition, the Senate Report on Superfund's predecessor bill stressed that "removal and remedial actions should be in accordance with the plan to the greatest extent possible."[66] The House Report similarly admonished that "response shall be in accordance with the plan to the greatest extent possible."[67]

Therefore, the NCP defines the outer boundaries of relief that may be ordered in a section 106 action. This point is expressly recognized in section 300.68(c) of the recently-issued NCP, which provides that the Plan shall

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[66] S. Rep. No. 848, 96th Cong., 1st Sess. 53 (1980).

[67] H.R. Rep. No. 1016, 96th Cong., 1st Sess. 30 (1980). One of the principal sponsors of the final Superfund legislation, Senator Stafford, explicitly recognized that the NCP would govern private cleanup actions under section 106. In the floor debates preceding enactment, he described the intended court review of section 106 administrative orders. According to Stafford, "we would expect the courts to examine the particular orders . . . to determine whether they were proper, given the standards of the Act and of the national contingency plan." 126 Cong. Rec. S15008 (daily ed. Nov. 24, 1980).

govern private cleanup to "determine the level of clean-up to be sought through enforcement efforts."[68] The most important limits imposed by the NCP "[i]n determining the need for and in planning" of cleanup actions may be summarized as follows.[69]

First, a preliminary assessment is required, which must evaluate "the magnitude of the hazard" and "the source and nature of the release."[70] The assessment and further federal action may be terminated by a number of circumstances, including a determination that the "amount released does not warrant Federal response," or that a "party responsible for the release, or any other person, is providing appropriate response."[71]

When an "immediate and significant risk of harm to human life or health or to the environment" is found,[72] and appropriate response action is not being taken, the NCP authorizes certain "defensive" "immediate removal actions."[73] All such actions must rely "on established

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[68] 47 Fed. Reg. 31180, 31216 (July 16, 1982). This section makes clear that the section 104(c)(4) to balance the level of publically financed cleanup against amounts available in the Fund do not apply to private cleanup.

[69] Id., § 300.61(c)(4).

[70] Id., § 300.64(a).

[71] Id., § 300.64(c).

[72] Id., § 300.65(a).

[73] Id., § 300.65(b).

technology when feasible and cost-effective."[74] Additional procedural and substantive conditions are set forth for subsequent removal and remedial actions.[75] These requirements help focus courts on procedures and techniques that may be imposed in section 106 actions.

Moreover, remedial (as opposed to removal) actions under section 106 should be limited to sites on the National Priority List. Under Superfund section 105(8), the Administrator is directed to establish a national list of the most hazardous sites, to be considered the highest priority response targets. The Administrator may designate up to 400 sites as top priorities for cleanup. Under the NCP, a site must be on the priority list to be eligible for remedial action. Unless these requirements as well as the additional and more specific provisions are complied with, no remedy is appropriate under section 106.

B. Section 106 Cleanup Can Be Ordered Only After Balancing the Equities of the Case.

Over and above the requirements of the NCP, equitable principles impose another condition on section 106 abatement relief. At equity, a court will issue an injunction only after "balancing" the "equities and hardships" involved.[76]

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[74] Id., § 300.61(c)(4).

[75] Id., §§ 300.66-.68.

[76] See Dobbs, Remedies 52 (1973).

Equity "balances the conveniences of the parties and possible injuries to them according as they may be affected by the granting or withholding of the injunction." Yakus v. United States, 321 U.S. at 440. Section 106's directive that relief be based on the "public interest" and the "equities of the case" further underscores the need for such a balancing of interests.

The Supreme Court elaborated on the importance of a balancing of interests in Aberdeen & Rockfish R.R. v. SCRAP, 409 U.S. 1207 (1972):

> Our society and its governmental instrumentalities, having been less than alert to the needs of our environment for generations have now taken protective steps. These developments, however praiseworthy, should not lead courts to exercise equitable powers loosely or casually whenever a claim of "environmental damage" is asserted . . .. The decisional process for judges is one of balancing and it is often a most difficult task.

409 U.S. at 1217-18. This process involves consideration of the relative good faith and negligence of the parties, Golden Press v. Rylands, 235 P.2d 592 (Colo. 1951), as well as a determination of whether the costs of an injunction are justified by its benefits. Boomer v. Atlantic Cement Co., 257 N.E.2d 870 (N.Y. 1970).

Nuisance cases provide one source of guidance regarding the nature of this balancing process.[77] In those cases, the issue is framed in terms of the "unreasonableness" of an activity. The Restatement defines an activity as unreasonable if:

> (a) the gravity of the harm outweighs the utility of the actor's conduct, or
>
> (b) the harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct not feasible.[78]

In determining the gravity of the harm, the Restatement identifies the following factors as relevant: (1) the extent of the harm involved, (2) the character of the harm, (3) the social value that the law attaches to the type of use or enjoyment invaded, (4) the suitability of the particular use or enjoyment invaded to the character of the locality and (5) the burden on the person harmed of avoiding the harm.[79] In determining the utility of the conduct claimed to be a nuisance, courts consider: (1) the social value that the law attaches to the primary purpose of the conduct, (2) the suitability of the conduct to the character

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[77] Nuisance cases traditionally arose in equity and provide the primary precedents for equitable balancing. See Reilly Tar, 546 F. Supp. at 1113. Dobbs, Remedies 52-55 (1973).

[78] Restatement (Second) of Torts, § 826.

[79] Id., § 827.

of the locality and (3) the impracticablity of preventing or avoiding the invasion.[80]

Hazardous waste cases have applied the Restatement's "reasonableness" test in determining whether a specific site is a nuisance. Thus, in New Jersey v. Ventron, the court emphasized that the case required "a delicate balancing of private and public interests" before finding a nuisance. 2 Chem. & Rad. Waste Lit. Rep. 348 (N.J. 1979).[81] There, waste disposal was held to be a nuisance under the balancing test.

In at least one hazardous waste disposal case, however, the site was held to be "reasonable." The court in State Department of Environmental Quality v. Chemical Waste

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[80] Id., § 828. Prosser identifies two especially important factors in the unreasonableness balancing test. First, courts look to the feasibility of preventing the nuisance:

> A very material factor in all cases is the practical possibility of preventing or avoiding the harm. If the defendant, by taking reasonable steps, without too great hardship or expense, could reduce or eliminate the inconvenience to the plaintiff, and still carry on his enterprise effectively, his failure to do so may render him liable.

Second, Prosser notes that the "decisive consideration in many cases is the nature of the locality, and the suitability of the use made of the land by both the plaintiff and the defendant." Prosser at 599. See also Restatement (Second) of Torts, §§ 830, 831.

[81] See also Village of Wilsonville v. SCA Services, Inc., 426 N.E.2d 824, 835 (Ill. 1981), where the court required a balancing test in a hazardous waste case but applied it in a manner that gave primary weight to health harms.

Storage & Disposition, Inc., 528 P.2d 1076 (Ct. App. Ore. 1974), relied primarily on the relatively remote location of the site in holding there was no nuisance. Id. at 1080.

These cases demonstrate the importance of the balancing test in section 106 litigation. This issue, though highly fact-dependent, may rule out injunctive relief altogether, where the site is a "reasonable" use of land or where the costs of cleanup would outweigh any benefits. Moreover, the balancing test may limit the scope of required cleanup operations, precluding excessive, costly measures that yield little public health benefit.

C. In Some Cases, Equitable Defenses Will Protect Generators from Section 106 Injunctions.

The application of equity principles under section 106 may, in appropriate cases, also give rise to certain traditional equitable defenses. For example, in some cases, generators may successfully invoke the defenses of "unclean hands" and "estoppel." Where the government owns a waste disposal site, or has itself deposited wastes at a site, these defenses may effectively bar a section 106 claim.

The requirement that plaintiffs possess "clean hands" is uniform throughout equity. As described by the Supreme Court:

> The guiding doctrine in this case is the equitable maxim that "he who comes into equity must come with clean hands." This maxim is far more than a mere

> banality. It is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant.

Precision Instrument Mfg. Co. v. Automotive Co., 324 U.S. 806, 814 (1945).[82] Although "unclean hands" is an absolute defense, the court has considerable discretion in its application. Id.

To invoke the doctrine of unclean hands, a plaintiff must have engaged in some form of improper behavior "in connection with the transaction under consideration." Great Western Cities, Inc. v. Binstein, 476 F. Supp. 827 (N.D. Ill. 1979).[83] As described by the seminal article in the field, a negligent motorist should not be "able to defend the subsequent personal injury suit by proving that the pedestrian had beaten his wife before leaving his home."[84]

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[82] See also Pope Mfg. Co. v. Gormully, 144 U.S. 224, 236-37 (1892); National Fire Insurance Co. v. Thompson, 281 U.S. 331, 338 (1930); Udall v. Littell, 366 F.2d 668, 675 (D.C. Cir. 1966).

[83] See Jacoby-Bender, Inc. v. Jacques Kreisler Mfg., 287 F. Supp. 134, 135 (S.D.N.Y. 1968) ("unclean hands is available to a defendant only if there is a direct relationship between plaintiff's misdeeds and defendant's") (citation omitted). See also Nice Ball Bearing Co. v. Bearing Jobbers, Inc., 205 F.2d 841, 850-51 (7th Cir.), cert. denied, 346 U.S. 911 (1953).

[84] Chaffee, Coming Into Equity with Clean Hands, 47 Mich. L. Rev. 877, 1072 (1949).

To constitute unclean hands, the behavior of the plaintiff need not "be actually fraudulent or sufficient to constitute a basis for legal action." Hanson & Associates v. Farmers Cooperative Creamery Co., 403 F.2d 65, 70 (8th Cir. 1968). Rather, the conduct in question must merely be such that it would be unfair to shift full responsibility onto the defendant. The defense of unclean hands applies equally to the government as plaintiff as it does to private parties.[85]

At least two of the circumstances held to represent unclean hands may help generator defendants in section 106 actions. First, plaintiffs may be denied relief where they have "participated" in the unlawful conduct. See, e.g., Johanna Farms, Inc. v. Citrus Bowl, Inc., 468 F. Supp. 866, 874 (E.D.N.Y. 1978); Jacoby-Bender v. Kreisler Mfg., 287 F. Supp. at 135.[86] And second, "unclean hands" applies when a defendant has relied on the representations of a plaintiff and has acted accordingly. In such circumstances, the

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[85] See, e.g., United States v. Georgia-Pacific Co., 421 F.2d 92, 103 (9th Cir. 1970); United States v. City of Milwaukee, 395 F. Supp. 725, 727 (E.D. Wis. 1975); Marcee v. United States, 455 F.2d 525, 527 (Ct. Cl. 1972). Cf. United States v. The Thekla, 266 U.S. 328, 339-40 (1924).

[86] Thus, where a contractor sought to have an original set of bids for a federal project set aside and a rebidding performed, he may not then attempt to overturn the rebidding results. In Contel Construction Corp. v. Parker, 261 F. Supp. 428 (E.D. Pa. 1966), the court held that "[h]aving been a willing and even eager participant in the rebidding, plaintiff cannot now be heard to say that its consequences should be enjoined." 261 F. Supp. at 430.

plaintiff may not repudiate its earlier statements and seek to enjoin the defendant's conduct.

In United States v. Georgia-Pacific, 421 F.2d 92 (9th Cir. 1970), a timber company invested in tracts of land, based on a 1958 government revision of the boundaries of national forest land. In 1970, the government came into court alleging that the 1958 changes were invalidly made and seeking part of defendant's land. The court observed that "Georgia-Pacific has made considerable investment in the Eden Ridge Tract based upon good faith reliance on both the boundary changes of 1958 and the failure of Government to assert any claim to the subject lands until the present suit was instituted." Id. at 104. In light of this past history, the court held that the government's hands were "tainted" in its present suit and the injunction was denied. Id.

These precedents for "unclean hands" should be helpful to generators in a variety of circumstances. In some cases, the government may have operated a waste site or used a site for disposal of wastes that it generated, only to sue a less responsible private party for cleanup under section 106.[87] On these facts, the government has "participated" in the wrong and its unclean hands should be taken into account when balancing the equities.

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[87] See, e.g., City of Philadelphia v. Stepan Chemical Co. 544 F. Supp. 1135 (E.D. Pa. 1982), where the city sought cleanup liability from private parties for a city-owned dump.

In other circumstances, waste disposal sites have been licensed by government and have received at best desultory investigation and enforcement. In many of these cases, more vigorous enforcement in the past would have significantly limited the scope and cost required for current cleanup efforts. Where generators have relied on the adequacy of these waste sites in using them for disposal, Georgia-Pacific suggests that the government should not be allowed to repudiate its earlier decision and require generators to clean up a site.[88] Again, unclean hands may be a factor in balancing the equities.

These facts may also give rise to the equitable defense of estoppel. Equitable estoppel prevents a party in a judicial proceeding from contradicting his earlier statements to the opposing party. This doctrine focuses primarily on doing "justice between the parties." Konstantinidis v. Chen, 626 F.2d 933, 936-37 (D.C. Cir. 1980).

The estoppel defense applies to actions brought by the government as well. Investors Research Corp. v. SEC, 628 F.2d 168, 174 (D.C. Cir. 1980). When seeking to estop the government, however, a defendant may be required to do more than show a negligent failure to inform; he may be required

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[88] In many situations, early enforcement inadequacy will probably be the fault of state and local governments, whereas section 106 is limited to federal actions.

to show "affirmative misconduct." Lavin v. Marsh, 644 F.2d 1378, 1382 (9th Cir. 1981).[89]

Thus, where the government has permitted a waste site, it may be estopped from proceeding under section 106.[90] For example, where pits, ponds or lagoons were built to specifications required pursuant to section 402 of the Water Act,[91] the federal government might be precluded from suing under section 106.

Plaintiffs will probably argue that a major exception to the unclean hands defense exists where the application of an unclean hands defense to government action would "frustrate the purpose of its laws or . . . thwart public policy." Pan American Petroleum and Transport Co. v. United

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[89] This burden may not be imposed by all circuits. For example, when the government negligently failed to depict a pipeline on dredging specifications, the government has been held responsible on estoppel grounds. Williams-McWilliams Co. v. U.S., 551 F.2d 945 (5th Cir. 1977). ("By a prolonged course of conduct the Government can induce justifiable reliance by interested parties on the course of action being continued.")

[90] One difficulty with this defense is the traditional requirement that the plaintiff must know the true facts at the time of the original representation. See, e.g., Bob's Big Boy Family Restaurants v. NLRB, 625 F.2d 850, 854 (9th Cir. 1980); Beverage v. Harvey, 602 F.2d 657, 659 (4th Cir. 1979). This knowledge, however, may be constructive rather than actual. Bohannon v. Manhattan Life Insurance Co., 555 F.2d 1205, 1211 (5th Cir. 1977).

[91] 33 U.S.C. § 1342. Regulations issued thereunder are codified in 40 C.F.R. §§ 122-125 (1981).

States, 273 U.S. 456, 506 (1927).[92] In the absence of an alternative means to ensure the cleanup of waste disposal sites, the strong public interest in health protection might indeed prevent the application of the unclean hands defense. But in light of the alternative of government cleanup under section 104, the public interest in requiring private cleanup under section 106 seems small, and unclean hands and estoppel should be effective defenses in some cases.[93]

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[92] See also Eichleay Corp. v. National Labor Relations Board, 206 F.2d 799, 806 (3d Cir. 1953); Deseret Apartments v. United States, 250 F.2d 457, 458 (10th Cir. 1957).

[93] In practice, these defenses may operate simply as a "backstop" to the irreparable injury requirement. Where the government has no adequate remedy except under section 106, unclean hands may not be helpful, due to the public interest exception.

TAB 5

CHAPTER 5:

THE LIABILITY PROVISIONS OF SECTION 107

INTRODUCTION AND SUMMARY OF CONCLUSIONS

Section 107 of Superfund provides the statute's only mechanism for recovering cleanup costs and natural resource damages from responsible parties. Despite EPA's expressed preference for compelling private cleanup through the emergency enforcement provisions of section 106 of Superfund,[1] suits under section 107 to recover the costs of government response actions are likely to become increasingly important. This is true not only because EPA inevitably will begin expending fund monies, but also because, as detailed in chapter 4 supra, section 106 is available only in extraordinary circumstances.[2]

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[1] See, e.g. EPA's Interim Superfund Removal Guidance (July 28, 1981) (instructing on-site coordinators to "request" or "compel" private cleanup before resorting to Response Fund expenditures); 10 Pest. & Tox. Chem. News, No. 26 at 17 (May 12, 1982) (EPA's Acting Director of the Office of Solid Waste Enforcement Programs stated that EPA prefers issuing orders for private cleanup to using Fund resources).

[2] At least ten section 107 counts have already been filed by United States and several state governments. In United States v. Wade, 546 F. Supp. 785 (E.D. Pa. 1982), the court dismissed a complaint against non-negligent generators for injunctive relief under section 106, indicating that a section 107 complaint was appropriate against a generator when federal response had already begun. See chapter 4 at IV-38.

This chapter addresses all aspects of section 107's liability provisions, except for three key general issues (standard of liability, causation, and apportionment) addressed in chapters 1-3.

Part I provides a brief statutory and legislative history background of section 107. The relationship of section 107 to the other key Superfund provisions is outlined and the legislative evolution of section 107 is summarized.

Part II addresses the scope of monetary relief which may be recovered under section 107. Unlike the much broader liability schemes proposed in earlier bills, section 107 carefully limits liability to cleanup costs and natural resource damages. Moreover, the scope of recoverable response costs is limited not only by the specific terms of section 107, but also by the substantive standards of section 104 and the substantive and procedural requirements of the National Contingency Plan (NCP). Natural resource claims are restricted to the lost economic value of federal and state lands and are subject to an administrative assessment procedure to be developed by regulation under section 301(c).

The parties who may sue under section 107 are examined in Part III. The United States, the states, and any other person who incurred response costs may sue to recover them under section 107. Only the United States and the states, however, may sue to recover natural resource damages.

Part IV describes the parties who may be liable under section 107. The broadest liability is imposed on the present owners and operators of facilities and sites. Liability for past owners and operators, transporters, and generators is imposed only in connection with disposal or treatment facilities. Even then, not all past owners and operators, transporters, and generators are liable; instead, Congress limited liability to those classes of defendants most likely to be in a position to control the risk of hazardous substance releases.

Part V addresses various defenses and limitations of liability available under section 107. In addition to defenses based on acts of God, acts of war, and acts or omissions of third parties, section 107 establishes certain monetary limits on liability and provides exclusions related to federally permitted releases, "good Samaritan" cleanup actions, and pesticide applications.

Finally, Part VI considers the section 107 provision for recovery of punitive damages of up to three times response costs against one who "fails without sufficient cause" to provide removal or remedial action under an administrative order. Where the defendant in good faith contests liability, or is unable to comply with the administrative order, punitive damages may not be recovered. Nor may punitive damages be assessed where the administrative order, or the response expenditures by which the damages would be

measured, fail to comport with statutory standards and the requirements of the NCP.

I. SECTION 107 IS AN INTEGRAL PART OF A UNIFIED STATUTORY SCHEME.

A. Superfund Provides for Response and Cleanup Supplemented by Limited Liability for Response Costs and Natural Resource Damages.

Superfund provides a comprehensive scheme for responding to releases of hazardous substances and for allocating the costs of such response efforts. Section 107 of Superfund, the Act's basic liability provision, plays a key role in this scheme and must be read in harmony with the entire statute.

Section 104 of Superfund authorizes the federal government, alone and in cooperation with the states, to use Superfund monies to respond to releases of hazardous substances. Voluntary private cleanup is also contemplated.[3]

Section 104 response actions are governed by standards set forth in both sections 104 and 105. For example, section 104 places dollar and time limits on response actions

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[3] Section 104(a) authorizes federal response "unless the President determines that such removal and remedial action will be done properly by the owner or operator of the vessel or facility from which the release or threat of release emanates, or by any other responsible party." Section 104(d)(1) authorizes state response under Superfund "[w]here the President determines that a State or political subdivision thereof has the capability to carry out any or all of the actions authorized in this section," and enters a contract or cooperative agreement with the state.

at a particular site unless specified conditions are met [§ 104(c)(1)] and requires the selection of remedial measures which accord with the NCP and provide for a cost-effective response [§ 104(c)(4)]. Section 105 provides for revision of the NCP previously published under section 311(c) of the Clean Water Act,[4] "to reflect and effectuate the responsibilities and powers created by" Superfund.[5]

Section 106 provides a limited supplement to governmental cleanup authority under section 104. Under section 106, the owner or operator of a site can be ordered to clean up an imminent and substantial endangerment where no adequate remedy exists under sections 104 and 107.[6]

Cleanup costs for response actions taken under Superfund, and damages for injury to natural resources, may be recovered under sections 107, 111, and 112. A claimant may elect to assert an unsatisfied claim which has been presented to private parties either in an action against responsible parties under section 107, or against the Fund under the claims procedures of sections 111 and 112.

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[4] The NCP promulgated under the Clean Water Act is codified at 40 C.F.R. Part 1510 (1981).

[5] The revised NCP must include, inter alia, criteria for determining the appropriate extent of removal, remedial, and other measures under Superfund [§ 105(3)], means of assuring that remedial measures are cost-effective [§ 105(7)], methods for assessing the risks presented by sites [§ 105(8)(A)], and a list of national priority sites for response [§ 105(8)(B)].

[6] See Chapter 4 at IV-35 to IV-43.

The Fund is available to satisfy claims against insolvent or absent parties at sites involving multiple responsible parties irrespective of whether or not liability is apportioned.[7] Similarly, a private party who conducts cleanup in excess of his apportioned share may recover excess costs against other responsible parties under section 107 or against the fund under section 112.

B. The Legislative Evolution of Section 107 Indicates That a Cautious Rather Than an Expansive Interpretation Is Required.

Superfund was passed in the lame-duck session of the 96th Congress in a last minute effort to enact a bill before the 97th Congress, elected along with President Reagan, took office. The enacted legislation was a massive compromise from earlier proposals, hastily drafted, and passed without the customary committee or conference reports explaining its provisions.

As the sponsors of the Superfund legislation conceded, S. 1480, the bill reported by the Senate Environment and Public Works Committee, could not be passed because it was regarded as overly harsh and extreme.[8] While the enacted

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[7] See Chapter 1 at I-11 to I-12.

[8] Even Senator Stafford, one of the key sponsors of S. 1480, conceded that many of his colleagues "perceive[d] [S. 1480] as punitive and unnecessarily rigorous." 126 Cong.

(Footnote [8] continued on next page.)

section 107(a) preserved the basic structure of the analogous liability provisions from S. 1480,[9] the compromise significantly restricted potential Superfund liability by eliminating the most onerous aspects of the Committee bill.[10]

For example, S. 1480 would have created an unprecedented private cause of action under federal law to recover a variety of damages for personal injury or economic loss resulting from the release of hazardous substances, incorporating a far weaker medical causation requirement than that imposed by common law.[11] As repeatedly emphasized during the final Senate debate on Superfund, this revolutionary federal cause of action for personal injury and economic

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(Footnote [8] continued from previous page.)

Rec. S14967 (daily ed. Nov. 24, 1980). Other Senators described the provisions of S. 1480 as "grossly unfair" (id. at S15004, Senator Helms) and "too burdensome or punitive" (id. at S15007, Senator Riegle). Thus, due to the "strong concern and opposition" to S. 1480, the bill's sponsors were required to make "major concessions" to obtain passage of a compromise bill. Id. at S14967 (remarks of Senator Stafford).

[9] S. 1480 § 4(a). As detailed in this chapter, some aspects of H.R. 7020, the bill originally passed by the House, were also used in developing the compromise legislation. Throughout this memorandum, references to H.R. 7020 are to the version of H.R. 7020 originally passed by the House, unless otherwise indicated.

[10] As the court observed in City of Philadelphia v. Stepan Chemical Co., 544 F.Supp. 1135 (E.D. Pa. 1982), "[w]hat was enacted and signed into law is a severely diminished piece of compromise legislation . . .." Id. at 1142.

[11] S. 1480 §§ 4(a)(2), 4(c); see chapter 3 at III-7.

loss could not pass and therefore was eliminated from the compromise bill.[12]

The compromise also eliminated both joint and several liability and the express provisions for strict liability found in both the Senate and House bills. In their place, Congress adopted the standard of liability applicable under section 311 of the Clean Water Act, permitting fault considerations to influence liability determinations in some Superfund cases.[13]

No committee report or conference report was prepared on the final compromise, which was presented on the floor of the Senate as an amendment in the nature of a substitute.[14] Neither the Senate report on the committee version of S. 1480,[15] nor the House debate and committee report on

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[12] See, e.g., 126 Cong. Rec. S14964 (daily ed. Nov. 24, 1980) (remarks of Senator Randolph); id. at S14967 (remarks of Senator Stafford); id. at S14973 (remarks of Senator Mitchell); id. at S14980 (remarks of Senator Cohen); id. at S15004 (remarks of Senator Helms).

[13] See chapter 1; compare S. 1480 § 4(a) and H.R. 7020 § 3071(a)(1), with Superfund § 107(a); and chapter 2 at II-8 to II-16; compare S. 1480 § 4(a) and H.R. 7020 § 3071(a), with Superfund §§ 107(a), 101(32).

[14] 126 Cong. Rec. S14948 (Nov. 24, 1980) (remarks of Senators Byrd and Stafford). Because the compromise bill passed in the Senate was accepted and passed in the House without amendment, no conference was needed. See id., H11791 (daily ed. Dec. 3, 1980) (remarks of Rep. Harsha); id. at H11792 (remarks of Rep. Breaux).

[15] S. Rep. No. 848, 96th Cong. 2d Sess. (1980).

H.R. 7020,[16] can be regarded as authoritative regarding the final compromise. Accordingly, the legislative history of S. 1480 and H.R. 7020 must be used cautiously in interpreting the provisions of the compromise legislation, and section 107 itself must be interpreted in light of the substantial narrowing of liability achieved in the final compromise.

II. CONGRESS CAREFULLY LIMITED THE RESPONSE COSTS AND DAMAGES RECOVERABLE UNDER SECTION 107.

Section 107 relief is limited to recovery of two kinds of solely money damages: the costs of responding to a release or threatened release of a hazardous substance [§§ 107(a)(4)(A), (B)];[17] and "damages for injury to, destruction of, or loss of natural resources . . ." [§ 107

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[16] H.R. Rep. No. 1016, 96th Cong. 2d Sess. (1980).

[17] Section 107(a) also requires "a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance.. . ." [§ 107(a)(4)]. "Release" and hazardous substance are both defined terms under the statute [§ 101(22) and § 101(14)]. Initially these terms appear to provide some practical limitation to the scope of liability, but in practice the definitions are very broad and have little limiting effect. It should be noted, however, that petroleum and crude oil fractions are excluded from the definition of hazardous substances [§ 101(14)]. In addition, although the government may respond in some cases under section 104 to the release of a "pollutant or contaminant" which is not a "hazardous substance," there is no liability under section 107 relating to the release of a "pollutant or contaminant."

(a)(4)(C)].[18] Equitable relief is permissible only under the narrowly-drawn emergency abatement provisions of section 106, available primarily against owners and operators -- not against past off-site generators.[19]

Moreover, the response costs and natural resource damages recoverable under section 107 are limited sharply. As detailed below, Congress tailored the scope of recovery to achieve the remedial ends of the statute without undue burden on either private defendants or the federal Response Fund, which must bear the liability of insolvent or unavailable parties.

A. Recoverable Response Costs Are Limited by the Requirements of Section 104 and the National Contingency Plan.

As an integral part of the Superfund comprehensive cleanup scheme, section 107 supplements the response authority provisions of section 104 by permitting recovery for the costs of response taken pursuant to section 104. Both the response authority and the liability provisions, however, explicitly require consistency with the revised NCP promulgated under section 105.

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[18] As noted above, Congress deliberately eliminated from the final compromise bill provision for the recovery of damages for personal injury or private economic loss, which had been included in both the Senate committee version of S. 1480 and the House bill, H.R. 7020. See p. 8, supra.

[19] United States v. Wade, supra n.2; see chapter 4 at IV-30 to IV-35.

Compliance with section 104 and the NCP is of critical interest to Superfund defendants. Both are designed to insure efficient, cost-effective, and economical cleanup. Without section 104 and the NCP, the government could seek to recover response costs under section 107 virtually without limitation, thereby removing its incentive to perform cost-effective, economical cleanup.

1. Superfund's language and legislative history require compliance with section 104 and the NCP in order to recover under section 107.

Both the statute and its legislative history show that the costs recoverable under section 107 are the costs of hazardous waste removal or remedial response actions taken in accordance with the section 104 cleanup authority and the provisions of the NCP. It follows, therefore, that section 107 provides no basis for recovering the costs of actions taken outside Superfund's statutory framework.

Response measures under Superfund include removal and remedial actions, both of which are authorized under section 104 in responding to releases or threatened releases of hazardous substances.[20] Removal action "is that initial response . . . which after discovery must be undertaken quickly to protect or prevent actual or potential injury

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[20] Superfund § 104(a)(1); Superfund § 101(25).

. . . ."[21] In contrast, remedial action "involves the more permanent, costly measures which may be necessary after the need for emergency action has terminated."[22]

Section 104 defines the scope of authorized response under Superfund by setting standards for removal and remedial measures, including (i) dollar and time limitations on removal action [§ 104(c)(1)]; (ii) requirements for consultation with affected states and state cost-sharing agreements prior to undertaking remedial action [§§ 104(c)(1), (2), (3)]; and (iii) requirements for selection of remedial measures which are cost-effective and balanced [§ 104(c)(4)]. State response under Superfund also requires a federal determination that the state is capable of carrying out the response and has obtained a federal-state agreement covering the response. Superfund § 104(d)(1).

In addition, both remedial and removal response actions are governed by the revised NCP promulgated under section

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[21] S. Rep. No. 848, 96th Cong., 2d Sess. 53 (1980). The enacted legislation adopted the distinction between removal and remedial action developed in S. 1480. The basic response authority provisions found in Superfund § 104 and S. 1480 § 3(c) are also similar.

[22] S. Rep. No. 848, 96th Cong., 2d Sess. 54 (1980). The terms "removal" and "remedial action" are terms of art under Superfund. See Superfund §§ 101(23), (24). As detailed in this chapter the terms "removal" and "remedial" are used throughout §§ 104, 105, 107, 111, and 112 in defining the scope of response and recovery authorized by Superfund.

105.[23] The application of the NCP to all Superfund response actions is emphasized throughout sections 104 and 105.[24] Significantly, actions inconsistent with the NCP are nowhere authorized under Superfund.

Indeed, the legislative history makes clear that the NCP was to provide standards both for response and liability. For example, the final Senate debate recognized that Superfund "is to be substantially keyed to the national contingency plan."[25] The Senate committee report on S. 1480 explains that the revised NCP should "give some consistency and cohesiveness to response planning and actions under this bill."[26] And the Senate debate on the

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[23] Section 105 requires that the NCP, inter alia, specify "methods and criteria for determining the appropriate extent of removal, remedy, and other measures authorized by this Act" [§ 105(3)]; establish "means of assuring that remedial action measures are cost-effective. . ." [§ 105(7)]; establish risk assessment procedures [§ 105(8)(A)]; and determine and list priorities for response among known releases or threatened releases [§ 105(8)(B)].

[24] See section 104(a)(1) (authorizing removal, remedial, and other response actions "consistent with the national contingency plan"); section 104(c)(4) (requiring selection of remedial actions "which are to the extent practicable in accordance with the national contingency plan"); and section 105 (requiring that "the response to and actions to minimize damage from hazardous substances releases shall, to the greatest extent possible, be in accordance with the provisions of the plan").

[25] 126 Cong. Rec. S15007 (daily ed. Nov. 24, 1980) (colloquy between Senator Helms and Senator Stafford).

[26] S. Rep. No. 848, 96th Cong., 2d Sess. 52 (1980).

final legislation confirms that the NCP applies even to administrative orders for removal or remedial action, and that the inconsistency of such an order with the NCP could be raised as a defense to a punitive damages action under section 107(c).[27]

Section 107 provides a logical complement to Superfund's response authority by providing recovery of costs incurred under the statutory response scheme. The costs which may be recovered are specified as:

> (A) all costs of removal or remedial action incurred by the United States Government or a State not inconsistent with the national contingency plan;
>
> (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan ....

Superfund §§ 107(a)(4)(A), (B).

This means that the costs to be recovered under section 107(a) are only the costs of "removal or remedial action" or "response." The costs of actions which do not comport with the standards of section 104 do not qualify as the costs of "removal or remedial action" and cannot be recovered under the terms of section 107(a).

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[27] 126 Cong. Rec. S15008 (daily ed. No. 24, 1980) (colloquy between Senator Simpson and Senator Stafford). The section 107(c) provision for punitive damages for violation of administrative orders is addressed at pp. V-69 to V-71 infra.

This unified construction of the section 107 liability provisions is also supported by Superfund's parallel scheme for recovering costs from the federal Response Fund. Response cost claims which remain unsatisfied after presentation to potentially liable parties may be asserted either in a section 107 action or against the Fund under sections 111 and 112, thereby indicating that the scope of response cost recovery against private defendants is coextensive with recovery from the fund. Superfund § 112(a). Recovery of response costs from the Fund is specifically linked to section 104 by section 111(a)(1), which provides for "payment of governmental response costs incurred pursuant to section 104 of this title . . ." (emphasis supplied). In short, the section 104 standards are applicable to all claims for response costs, whether asserted against responsible parties or against the Fund.

Moreover, the cost recovery provisions of section 107 -- like sections 104 and 105 -- specifically require consistency with the NCP. The federal and state governments may recover only those costs that are "not inconsistent with the national contingency plan," and other persons may recover only costs "consistent with the national contingency plan."

The key language in section 107 requiring consistency with the NCP was added in the final compromise legislation and does not appear in the liability provisions of either

S. 1480 or H.R. 7020.[28] Thus, the compromise reinforced the central role of the NCP in Superfund by using it explicitly to define the limits of cost recovery under section 107 as well as the extent of response authority under section 104. While nothing in the statute or legislative history explains the use of the terms "not inconsistent with" in section 107(a)(4)(A) and "consistent with" in section 107(a)(4)(B), the double negative "not inconsistent" is logically equivalent with the positive "consistent."[29] Given the rushed rewriting of Superfund in the closing days of Congress, no particular importance should be attributed to those essentially identical formulations.[30]

Taken together, the only coherent reading of sections 104, 105, and 107 is that liability under sections 107(a)(4)(A) and (B) is limited to "removal," "remedial," and "response" actions taken in accordance with the section

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[28] See S. 1480 §§ 4(a)(1)(A), (B); H.R. 8020 § 3071(b).

[29] Arguably, "consistent with" was considered a tighter verbal formulation and that tighter control was intended for recovering the cost of private response action. The statute as a whole, however, makes clear that both governmental and private recovery for response costs is to be conditioned on meeting NCP requirements.

[30] The final Act contains numerous, obvious examples of errors in draftsmanship. For example, section 107(c)(3) imposes penalties on parties who violate Presidential orders under section 104 of the Act, but section 104 contains no authority for such orders. And section 303 cuts off taxing authority in 1985, even though the post-closure tax fund continues thereafter.

104 cleanup authority and the NCP. Cleanup costs taken outside the Superfund statutory framework are recoverable, if at all, only under other legal authority, such as state common law.

2. The better interpretation reads section 107 "in tandem" with section 104.

Although early judicial interpretations of Superfund are divided, the recent decision in United States v. Wade comes closest to meshing section 107 with the response standards of section 104. There, the court dismissed claims against non-negligent generators under section 7003 of RCRA and section 106 of Superfund. In interpreting the injunctive power of section 106, the court analyzed the statute as a whole, and focused on the availability of an alternative remedy for the government under sections 104 and 107, emphasizing their close link:

> Congress intended section 104 to work in tandem with section 107, the liability section. By the terms of section 107, the government is authorized to sue designated classes of persons to reimburse the Superfund for emergency cleanup, removal and containment actions which it undertook under section 104.

546 F. Supp. at 793 (citations and footnotes omitted).

By contrast, in United States v. Reilly Tar & Chemical Corp., the court interpreted section 107(a) without reference to related statutory provisions. Relying on the first

clause of section 107(a) ("[n]otwithstanding any other provision or rule of law and subject only to the defenses set forth in subsection (b) of this section"), the court rejected Reilly Tar's argument[31] that plaintiff's section 107 claim should be dismissed because plaintiff failed to obtain the cooperative agreement required under section 104(c)(3). According to the court,

> Congress did not intend that courts engage in the complex inquiry and statutory tracing of the various sections Reilly Tar relied on. Section 107(a) was meant to stand by itself . . ..

17 E.R.C. at 2124.[32]

The brief introductory clause relied upon in the Reilly Tar decision does not compel the crabbed interpretation of section 107 imposed by the court. Other courts, when presented with the unitary reading of sections 104, 105, and 107 described at pp. 11-17 supra, should reach a different result. Accordingly, the Wade approach of reading section 104 and 107 in tandem provides the proper analytical framework for section 107 claims.

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[31] This argument was based on a technical reading of section 112(a) and section 111(a).

[32] The court also rejected Reilly Tar's argument that because no final revised NCP was available, it was impossible to determine whether the costs sought to be recovered were consistent with the NCP. It held instead that section 107 was intended to become effective immediately upon passage, and that the NCP promulgated under section 311 of Clean Water Act governed Superfund response until publication of the revised NCP under section 105.

3. Section 104 and the NCP establish cost-effective standards governing both response and section 107 recovery.

Section 104 and the NCP provide detailed substantive and procedural requirements for all removal and remedial actions under Superfund, including those that become subject to a section 107 action. These standards impose substantial limits on the scope of all response and recovery, thereby making compliance with section 104 and the NCP central issues in many future Superfund cases.

a. Federal removal actions are limited in both scope and expense.

As explained above, removal actions are intended to provide an initial response to emergency conditions where prompt action may be required to avoid harm.[33] For this reason the total expenditures for and duration of removal action are sharply restricted. Removal actions are not, however, subject to some of the substantive and procedural limitations which govern remedial action.[34]

Removal expenditures are limited to $1,000,000 or any lesser amount spent within six months of the initial response. Superfund § 104(c)(1). The $1,000,000 -- six-month limit for removal action can be exceeded only where

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[33] See p. V-12 supra.

[34] See pp. V-21 to V-23 infra.

"continued response actions are immediately required to prevent, limit, or mitigate an emergency," there is an "immediate risk," and timely assistance will not otherwise be provided. Id.

The revised NCP[35] limits removal action by setting standards for immediate removal and planned removal. These NCP removal standards emphasize that removal actions encompass only responses of short duration, calling for limited expenditures, at sites which present an immediate and high risk.[36] Immediate removal actions must be terminated when the site no longer meets acute hazard criteria and proper disposal has been completed. NCP § 300.65(c).

The NCP permits planned removal only at the request of the affected state. NCP § 300.67(b).[37] Moreover, the NCP indicates that the situations in which planned removal are appropriate are limited to direct human contact with hazardous substances, "contaminated drinking water at the tap,"

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[35] National Oil and Hazardous Substances Contingency Plan, 47 Fed. Reg. 31180 (1982).

[36] The NCP permits immediate removal only where such action "will prevent or mitigate immediate and significant risk of harm to human life or health or to the environment," such as "exposure to acutely toxic substances" "contamination of a drinking water supply," "fire and/or explosion," or other "similarly acute situations." NCP § 300.65(a).

[37] Planned removal actions are directed at non-emergency situations falling short of full remedial action and staying within the statutory criterion for removal actions.

and other "serious threats." NCP § 300.67(c). Planned removal must also be terminated after the expenditure of $1,000,000 or six months after the date of initial response, unless continued response is "immediately required" by an "emergency" and "immediate risk." NCP § 300.67(e).

b. Federal remedial actions must be cost-effective, comport with the NCP and meet other statutory criteria.

Remedial actions, in contrast to emergency removal actions, provide a more costly, long-lasting response, normally requiring considerable study.[38] While federal remedial actions are not subject to the $1,000,000 -- six months remedial limits, they are governed by strict standards for state consultation and cost sharing, as well as cost-effectiveness. Federal remedial action not only requires prior consultation with any affected state [§ 104(c)(2)] but the state must enter a contract or cooperative agreement assuring, inter alia, that the state will provide "all future maintenance" at the site and will pay ten percent of the costs [§ 104(c)(3)].

By these limitations, Congress expressly intended to avoid quixotic attempts to clean up every release of a hazardous substance regardless of cost. For example, in the

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[38] S. Rep. No. 848, 96th Cong. 2d Sess. 54 (1980).

final debate on Superfund, Senator Stafford, one of the key architects of both S. 1480 and the compromise legislation, emphasized that:

> [C]onsiderations of the relationship between the costs and the benefits of a particular response action are an essential part of both the national contingency plan, to be developed under section 105, and the selection of remedial and response actions under section 104. We intend that priorities be set for expenditures from the fund, and that such expenditures be made in those situations which most present a threat. The fund should not be used to clean up or remedy any and every discharge.[39]

Similarly, Senator Dole observed that "[f]ederal action must be responsible, and carefully calculated to deal with the immediate problem in a realistic and cost-effective way."[40]

As Superfund requires, the NCP also sharply limits the sites at which remedial action may be taken by defining remedial actions as "responses to releases on the National

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[39] 126 Cong. Rec. S15007 (daily ed. Nov. 24, 1980).

[40] 126 Cong. Rec. S14982 (daily ed. Nov. 24, 1980). He further noted that,

> [t]he compromise package . . . imposes limits on the discretion of those administering the response mechanism, to insure that reasonably cost-efficient actions are taken, and that the response to a given problem is shaped with regard to the entire range of problems covered by the fund and to the overall limit on the fund.

Id.

Priorities List." NCP § 300.68(a)(3).[41] Thus, at non-priority sites, only removal action -- subject to the strict limits described above -- can be undertaken and recovered.

Moreover, remedial actions must comply with detailed substantive and procedural requirements to ensure the selection of cost-effective measures. The NCP requires development and detailed analysis of alternative remedial measures based on cost, effectiveness, and feasibility. NCP §§ 300.68(g), (h), (i). For example, the NCP requires selection of the alternative,

> which . . . is cost-effective (i.e., the lowest cost alternative that is technologically feasible and reliable and which effectively mitigates and minimizes damage to and provides adequate protection of public health, welfare, or the environment).

NCP § 300.68(j).

In short, the express invocation of NCP standards in section 107 provides substantial limitations on the scope of response cost recovery. Expenditures contrary to the NCP provisions may not be recovered under section 107.

c. With federal approval, a state can exercise the statutory response authority and recover its costs.

Old hazardous waste sites often present acute political problems for state and local governments, and state

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[41] Section 105(8)(B) requires the creation of a National Priorities List of four hundred sites based on risk assessments pursuant to the NCP.

government interest and participation in cleanup has been accordingly keen. Because of their proximity to citizen concern, states may, in certain situations, want expensive, even zero-risk cleanup, particularly if cleanup costs are to be borne out of the Response Fund rather than state treasuries. Accordingly, the requirement that the state comply with section 104 and the NCP as a condition to recovering response costs under section 107 may be of particular importance in certain situations.[42]

Section 104 has two provisions that affect the terms of participation by state and local governments in Superfund cleanup. The first, section 104(d)(1), provides statutory authority for state and local governments to undertake responses, including removal and remedial action under Superfund. The second, section 104(c)(3), requires that a state provide financial and management assurances before the federal government spends Response Fund money on remedial actions within the state.

Section 104(d)(1) provides the basic authority for state Superfund response.[43] Under that provision, states

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[42] In a number of recent cases, including Ohio v. Georgeoff, No. C-81-1961 (N.D. Ohio, filed Oct. 1, 1981), state governments have sued in disregard of the limitations and requirements of section 104 and the NCP.

[43] Section 104(d)(1) provides, in pertinent part:

> Where the President determines that a State or political subdivision thereof has the capability to carry out any or

(Footnote [43] continued on next page.)

may exercise Superfund response authority based on a federal determination that the state "has the capability to carry out" the response and has entered into a federal-state agreement providing for state response. Significantly, because the authority granted the state under section 104(d)(1) is the authority to take "actions authorized in this section," the substantive standards of section 104 are applicable to state response.

Congress hoped that many, even most, states would play a central role in hazardous waste cleanup actions. Nevertheless, the requirement for federal approval and the maintenance of statutory controls over state activity reflect a general congressional concern that not all states could deal with the problems of hazardous waste sites, and that a comprehensive federal framework for response was needed.

For example, during the House debate on H.R. 7020, before President Reagan's "New Federalism" swept Washington, then-representative David Stockman offered a substitute bill

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(Footnote [43] continued from previous page.)

> all of the actions authorized in this section, the President may, in his discretion, enter into a contract or cooperative agreement with such State or political subdivision to take such actions in accordance with criteria and priorities established pursuant to section 105(8) of this title and to be reimbursed for the reasonable response costs thereof from the Fund.

giving the states primary responsibility for addressing hazardous waste sites, with the aid of federal funding, in lieu of federal authority under Superfund.[44] The Stockman substitute was overwhelmingly rejected because the House did not believe that all states were equally capable of doing the job.[45] Moreover, Congress recognized hazardous waste response as a national problem deserving a comprehensive legal framework.[46]

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[44] 126 Cong. Rec. H9437-H9440 (daily ed. September 23, 1980).

[45] During the debate on the Stockman bill, Representative Florio stated:

> Many states, quite frankly, are not interested or are not capable of going forward. And they do not want to. They want to defer to the Federal Government.

Id. at H9441. Indeed, according to Representative Gore, the states themselves "recognize[d] that they have neither the capacity nor the expertise" necessary to address the problem. Id. at H9449. Representative Gore stated that:

> A number of States, among them Michigan, California, New York, Kentucky, and New Jersey, have repeatedly testified before the Congress concerning the severe limitations on the ability of the states to deal with hazardous waste sites and concerning the need as they see it, for Federal legislation.

Id. at H9445.

[46] Id. at H9445 (remarks of Representative La Falce). See also id. at H9449 (remarks of Representative Martin). Thus, Congressman La Falce concluded simply that "the States cannot handle" the problem of responding to hazardous waste sites. Id. at H9445.

Even where a state or local government has not been granted Superfund response authority under a section 104(d)(1) agreement, the state still must participate in any federal remedial action using the Fund. As a condition to the expenditure of federal funds on remedial action, section 104(c)(3) requires a state contract or cooperative agreement providing a percentage of state funding, future maintenance by the state, and state disposal of materials removed from the site. To the extent provided in the contract or cooperative agreement and if in compliance with the NCP and other requirements, state expenditures and actions under section 104(c)(3) are pursuant to the federal scheme and should be eligible for recovery under section 107(a)(4)(A).

The NCP, as promulgated, repeats and reinforces the requirements of sections 104(d)(1) and 104(c)(3). Section 300.24 of the new NCP dealing with "state and local participation" encourages state and local governments to participate in cleanup operations, pursuant to section 104(d) agreements.[47]

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[47] Under Section 300.24, states are encouraged to use their own authorities to compel or undertake response actions. Section 300.24 provides for the only use of Superfund authority:

> "States may enter into cooperative agreements pursuant to section 104(c)(3) and (d) . . ., as appropriate, to undertake actions authorized under subparts E and F of this Plan. Requirements for entering into these agreements are included in sections 300.58 and 300.62 of this Plan."

Section 300.62 of the NCP, which pertains to the "State Role" in hazardous substance cleanup, recites the requirement of a contract or cooperative agreement under section 104(d)(1) in order to play a cleanup role and includes in the Plan the section 104(c)(3) requirements for a state financing and disposal commitments before federal funds can be spent for remedial action in a state.

Not only are the commitments and agreements of sections 104(c)(3) and (d)(1) required by the NCP, state and local governments must also show that the costs were not inconsistent with the substantive and procedural provisions of the NCP.[48]

d. Other plaintiffs can recover only for response costs incurred in compliance with section 104 and the NCP.

Parties other than the federal and state governments, including responsible parties,[49] can recover response costs in compliance with the substantive standards of section 104 and consistent with the NCP. Superfund § 107(a)(4)(B).

Cities, counties, and other "political subdivisions" of states may be granted authority to conduct response actions under the terms of section 104(d)(1). As with states, the

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[48] See pp. V-11 to V-18 supra.

[49] See pp. V-50 to V-52 infra.

exercise of section 104 authority by such political subdivisions is conditioned on a federal determination that the political subdivision has the capability to carry out the action and on a contract or cooperative agreement between the federal government and the political subdivision. Exercise of such authority and recovery of costs are subject to the standards of section 104.

Responsible parties can also conduct response actions in lieu of governmental action, and then recover response costs in appropriate cases. Superfund § 107(a)(4)(B). Section 104(a)(1) authorizes federal removal or remedial action unless others will properly carry out such action. Thus, section 104 contemplates that the same response measures may be taken by private respondents as by federal or authorized state authorities; the statute merely provides that responsible parties may act in place of federal or authorized state authorities when the President determines that they will conduct the response properly.

Moreover, in any action under section 107(a)(4)(B), recovery is limited to the "necessary costs of response . . . consistent with the national contingency plan." Thus, recovery is governed by the same substantial and procedural standards applicable to federal and state response and recovery under the NCP. In addition, section 300.25(d) of

the Plan requires advance EPA approval of actions by other persons in order for the costs to be reimbursable.[50]

B. Future Response Costs Cannot Be Recovered.

Section 107 expressly limits response cost recovery under Superfund to costs that have been "incurred." Similar language in the Clean Water Act has been held to require government expenditures and completed cleanup operations before suit. Superfund plaintiffs have improperly attempted to circumvent this limitation by seeking injunctive relief mandating the payment of future response costs and by seeking a declaratory judgment for future response costs.

1. Costs must have been "incurred."

By its very terms, section 107 permits recovery of only "incurred" response costs. Superfund simply provides no recovery for future response costs.

Similar language limiting recovery to costs that have been "incurred" appeared in the liability provisions of both

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[50] Section 300.25(d) provides as follows:

> The prior authorization is only specifically tied to claims against the fund under Section 111(a)(2) of Superfund. But failure to obtain permission should nonetheless be considered inconsistent with the plan for the analogous provisions of Section 107(a)(4)(B).

S. 1480 and H.R. 7020.[51] Indeed, this was precisely what former EPA Administrator Douglas Costle sought -- "a revolving fund that would allow us to go in and clean up hazardous waste sites first, then try to recover the costs of cleanup later."[52]

The language of section 107 and the earlier bills limiting recovery to costs already "incurred" is derived from section 311(f) of the Clean Water Act, which provides liability for "actual costs incurred." This language has been construed to give rise to a cause of action only after the response action has been performed and the money expended.[53]

For example, in United States v. The Barge Shamrock, 635 F.2d 1108 (4th Cir. 1980), cert. denied, 454 U.S. 830 (1981), the court explicitly held that "[t]he cause of action for recouping expenses incurred by the government

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[51] S. 1480 § 4(a); H.R. 7020 § 3071(b).

[52] S. Rep. No. 848, 96th Cong. 2d Sess. 12 (1980).

[53] Judicial construction of analogous terms from the Clean Water Act is particularly persuasive in interpreting Superfund because, as one of the key sponsors observed during the final Senate debate on Superfund, the Superfund legislation is "modeled upon the experience with the Clean Water Act's spill response program." 126 Cong. Rec. S14965 (daily ed. Nov. 24, 1980) (remarks of Senator Randolph). See also S. Rep. No. 848, 96th Cong., 2d Sess. 1 (1980), stating that S. 1480, the Senate predecessor to the Superfund bill enacted by Congress, "has its roots in the liability and funding provisions provided in the Clean Water Act of 1972."

does not fully accrue until the government has completely exercised its option and completed the cleanup operation." 635 F.2d at 1110. As the court observed, the Clean Water Act authorizes the President to act first and recover costs later, "[i]n order to avoid the obvious consequences of possible delay or ineffectiveness." Id. As a consequence, claims for future amounts to be expended in planned or continuing response actions are not cognizable.

2. Declaratory judgments for future response costs are not available.

Superfund plaintiffs have sought declaratory judgments that defendants are liable for response costs not yet incurred.[54] This means of circumventing the express statutory limitation, "costs incurred," must fail.[55]

An analogous case is United States v. Burns, 512 F. Supp. 916 (W.D. Pa. 1981), where plaintiffs sought to avoid the dollar limit on liability under section 311(f) of the Clean Water Act by seeking a declaratory judgment under the Toxic Substances Control Act. The court dismissed plaintiffs' claims, stressing that Congress intentionally limited

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[54] See Ohio v. Georgeoff, supra n.42.

[55] Nor should the government be able to seek injunctive relief under section 106 in order to avoid the costs incurred limitation. See chapter 4.

liability for discharges into navigable waters and that plaintiffs would not be permitted to circumvent these limitations by proceeding under a different act. 512 F. Supp. at 919.

More generally, declaratory relief has traditionally been held inappropriate where specific statutory procedures are provided for the resolution of contested issues.[56] This is so because "courts should refrain from exercising jurisdiction under the Declaratory Judgment Act where special statutory proceedings have been established to grant the relief sought by the declaratory action." Clausell v. Turner, 295 F. Supp. 533, 537 (S.D.N.Y. 1969) (denying declaratory judgment to hold conviction unlawful, in light of availability of habeas corpus petition).[57] In view of Congress' comprehensive system for response and recovery under Superfund, and the express limitation of recovery to costs actually "incurred," courts are unlikely to grant pre-cleanup declaratory judgments.

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[56] Independent Cosmetic Manufacturers and Distributors, Inc. v. Dep't of Health Education and Welfare, 574 F.2d 553, 555-56 (D.C. Cir. 1978) (statute providing for administrative hearing with appeal to circuit court).

[57] See also Holiday Inns of America, Inc. v. Holiday House, Inc., 279 F. Supp. 648, 649 (W.D. Pa. 1968), referring "to the impropriety of declaratory relief in a situation where a comprehensive statutory scheme has been established" (declining to grant such relief where Congress established procedures for NLRB adjudication of such matters).

Moreover, even though in certain circumstances the existence of "another adequate remedy does not preclude a judgment for declaratory relief," Fed. R. Civ. P. Rule 57, the decision to grant a declaratory judgment is discretionary. The availability of alternative relief, such as that which would be available to Superfund plaintiffs in a subsequent action for response costs incurred, has been invoked in denying declaratory relief.[58]

The doctrine of "ripeness" also provides a strong reason for denying declaratory relief. Courts will not grant declaratory judgments until the issues "have taken on fixed and final shape." Public Service Commission v. Wycoff Co., Inc., 344 U.S. 237, 244-45 (1952). A fundamental principle is whether the challenge presents a "purely legal question" appropriate for declaratory judgment or whether "factual" issues are relevant to the decision. Toilet Goods Association, Inc. v. Gardner, 387 U.S. 158, 162, 164 (1967). Accordingly, declaratory judgment claims for future response costs are not ripe for decision because none of the key factual issues will not have taken on "fixed and final shape" until cleanup is completed. For as explained above,

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[58] See City of Highland Park v. Train, 519 F.2d 681, 692 (7th Cir. 1975), cert. denied, 424 U.S. 927 (1976) (denying relief where the Clean Air Act provides specific review procedures); Cartier v. Secretary of State, 506 F.2d 191, 200 (D.C. Cir. 1974), cert. denied, 421 U.S. 947 (1975).

recovery depends on plaintiff's compliance with the requirements of section 104 and the NCP, which cannot be determined until response actions have been completed. See pp. V-11 to V-29 supra. Moreover, the nature of the cleanup needed or appropriate may be revised in light of new information that may come available only after response actions have begun.

In sum, Superfund's goals, as well as sound judicial administration, can only be achieved by requiring, at least that each major phase of cleanup be completed before section 107 is invoked. Most courts are likely to eschew piecemeal litigation and multiple trials even regarding different phases of cleanup (e.g., groundwater and surface water). The best solution from the standpoint of all concerned, therefore, is likely to be cleanup first and litigation later. Not only will this encourage prompt cleanup, but it also will prevent needlessly complex judicial proceedings and facilitate the just apportionment of response costs among the Fund and the various responsible parties.

C. Recovery of Natural Resource Damages Is Limited to Economic Loss by the Federal Government or a State.

Section 107 authorizes recovery of damages incurred to natural resources as a result of a release of hazardous substances, but carefully limits the scope of those damages. Measurement of natural resource damages will be a critical issue in many Superfund cases. Natural resource liability

could often exceed response cost liability or provide a detour around response cost limitations, unless its measurement is properly restricted. A future rulemaking under section 301 will set procedures for measurement and assessment and will be most important in determining the scope of potential liability. In the meantime, the statute and its legislative history provide important guidance for assessments and for the section 301 rulemaking.

The Act and its legislative history emphasize that the measure of natural resource damages should be "economically efficient," "cost-effective," and "accurate." Thus, the natural resource damages recoverable under the statute were limited to the lost economic value of federal or state resources. Rehabilitation and restoration costs are not imposed if they exceed the economic damages. To do otherwise would not be "economically efficient" or "cost-effective," because it would devote more money to restoring natural resources than they were worth in the first place. This congressional requirement is consistent with applicable common law precedents.

1. Natural resource damages may not exceed reduced economic value.

Superfund authorizes recovery of "damages for injury to, destruction of, or loss of natural resources," and the

"reasonable costs of assessing such injury . . .." Superfund § 107(a)(4)(C).[59]

Federal officials designated under the NCP are to assess natural resource damages, and their assessment is given presumptive weight. Superfund § 111(h). In turn, section 301 directs the President to "promulgate regulations for the assessment of damages for injury to, destruction of, or loss of natural resources." Superfund § 301(c)(1).[60]

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[59] The section goes on to provide that "[s]ums recovered shall be available for use to restore, rehabilitate, or acquire the equivalent of such natural resources by the appropriate agencies of the Federal Government or the State government but the measure of such damages shall not be limited by the sums which can be used to restore or replace such resources." Superfund § 107(f).

Section 107 also provides certain exemptions from natural resource liability. There is no liability where "such damages and the release of a hazardous substance from which such damages resulted have occurred wholly before the enactment of this Act." Superfund § 107(f). Nor is there liability "where the party sought to be charged has demonstrated that the damages to natural resources complained of were specifically identified as an irreversible and irretrievable commitment of natural resources in an environmental impact statement, or other comparable environmental analysis, and the decision to grant a permit or license authorizes such commitment of natural resources, and the facility or project was otherwise operating within the terms of its permit or license." Id.

[60] The regulations are to be promulgated within two years and are to provide:

> (A) standard procedures for simplified assessments requiring minimal field observation, including establishing measures of damages based on units of

(Footnote [60] continued on next page.)

Natural resource damages are measured under a two-pronged system. First, for a few releases requiring minimal field investigation, the use of standardized tables is authorized. Second, for any potentially significant natural resource damages, the statute requires the "best" estimate of actual damages, including consideration of such factors as the natural "ability of the ecosystem or resource to recover."

The legislative history elaborates this two-pronged system to include two other overriding principles. First, economic values, rather than an intangible, inherent value of an animal or a tree must be used. Second, reduction in economic or land value is the primary measure of damages, except where restoration costs less than the reduction in land value.

(Footnote [60] continued from previous page.)

> discharge or release or units of affected area, and (B) alternative protocols for conducting assessments in individual cases to determine the type and extent of short- and long-term injury, destruction, or loss. Such regulations shall identify the best available procedures to determine such damages, including both direct and indirect injury, destruction, or loss and shall take into consideration factors including, but not limited to, replacement value, use value, and ability of the ecosystem or resource to recover.

Superfund § 301(c)(2).

The primacy of economic value was reflected in the floor debates by Senator Simpson, who stated that the bill called for use of "traditional legal rules for calculating of damages," such as reduced land value.[61] As discussed infra, these common law rules call for a measurement of lost economic value.

H.R. 7020, the original House-passed bill, also focused recovery on the economic value of damaged natural resources. But the House clearly did not intend for natural resource damages to form a major part of the Superfund response effort. H.R. 7020 thus limited natural resource damages to ten percent of the total amount authorized for Superfund response actions. H.R. 7020 § 3041(a)(2).

The measure of damages should generally be the reduction in land values resulting from damage to natural resources rather than restoration costs. Senator Simpson detailed the factors that should be considered in measuring natural resource damages:

> [R]ehabilitation should be planned and cost effective -- those are sound principles of public administration. I also trust that the traditional legal rules for calculating of damages for injury in tort will be observed as part of cost effectiveness. For example, the law achieves cost effectiveness by awarding the difference in value before and after

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[61] 126 Cong. Rec. S15008 (daily ed. November 24, 1980).

> the injury, and where the injured interest can be restored to its original condition for less than the difference in value, the cost [of] restoration is used.[62]

Similarly, the Senate Report on S. 1480, the bill from which Superfund's natural resource damage provisions evolved, stressed that "actions to restore, rehabilitate, or replace natural resources under the provisions of this Act be accomplished in the most cost-effective manner possible."[63]

The Report on S. 1480 also elaborates the nature of the two-pronged approach to damage assessment. For "'minor' releases," the Committee intended that assessments should "rely on a combination of habitat values, tables of values for individual species, and previously conducted surveys and laboratory studies, related to units of discharge or units of affected area."[64]

By contrast, for substantial natural resource damage, the Report mandates a "site-specific damage assessment," including "extensive fieldwork."[65] The Committee

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[62] Id. (emphasis supplied). Other Senators also stressed that natural resource damages should be limited to what was economically reasonable. Senator Stafford noted that any "rehabilitation and replacement of natural resources [should] be accomplished in the most cost-effective manner possible." Id.

[63] S. Rep. No. 848, 96th Cong., 2d Sess. 85 (1980).

[64] Id. at 86.

[65] Id. This would include a system for "assessing the value of direct losses of organisms and their habitat and indirect losses of organisms and habitat through ecological interactions." Id.

recognized that "procedures for these types of monetary cost assessments are sometimes hard to define," but the Agency was directed to "make a decision as to which are the most accurate and efficient for accomplishing the mandates in this legislation."[66]

2. Common law confirms that reduced economic value normally should be the measure of resource damages.

As Senator Simpson observed, the common law employs the most "cost-effective" approach, measuring damages in terms of the reduced value of land or the market value of products damaged or destroyed. Restoration costs in excess of this net reduction in value are not granted. Where restoration costs are less than the net reduction in value, however, the efficient measure of damages is the cost of restoring the resources.

When injured or destroyed natural resources have an independent economic value of their own, such as marketable timber or fish in a hatchery, the measure of damages is the value of the destroyed resource.[67] Many natural resources,

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[66] Id.

[67] See, e.g., Chevron Oil Co. v. Snellgrove, 175 So.2d 471, 474 (Miss. 1965) (timber); State Dep't of Fisheries v. Gillette, 621 P.2d 764, 768 (Ct. App. Wash. 1980) (fish in hatchery); Nash & Windfohr v. Edens, 109 S.W.2d 496, 500 (Ct. App. Tex. 1937) (strawberry plants); First Nat'l Bank v. Amco Engineering Co., 335 N.E.2d 591, 593 (Ct. App. Ill. 1975) (dicta).

however, will have no such clearly ascertainable value, and courts must turn to other sources to value any damages.

The virtually unanimous rule in state courts is that damages to natural resources that lack their own economic value should be measured by the reduction in the market value of the land to which they are attached.[68] In some cases, however, it may be very difficult to evaluate the diminution of market value of land due to damage to natural resources, especially on publicly-owned land. Even in these cases, however, the government has established its ability to measure losses in the closely analogous terms of reduced benefits from land (see p. V-46 infra), and these techniques should be used under Superfund.

An exception to this general rule exists where the injured or destroyed natural resouces can be restored to their original condition for less cost than the decreased

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[68] See, e.g., Atlas Chemical Industries, Inc. v. Anderson, 524 S.W.2d 681, 687 (Tex. 1975) (damage to land from polluted creek); Fiske v. Moczik, 329 So.2d 35, 37 (Ct. App. Fla. 1976) (ornamental trees); First Nat'l Bank v. Amco Engineering Co., 335 N.E.2d at 593 (damage to shade trees); Farny v. Bestfield Builders, Inc., 391 A.2d 212, 214 (Del. 1978) (damage to shade trees); Borland v. Sanders Lead Co., Inc., 369 So.2d 523 (Ala. 1979) (damage to agricultural land from airborne lead); Pehrson v. Saderup, 498 P.2d 648, 650 (Utah 1972) (damage to lilacs); Chevron Oil Co. v. Snellgrove, 175 So.2d at 474 (damage to trees from oil exploration); Phillips Petroleum Co. v. Mangan, 114 P.2d 454, 456 (Okla. 1941) (damage to soil and shade trees).

market value of the land.[69] Where restoration costs exceed the reduction in land value, however, they are an inappropriate measure of damages.[70] Moreover, when restoration is proper, it should be tempered by cost-effectiveness considerations. In Farny v. Bestfield Builders, supra n.68, a case involving damages to large residential shade trees, the court acknowledged that "replacement cost may be considered to the extent that the cost is reasonable and practical," but required consideration of less costly replacement alternatives:

> [W]hether the plaintiffs Farny as reasonable owners would well have replaced the dead trees, perhaps then fully matured, in light of the fact that their replacement cost may unreasonably exceed their marginal aesthetic value; or whether the plaintiffs Farny would have replaced the lost trees with less mature trees of a somewhat lower replacement cost but with an aesthetic value near to that of the lost trees.

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[69] Chevron Oil Co. v. Snellgrove, 175 So.2d at 474 (restoring seedlings). See also Watkins v. FMC Corp. 531 P.2d 505 (Ct. App. Wash. 1975) (damage to apple trees); Steckman v. Quincy, O. & K.C.R. Co., 165 S.W. 1122 (Mo. App. 1914) (dicta). Of course, section 107(f) mandates that restoration costs may not be the sole measure of damages, and plaintiffs should also be able to recover any losses incurred during the time pending completion of restoration. See id. at 1123-24.

[70] See, e.g., Maldonado v. Connecticut Light and Power Co., 328 A.2d 120 (Conn. 1974) (damage to shade trees); Nillson v. Hiscox, 158 So.2d 799 (Ct. App. Fla. 1963) (damage to large trees); First Nat'l Bank v. Amco Engineering Co., 335 N.W.2d at 593 (damage to shade trees); Pehrson v. Saderup, 498 P.2d at 650 (damage to lilacs); Governale v. Owosso, 229 N.W.2d 918 (Mich. App. 1975) (damage to shade trees); Watkins v. Mountain Home Cooperative Irrigation Co., 197 P. 247, 251 (Idaho 1921) (damage to shade trees).

391 A.2d at 214. The court stressed that it would not impose costs that were "wholly disproportionate to the damage inflicted," and held that "it cannot be expected that restoration or replacement will exactly duplicate what was damaged or destroyed." Id.

Finally, the common law, like Superfund, requires consideration of "the ability of the ecosystem or resource to recover." In Watkins v. FMC Corp., supra n.69, an accidental herbicide spraying damaged apple trees. Plaintiffs sought recovery of the entire value of the trees, but the court noted that "there was no root damage and that the trees will come back to a vigorous tree," by natural processes. 531 P.2d at 506. Permanent damages were therefore denied, and plaintiffs were awarded only those damages that they would suffer in the time prior to the natural recovery of the trees. Id.

In short, the overriding goal of common law damages for loss of natural resources is achieving the most economically efficient measure possible. Plaintiffs in section 107 cases, however, may argue that courts should impose stipulated damages in the form of a certain specified amount for each animal lost or each acre damaged.[71]

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[71] The "unit-cost" type formula was employed by the district court in Commonwealth of Puerto Rico v. SS Zoe Colocotroni, 456 F. Supp. 1327 (D.P.R. 1978), affirmed in part, vacated in part, 628 F.2d 652 (1st Cir. 1980), cert.

(Footnote [71] continued on next page.)

A unit-cost formula for assessing natural resource damages, however, is generally contrary to the Act. Although section 301(c)(2) permits such an approach for

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(Footnote [71] continued from previous page.)

denied, 450 U.S. 912 (1981). This case involving local statutes and the Clean Water Act granted damages, inter alia, of six cents per small invertebrate creature. 628 F.2d at 1344-45.

The circuit court vacated this part of the damage award, denying recovery for "the loss of small, commercially valueless creatures" that could not be replaced anyway. 628 F.2d at 677. The court also rejected diminished monetary value as the measure of damages, however, and used the reasonable costs of restoration as the proper measure. 628 F.2d at 673-74. The requirement of compensation for actual restoration costs was based in large part on the language of the Puerto Rican statute under which the government recovered natural resource damages. 628 F.2d at 674.

The legislative history discussed above indicates that a different result would obtain under Superfund. Although much of Superfund liability is patterned after § 311 of the Clean Water Act, Congress intended to limit the scope of natural resource damages under Superfund by applying traditional common law standards of economic loss. Even if restoration costs were appropriate under Superfund, however, the Colocotroni decision clearly limits damages to reasonable, cost-effective restoration measures, taking into account natural regenerative processes.

> The focus in determining such a remedy should be on the steps a reasonable and prudent sovereign or agency would take to mitigate the harm done by the pollution, with attention to such factors as technical feasibility, harmful side effects, compatibility with or duplication of such regeneration as is naturally to be expected, and the extent to which efforts beyond a certain point would become either redundant or disproportionately expensive.

628 F.2d at 675 (emphasis supplied).

"minor" damages, that section makes clear that for significant natural resource losses, the measure of damages must be "site-specific" and "the most accurate and efficient" possible. See p. 40 supra.

EPA has readily available means for performing such an accurate and efficient measure of damages. In environmental impact statement cases, courts have required agencies to assess economically natural resource damages from major federal projects. See Alabama v. Corps of Engineers, 411 F. Supp. 1261 (N.D. Ala. 1976). The procedure recommended by the court included placing monetary values on economic losses from reduced fishing, hunting, and other recreational activities. 411 F. Supp. at 1270-71. This tool has been used in common law damage measurements as well. State Dep't of Fisheries v. Gillette, 621 P.2d at 768.[72]

The use of these and similar procedures will enable courts to obtain a reliable measurement of economic losses resulting from natural resource damages and fulfill Congress' intent of obtaining the most accurate and efficient measure of damages.

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[72] EPA has proposed guidelines for measuring natural resource losses for use in preparing regulatory impact analyses pursuant to President Reagan's Executive Order 12291. See Guidelines for Performing Regulatory Impact Analyses (draft) (April 15, 1982). These guidelines are now undergoing review within the agency. They outline a framework for valuing natural resource damages in terms of estimates of "willingness to pay," using studies of travel costs and property values to measure the economic value of recreation effects. Id. at 11-12, Appendix A.

3. Natural resource damages may be recovered only by the federal and state governments, and are limited to public resources.

Only the federal and state governments may recover natural resource damages under section 107, and only damages to publicly owned or controlled resources may be recovered. Congress did not intend section 107 to authorize recovery for damages to privately-owned natural resources, and it eliminated provisions for private recovery from the compromise legislation. Section 107(f) expressly limits the recovery of natural resource damages to the United States and states:

> In the case of an injury to, destruction of, or loss of natural resources under subparagraph (C) of subsection (a) liability shall be to the United States Government and to any State for natural resources within the State or belonging to, managed by, controlled by, or appertaining to such State. . . .

(emphasis supplied).

In addition, the statutory definition of "natural resources" includes only resources "belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States . . . any State or local government, or any foreign government." Section 101(16).[73]

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[73] As the Senate committee report explained the virtually identical provisions of S. 1480:

(Footnote [73] continued on next page.)

Damage to privately-owned resources therefore provides no basis for recovery under section 107.

Unlike the final legislation, S. 1480 would have allowed private recovery for some economic losses resulting from harm to natural resources.[74] But the provisions for private recovery were deliberately eliminated from the compromise legislation along with provisions for personal injury recovery.[75]

(Footnote [73] continued from previous page.)

> In such cases of harm to natural resources the President, or the authorized representative of any State, shall act on behalf of the public as trustee in recovering for such damage, injury, or loss of such resources.

S. Rep. No. 848, 96th Cong. 2d Sess. 84 (1980). The pertinent provisions of S. 1480 and the final compromise legislation are identical in all material ways. Compare S. 1480 § 4(a)(2)(C), with Superfund § 107(a)(4)(C) (creating liability for "injury to, destruction of, or loss of natural resources"); S. 1480 § 4(b), with Superfund § 107(f) (providing that "liability shall be to the United States Government and to any State"); S. 1480 § 2(b)(14), with Superfund § 101(16) (defining "natural resources" as including only resources "belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States . . . any State or local government, or any foreign government.")

[74] For example, S. 1480 would have allowed private plaintiffs to recover for "any loss of use of natural resources, without regard to the ownership or management of such resources" [S. 1480 § 4(a)(2)(D)], and for "any loss of income or profits or impairment of earning capacity resulting from . . . injury to or destruction of real or personal property or natural resources, without regard to the ownership of such property or resources" [S. 1480 § 4(a)(2)(E)].

[75] See. p. V-8 supra.

Accordingly, the federal and state governments are the only proper plaintiffs in actions to recover natural resource damages under section 107, and may recover only damages for public resources.

III. PROPER SECTION 107 PLAINTIFFS INCLUDE THE FEDERAL AND STATE GOVERNMENTS, AND IN ACTIONS TO RECOVER RESPONSE COSTS, "ANY OTHER PERSON."

Section 107 specifically identifies the plaintiffs who may seek to recover each of the two kinds of monetary relief -- response costs and natural resource damages -- available under the liability provisions. Under section 107, the United States, states, and "other persons" may sue to recover response costs, although only the United States and states are proper plaintiffs in actions to recover natural resource damages.

The ability of the "United States' Government or a State" to recover response costs is unquestioned. But, despite its apparent breadth, the provision that "any other person" may recover response costs will require interpretation.[76]

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[76] Sections 107(a)(4)(A) and (B) provide for the recovery of response costs by the United States, a state, or "any other person" who has incurred response costs. Specifically, those sections provide recovery for

(Footnote [76] continued on next page.)

In the recent decision in City of Philadelphia v. Stepan Chemical Co., 544 F. Supp. 1135 (E.D. Pa. 1982), defendants moved to dismiss on the ground that the city could not sue as "any other person" under section 107(a)(4)(B) because it too was potentially liable as the owner and operator of the disposal site in question. The court held, however, that Philadelphia could bring an action against off-site generators to recover response costs.

The Stepan court rejected the argument that the term "any other person" must be interpreted as any person other

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(Footnote [76] continued from previous page.)

> (A) all costs of removal or remedial action incurred by the United States Government or a State not inconsistent with the national contingency plan;
>
> (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan . . . .

The analogous provisions of S. 1480 were similar, but not identical to, sections 107(a)(4)(A) and (B). The S. 1480 provisions did not expressly require consistency with NCP, and recovery by "any person" was limited to the costs of "removal" as defined in section 311(a)(8) of the Clean Water Act. The S. 1480 provisions read:

> (A) all costs of removal, or remedial action incurred by the United States Government or a State, and
>
> (B) any other costs or expenses incurred by any person to remove a hazardous substance as the terms "remove" or "removal" are defined in section 311(a)(8) of the Clean Water Act . . . .

S. 1480 §§ 4(a)(1)(A), (B).

than responsible parties with potential section 107 liability. Instead, according to the court, the term "any other person" refers to persons other than the federal and state governments:

> The provision merely sets forth, in general terms, three categories of "persons" entitled to recover response costs from those parties designated as liable for such costs. . . . Under 42 U.S.C. § 9601(21) both federal and state governments are subsumed under the definition of person. In the context in which it appears, then, the term "any other person" is quite conceivably designed to refer to persons other than federal or state governments and not, as defendants argue, to persons other than those made responsible under the act.

544 F. Supp. at 1142 (emphasis supplied).

The Stepan holding, although perhaps limited because the plaintiff there was a municipality,[77] nevertheless would encourage persons who conduct voluntary cleanup to recover cleanup costs in excess of its fairly apportioned share from other responsible parties. Indeed, the same

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[77] An issue the court did not consider is whether the City of Philadelphia, as a political subdivision of Pennsylvania, is included within the term "State" as used in section 107(a)(4)(A) or whether Philadelphia is "any other person" under section 107(a)(7)(B). It could be argued that Philadelphia is "any other person" and not within the term state becase section 104(a)(4)(A) and the definition of state in section 101(27) make no mention of political subdivisions, while section 104(d)(1) specifically refers to the "state or political subdivision." Pennsylvania, however, should not be allowed to evade the requirements of sections 104(c)(3) and 104(d)(1) by havings its subdivisions sue as "any other person" under section 104(a)(4)(B). On this basis, Philadelphia should be included within the term "state" for purposes of section 107(a)(4).

would be true even if cleanup were involuntary in the sense of being conducted pursuant to an administrative or judicial order. Accordingly, the Stepan decision appears to conflict with joint and several liability and to comport with apportionment among responsible parties.

This reading of the statute is also supported by section 111(a)(1), which after providing for Fund payment of "governmental response costs," specifies that:

> [P]ayment of any claim for necessary response costs incurred by any other person as a result of carrying out the national contingency plan . . . Provided, however, That such costs must be approved under said plan and certified by the responsible Federal official. . ..

Section 111(a)(2) (emphasis in original). The Stepan court's analysis of the term "any other person" in section 107(a)(4)(B) applies with even greater force to the use of the same term in section 111(a)(2), which in context can only mean other than the "governmental response" dealt with in section 111(a)(1).[78] Accordingly, plaintiffs in

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[78] Contrary to the argument made by defendants and rejected in Stepan, this construction of §§ 107(a)(4)(B) and 111(a)(2) need not lead to "a merry go round of litigation with the government suing a responsible person which in turn could sue other responsible persons which in turn could claim against the fund and so forth." 544 F. Supp. at 1141. Under either § 107 or § 111, a responsible party should recover only those costs of response which exceed his proportionate share of liability at the site. Thus, at most, a responsible party could recover his excess costs from the Fund, which in turn would be subrogated to his claims against other responsible parties. See § 112(c)(1).

response cost actions under section 107 may include the United States, states, and "any other person," including a responsible party, who incurs response costs.

IV. TO BE LIABLE, A DEFENDANT MUST BE SPECIFICALLY TARGETED IN SECTION 107.

Section 107 identifies four categories of potentially liable defendants. Present owners and operators of vessels and facilities may be liable for releases at disposal sites and elsewhere, such as an accident scene. Superfund § 107 (a)(1). In addition, at disposal or treatment facilities, some past owners and operators, certain transporters, and some generators may also be liable. Superfund §§ 107(a)(2)-(4).[79]

The statutory language defining the four classes of Superfund defendants is derived from the analogous provisions of S. 1480.[80] Neither S. 1480 nor the final legislation attempted to impose liability on all past owners and

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[79] Section 107(a) was poorly drafted and requires some interpretive modification. Read literally, the section would impose liability only on certain transporters, under § 107(a)(4). Sections 107(a)(1), (2) and (3), dealing with owners, operators, and generators, contain no liability language. A sensible construction of section 107(a) can be achieved only be reading the liability language in § 107(a)(4) as modifying each of §§ 107(a)(1)-(4).

[80] See S. 1480 §§ 4(a)(i)-(iv). But the legislative history of S. 1480 must be used cautiously in interpreting the final legislation, both because the language defining potentially liable parties was amended in the compromise and because the terms of the compromise were intended to ameliorate the harsh aspects of the S. 1480 liability regime.

operators, transporters, and generators connected with a disposal site. Instead, Congress intended to limit liability to those best able to control the risks posed by waste disposal. As the Senate committee report on S. 1480 stated,

> By holding the factually responsible person liable, S. 1480 encourages that person -- whether a generator, transporter or disposer of hazardous substances -- to eliminate as many risks as possible.[81]

This policy restricts the potentially liable parties to those who were in a position to control the risk.

A. Present Owners and Operators Are Broadly Liable.

All present owners and operators are potential defendants under section 107.[82] Because they are generally in the best position to control risk, Congress imposed broad liability to encourage them to limit risk.

Unlike other sections pertaining to past owners and operators, transporters, and generators, section 107(a)(1)

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[81] S. Rep. No. 848, 96th Cong., 2d Sess. 33 (1980).

[82] Section 107(a)(1) identifies as responsible "the owner and operator of a vessel (otherwise subject to the jurisdiction of the United States) or a facility . . .."

The language of § 107(a)(1) is identical to § 4(a)(1) of S. 1480, except for the addition of the parenthetical clause "otherwise subject to the jurisdiction of the United States," which was added during Senate debate in a group of amendments described as "technical" or "minor" amendments. 126 Cong. Rec. S14988 (daily ed. Nov. 24, 1980).

is not limited to disposal or treatment sites.[83] Suit can be brought against present owners and operators of all "facilities," defined broadly to include buildings, pipes, wells, pits, ponds, landfills, storage containers, motor vehicles, and aircraft.[84] Thus, owners and operators of a truck from which a hazardous substance is released in a highway accident are potential defendants.[85] Similarly,

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[83] The application of the statute to releases other than from disposal sites was noted in the final Senate debate by Senator Randolph:

> Accidents -- whatever their cause -- which result in, or can reasonably be expected to result in releases of hazardous pollutants would not be exempt from the requirements and liabilities of this bill. Thus fires, ruptures, wrecks and the like invoke the response and liability porvisions [sic] of the bill.

126 Cong. Rec. S14965 (daily ed. Nov. 24, 1980). See also id. at S14966 (remarks of Senator Stafford, detailing the need for response to "spills and other nonwaste disposal incidents").

[84] Superfund § 101(9). The Act contains a circular definition of the owner or operator of a facility as "any person owning or operating such facility." Superfund § 101(20)(A). The potential defendants also include all present owners and operators of "vessels," defined as "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." Superfund § 101(28). The "owner or operator" of a vessel includes "any person owning, operating, or chartering by demise, such vessel." Superfund § 101(20)(A).

[85] The statutory definition of "owner or operator" provides expressly that "in the case of a hazardous substance which has been accepted for transportation by a common or contract carrier . . . the term 'owner or operator' shall mean such common carrier or other bona fide for hire carrier acting as an independent contractor during such transportation . . .." Superfund § 101(20)(B).

present owners and operators of a chemical manufacturing plant from which a release occurs could be sued. Superfund 107(a)(1).

Moreover, present owners and operators of disposal sites are potential defendants under section 107(a)(1) even where they had no connection with past disposal operations at the site.[86] Present owners and operators are generally in the best position to prevent current releases, given their current knowledge of site conditions and access to the site.

B. Past Owners and Operators Are Liable Only if Disposal Occurred During Their Tenure.

Potential section 107 defendants also include past owners and operators.[87] Unlike section 107(a)(1), section 107(a)(2) is limited expressly to owners or operators of facilities at which hazardous substances were disposed.

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[86] Unlike the section 107(a)(2) provision for past owners and operators, the applicability of section 107(a)(1) is not limited to those who owned or operated a disposal site "at the time of disposal."

[87] Section 107(a)(2) brings in "any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of . . .." This subsection was modeled after § 4(a)(ii) of S. 1480, with two changes. The term "facility or site" was changed to "facility," and the term "are disposed of" was changed to "were disposed of."

Moreover, past owners and operators are potentially liable only if they owned or operated the disposal facility "at the time of disposal." Superfund § 107(a)(2) (emphasis supplied). Other owners and operators, who came before or after the relevant disposal action, but who no longer own or operate the facility, are not covered. Congress thereby recognized that intervening owners and operators who have no ability to control hazardous waste disposal or fault for current releases should not be subject to liability.

C. Only Transporters Who Select Disposal Sites or Cause Releases Are Liable.

Section 107(a)(4) includes only those transporters who select disposal or treatment facilities as potential defendants.[88] Consequently, transporters who do not select disposal or treatment facilities or sites are not liable. Common carriers can be held liable only as "owners or operators" for releases which occur "during transportation."[89]

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[88] Section 104(a)(4) provides in pertinent part as follows:

> Any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities or sites selected by such person . . ..

This provision is virtually identical to § 4(a)(iv) of S. 1480, but the term "accepts" in the S. 1480 provision was changed to read "accepts or accepted" in the final legislation.

[89] Superfund § 101(20)(B).

But transporters not selecting sites have no responsibility after delivery to a disposal or treatment facility.[90]

In short, Congress limited the liability of transporters to the two circumstances where they control the risk of release. Transporters (i) may be liable as "owners or operators" for in transit releases and (ii) may be liable as transporters for releases from disposal or treatment facilities they select.

D. Only Generators Who Select Disposal Sites Are Liable.

Some off-site generators at disposal or treatment facilities are potentially liable. Superfund § 107(a)(3). Although Superfund does not use the term "generator," it includes as potential section 107 defendants:

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[90] Section 101(20)(C) provides:

> [I]n the case of a hazardous substance which has been delivered by a common or contract carrier to a disposal or treatment facility and except as provided in section 107(a)(3) or (4) (i) the term "owner or operator" shall not include such common or contract carrier, and (ii) such common or contract carrier shall not be considered to have caused or contributed to any release at such disposal or treatment facility resulting from circumstances or conditions beyond its control.

(Emphasis supplied).

> [A]ny person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility owned or operated by another party or entity and containing such hazardous substances . . . .[91]

According to this provision, generator liability is expressly limited to instances where a generator "arranged for disposal or treatment, or arranged with a transporter for disposal or treatment, at any facility" owned or operated by others.[92] Superfund liability does not attach where the generator makes some other distribution of a hazardous substance, such as a sale or distribution in commerce.[93] Indeed, Superfund expressly adopts the definitions of "disposal" and "treatment" set forth in section

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[91] Section 107(a)(3). This section was derived, with some changes, from § 4(a)(iii) of S. 1480. The debates on the final compromise bill do not explain the revisions in the language of the generator provision. Significantly, however, both § 107(a)(3) and the S. 1480 provision did not include all off-site generators as potential defendants.

[92] As the court recognized in United States v. Wade supra, some past off-site generators are subject to suit under this provision. 546 F. Supp. at 793. But the Wade opinion, which dealt only with the government's claims under Superfund § 106 and RCRA § 7003, did not consider the precise scope of generator liability under § 107(a)(3).

[93] Generators could be liable as owners or operators for a release or threatened release of a hazardous substance from a manufacturing facility, disposal site, or other facility that they presently owned or operated. See pp. V-54 to V-56 supra.

1004 of the Solid Waste Disposal Act, which does not include commercial distribution.[94]

Moreover, section 107(a)(3) is best interpreted as covering only off-site generators who arrange for disposal or treatment at a specifically selected facility.[95] This

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[94] Superfund § 101(29). Under the Solid Waste Disposal Act:

> The term "disposal" means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

42 U.S.C. § 6903(3) (1976). The Solid Waste Disposal Act also provides that:

> The term "treatment," when used in connection with hazardous waste, means any method, technique, or process, including neutralization, designed to change the physical, chemical, or biological character or composition of any hazardous waste so as to neutralize such waste or so as to render such waste nonhazardous, safer for transport, amenable for recovery, amenable for storage, or reduced in volume. Such term includes any activity or processing designed to change the physical form or chemical composition of hazardous waste so as to render it nonhazardous.

42 U.S.C. § 6903(34) (1976).

[95] The analogous provision of S. 1480 contained language very similar to that of § 107(a)(3):

(Footnote [95] continued on next page.)

limit on section 107(a)(3) is strongly supported by the parallel provisions of section 107(a)(4), dealing with transporters. As detailed above,[96] transporters are potentially liable in connection with releases from a disposal or treatment facility only where they selected the facility. Accordingly, where the generator arranges for disposal at a specific site, the transporter has no liability; where the transporter is responsible for site selection, the generator has no liability.[97]

(Footnote [95] continued from previous page.)

> [A]ny person who by contract, agreement, or otherwise arranged for disposal, treatment, or transport for disposal or treatment by any other party or entity of hazardous substances owned or possessed by such person, at facilities or sites owned or operated by such other party or entity and containing such hazardous substances . . ..

S. 1480 § 4(a)(iii). Thus, the S. 1480 provision applied only to a generator who "arranged for disposal, treatment, or transport for disposal or treatment by any other party or entity . . . at facilities or sites owned or operated by such other party or entity . . .." (Emphasis supplied). The revision of this language in the final compromise bill was not explained in debate, but the compromise was designed to ameliorate the harsh aspects of S. 1480, not to make liability more severe. See pp. V-6 to V-9 supra. Thus, § 107(a)(3) must be read to limit the class of generator defendants at least as strictly as the terms of S. 1480.

[96] See pp. V-57 to V-58 supra.

[97] Plaintiffs, however, are likely to contend that the language of section 107(a)(3), which is not as clear on limiting liability to those who selected sites as is the parallel language of secton 107(a)(4), should be given an expansive interpretation. But failure to limit generator

(Footnote [97] continued on next page.)

By limiting liability to site owners and operators, and parties actually responsible for the selection of disposal or treatment facilities, Congress implemented the logical policy of establishing liability only for those in a position to control the risk. When the transporter selects the disposal or treatment facility, the generator has no control over ultimate disposition and should not be held liable. Moreover, a transporter assuming responsibility for site selection normally should have been compensated for the use of his expertise, and should therefore bear all liability for improper site selection. An even stronger argument can be made that a generator should not be liable when the generator selects a specific site, but the transporter disregards instructions and takes the waste to another site where a problem arises.

Accordingly, not all off-site generators are subject to section 107 suits. Off-site generators who did not choose a specific disposal or treatment facility were in no position to control the risk and are not proper defendants under section 107.

(Footnote [97] continued from previous page.)

liability to those who selected sites would render part of the section's language superfluous and defeat the policy objective of assigning liability to the causally responsible party.

V. SECTION 107 PROVIDES OTHER DEFENSES AND LIABILITY LIMITATIONS.

Section 107 provides defenses based on acts of God, acts of war, and acts or omissions of third parties. It also establishes defenses or limitations on liability for federally permitted releases, pesticide applications, and "good Samaritan" cleanup actions, and sets overall monetary limits on liability.

A. Defenses Based on Acts of God, War, and Third Parties Are Provided.

Releases or threatened releases caused solely by persons other than the defendant are not actionable. But the defendant must show "by a preponderance of the evidence" that the release or threatened release and resulting damages "were caused solely by" an act of God, war, or a third party.[98]

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[98] Section 107(b) provides:

> There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by --
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> (1) an act of God;
> (2) an act of war;
> (3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff

(Footnote [98] continued on next page.)

The legislative history of H.R. 7020, from which the section 107(b) defense provisions were principally derived, shows that the standard of proving causation under the defense provisions is the same standard applicable to the plaintiff's cause of action.[99] Thus, "the usual common law principles of causation, including those of proximate causation" apply to the section 107(b) defenses as well as to plaintiff's proof of causation under section 107(a).[100]

The third-party defense of section 107(b)(3) is considerably more complex and potentially more important than the act of God and act of war defenses.[101] The third-party provision of H.R. 7020, as reported out of committee in the House, provided a defense based on:

(Footnote [98] continued from previous page.)

> and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or
>
> (4) any combination of the foregoing paragraphs.

[99] H.R. Rep. No. 1016, Part I, 96th Cong. 2d Sess. 34 (1980).

[100] Id. at 33; see also chapter 3.

[101] An "act of God" is "an unanticipated grave natural disaster or other natural phenomenon of an exceptional, inevitable, and irresistible character, the effects of which could not have been prevented or avoided by the exercise of due care or foresight." Section 101(1). The term "act of war" is not defined in the statute.

> an act or omission of a third party if the defendant establishes that he exercised due care with respect to the hazardous waste concerned, taking into consideration the characteristics of such hazardous waste.[102]

The committee version of H.R. 7020's relatively simple provision was amended on the House floor. Representative Gore's amendment made the third-party defense available only if the third party was neither "an employee or agent of the defendant," nor "a person whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant."[103] In addition, it required a defendant to "demonstrate that he exercised due care . . .."[104]

Although his amendment restricted the scope of the third-party defense, Representative Gore recognized that the defense would continue to be available in some cases:

> [T]he amendment would permit a defendant to escape liability for damages caused by the act or omission of a third party who has no connection whatsoever with the defendant and which act or omission

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[102] H.R. 7020 § 3071(a)(1)(C) (as reported out of committee). By contrast, S. 1480 as reported out of committee provided defenses for acts of God and acts of war, but contained no express third-party defense. See S. 1480 § 4(a).

[103] 126 Cong. Rec. H9461 (daily ed. Sept. 23, 1980); H.R. 7020 § 3071(a)(1)(C).

[104] 126 Cong. Rec. H9461 (daily ed. Sept. 23, 1980); H.R. 7020 § 3071(a)(2).

> is unforeseeable . . .. [W]ith regard to foreseeable acts by third parties, the amendment requires that a defendant demonstrate that he acted with due care in order to escape liability.[105]

The third-party defense provisions of H.R. 7020 [§§ 3071 (a)(1)(C) and 3071(a)(2)] were consolidated as section 107(b)(3) in the final Superfund bill.[106] Accordingly, the third-party defense under Superfund is equivalent to the scope of the defense provided in H.R. 7020 as passed by the House.

Despite the limitations imposed by the Gore amendment, Superfund's third-party defense provision is likely to be helpful in many cases. For example, a generator would not have a direct or indirect contractual relationship with a subsequent site owner or operator and normally can establish a third-party defense based on the actions of the subsequent owner or operator.[107] Similarly, a generator has no contractual relationship whatsoever with another generator who

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[105] 126 Cong. Rec. H9463 (daily ed. Sept. 23, 1980).

[106] The only material change made in the language was the addition of the parenthetical clause "except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail." 126 Cong. Rec. S14993 (daily ed. Nov. 24, 1980). As Senator Stafford explained, this language was intended to provide that the "'contractual relationship' language of [the] third-party defense does not apply to rail carriers . . .." Id.

[107] Although Superfund does not define the concept of an "indirect" contractual relationship, the relationship between an off-site generator and a subsequent disposal site

(Footnote [107] continued on next page.)

sends wastes to the same disposal site, and therefore may often have a defense based on the actions of another generator.

B. Federally Permitted Releases, Pesticide Applications, and Actions Taken in Accordance with the NCP Are Exempt from Superfund Liability.

Superfund provides three miscellaneous exemptions from section 107 liability for federally-authorized releases, pesticide applications and NCP-authorized cleanups. Section 107(j) exempts "federally permitted releases" from Superfund liability.[108] They include a broad range of discharges or

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(Footnote [107] continued from previous page.)

owner or operator is so remote that no contractual relationship whatsoever should be inferred. The generator has no control whatsoever over the selection or actions of a subsequent purchaser of a disposal site; thus, a subsequent site owner should be treated no differently than any other unrelated third party.

A reasonable construction of the "indirect" contractual relationship language would preclude the use of the third-party defense only where the third party participates in the disposal or treatment of the generator's waste. For example, a generator who contracts with a transporter who in turn contracts with a disposal operator has a direct contractual relationship with the transporter and an indirect contractual relationship with the site operator, and cannot establish a third-party defense based on the disposal operator's conduct. The same generator would have no contractual relationship with a subsequent purchaser of the disposal site, and the third-party defense would therefore be available based on the acts of the purchaser.

[108] Section 107(j) provides in part:

> Recovery by any person (including the United States or any State) for response

(Footnote [108] continued on next page.)

emissions in connection with permits under specific statutes.[109]

Superfund also exempts application of registered pesticides from the liability provision of the Act, but preserves any liability under other federal or state law, including common law. Superfund § 107(i). The pesticide exclusion covers "field application" of pesticides, which, as the Senate committee report explained, was "intended to mean the

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(Footnote [108] continued from previous page.)

> costs or damages resulting from a federally permitted release shall not be pursuant to existing law in lieu of this section.

[109] Federally permitted releases include releases excluded from section 311 of the Clean Water Act and releases contemplated by permits under the Clean Water Act, the Solid Waste Disposal Act, the Marine Protection, Research, and Sanctuaries Act of 1972, the Safe Drinking Water Act, the Clean Air Act, and the Atomic Energy Act, as well as fluid injections authorized under state laws in connection with crude oil, natural gas, or water wells. Superfund § 101(10).

The federally permitted release exemptions originated in S. 1480. S. 1480 §§ 4(1), 2(b)(18). As the committee report on S. 1480 explained,

> in view of the large sums of money spent to comply with specific regulatory programs, liability for federally permitted releases ought to be determined based on the facts of each individual case. Therefore, the reported bill authorizes reponse to federally permitted releases, but requires costs to be assessed against the permit holder under the liability provisions of other laws, not S. 1480.

S. Rep. No. 848, 96th Cong. 2d Sess. 46 (1980).

use of a pesticide generally in accordance with its purpose."[110] Other releases of pesticides, such as spills or disposal, are not excluded.[111]

Finally, section 107(d) provides a defense to Superfund liability for actions taken in accordance with the NCP or at the direction of an onscene coordinator appointed under the NCP.

C. The Statute's Monetary Limits on Liability Are High.

Superfund establishes high monetary limits on liability arising from a release. Superfund § 107(c)(1). These limits provide little relief for generators in connection with disposal sites or manufacturing facilities since, for facilities other than transportation facilities, liability shall not exceed "the total of all costs of response plus $50,000,000 for any damages under this title."[112] Thus, at facilities such as disposal sites and manufacturing plants, there is no ceiling on the recovery of removal and remedial

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[110] Id. at 45. The pesticide application exclusion originated in S. 1480. See S. 1480 § 4(k).

[111] S. Rep. No. 848, 96th Cong., 2d Sess. 45 (1980).

[112] The specified transportation "facilities" are dealt with separately in § 107(c)(1)(C). Monetary limits for "vessels" are set in §§ 107(c)(1)(A) & (B).

costs, and the limitation on recovery of natural resource damages is set at $50,000,000.[113]

VI. LIABILITY FOR PUNITIVE DAMAGES FOR NONCOMPLIANCE WITH ADMINISTRATIVE ORDERS IS SUBJECT TO IMPORTANT LIMITATIONS.

The United States may bring an action to recover punitive damages from any liable party who "fails without sufficient cause to properly provide removal or remedial action upon order of the President pursuant to section 104 or 106."[114] Nevertheless, the legislative history reveals important limitations on the imposition of punitive damages.

Although the liability provision of S. 1480 contained a treble punitive damages provision,[115] the language was substantially revised in the final Superfund compromise. The compromise added the limitation that the failure to provide

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[113] Under section 107(c)(2), the monetary limits of section 107(c)(1) do not apply in cases where the release or threatened release resulted from "willful misconduct or willful negligence within the privity or knowledge" of the defendant; or the primary cause of the release was a violation of safety, construction, or operating standards or regulations; or the defendant failed or refused to cooperate with or assist as requested in response activities under the NCP.

[114] Superfund § 107(c)(3). Punitive damages may be assessed "in an amount at least equal to, and not more than three times, the amount of any costs incurred by the Fund as a result of such failure to take proper action," and are to be recovered "in addition to any costs recovered from such person pursuant to section 112(c)," the subrogation provision of Superfund.

[115] S. 1480 § 4(g). H.R. 7020 also contained a provision for recovering "civil penalties" for violation of administrative orders.

removal or remedial action must have been "without sufficient cause," changed the measure of damages from a flat three times removal costs under S. 1480 to allow discretion in setting punitive damages, and conditioned liability upon noncompliance with an "order" of the President rather than a "request" of the President.[116]

The "sufficient cause" limitation precludes punitive damages where the defendant in good faith contested liability, was only a minor contributor to a release, or was financially or technically unable to comply with the order. As Senator Stafford explained,

> It would certainly be unfair to assess punitive damages against a party who for good reason believed himself not to be the responsible party. For example, if there were, at the time of the order, substantial facts in question, or if the party subject to the order was not a substantial contributor to the release or threatened release, punitive damages should either not be assessed, or should be reduced in the interest of equity. There could also be "sufficient cause" for not complying with an order if the party subject to the order did not at the time have the financial or technical resources to comply, or if no technological means for complying was available.[117]

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[116] Compare Superfund § 107(c)(3), with S. 1480 § 4(g); see 126 Cong. Rec. S15008 (daily ed. Nov. 24, 1980) (colloquy between Senators Simpson and Stafford).

[117] 126 Cong. Rec. S15008 (daily ed. Nov. 24, 1980).

In addition, punitive damages may not be assessed unless the Government complied with the NCP and statutory standards. As Senator Stafford explained:

> We also intend that the President's orders, and the expenditures for which a person might be liable for punitive damages, must have been valid. In particular, they must not be inconsistent with the national contingency plan and must in the President's belief, have been required in order to protest the public health or welfare or the environment. Thus, in deciding whether a person should be liable for punitive damages, we would expect the courts to examine the particular orders or expenditures from the fund to determine whether they were proper, given the standards of the act and of the national contingency plan, taking into account the fact that a threat to the public was posed by the situation sought to be corrected.[118]

Accordingly, compliance with the provisions of Section 104 and the NCP will be a condition for punitive damages as well as response cost liability.

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[118] Id.

TAB 6

CHAPTER 6:

THE POTENTIAL FOR CONSTITUTIONAL CHALLENGES TO SUPERFUND PROVISIONS HAVING RETROACTIVE EFFECT

INTRODUCTION AND SUMMARY OF CONCLUSIONS

Many provisions of Superfund are likely to be applied to transactions and events that were completed long before enactment of the statute. The consequences of this retroactive change of law could, in some cases, be extremely severe and unfair, especially where liability is asserted for actions that were absolutely lawful when undertaken.[1] Depending upon the judicial interpretation of Superfund and the discretion exercised in implementing and enforcing the statute, the financial liability resulting from the legislation's retroactive provisions could be enormous.

The retroactive application of Superfund is, however, subject to constitutional limitations. Three doctrines developed by the Supreme Court provide potentially strong bases for challenging certain types of retroactive action under Superfund, in the appropriate circumstances. Those doctrines are founded on the constitutional prohibition against impairing contractual obligations, the proscription

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[1] For purposes of this chapter it will be assumed arguendo that Congress intended to make Superfund retroactive, with a limited exception for natural resource damage recoveries, § 107(f), notwithstanding the contrary interpretation that may be developed from the legislative history.

against taking private property for public use without just compensation, and the bar against deprivations of property without providing due process. Although it is highly unlikely that these doctrines could be applied to invalidate Superfund in its entirety, there is a much more reasonable prospect of invalidating individual Superfund provisions as applied in specific factual situations where the government argues for an extreme or harsh interpretation of such provisions. The most vulnerable of those provisions are certain aspects of section 107, which creates a new liability action, and certain types of cleanup measures, particularly as applied in individual cases. Equally as important, the presentation of a persuasive constitutional challenge can favorably influence related issues of statutory interpretation, because of the judicial preference to adopt constructions that avoid constitutional infirmity.

Part I of this chapter suggests possible constitutional challenges that could be raised in appropriate cases, first by discussing three typical situations that may present constitutional questions and then by addressing the importance of distinguishing among cases in which a constitutional argument might be raised. Part II presents the necessary academic detour into the scope of the constitutional doctrines and the framework of analysis for evaluating potential challenges to Superfund. Finally, Part III applies the constitutional doctrines to the three typical fact patterns.

This analysis thereby suggests the circumstances needed to develop a reasonable constitutional challenge, explains the significance of various factual differences, and identifies those cases in which possible interpretation of Superfund by the government may be vulnerable on constitutional grounds.

I. IN MANY SITUATIONS, RETROACTIVE APPLICATION OF SUPERFUND MAY POSE SIGNIFICANT CONSTITUTIONAL QUESTIONS.

A. Typical Situations in Which the Retroactive Provisions of Superfund May Be Challenged on Constitutional Grounds.

Superfund may be given its most extreme retroactive effect through the newly created cause of action for response costs and through cleanup measures either ordered or actually undertaken by the government.[2] Three typical fact situations are likely to arise from the use of those statutory mechanisms, in which the retroactive consequences may be subject to constitutional objections: (1) the imposition of retroactive financial liability under the new cause of action for previously lawful activities; (2) the invalidation retroactively of contract provisions allocating

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[2] The Trust Fund established by Title II of Superfund also operates retroactively by imposing taxes on current operations to finance cleanup of hazardous waste deposited before the statute's enactment. This chapter focuses on the retroactive consequences described in the text above, which are more objectionable on constitutional grounds, and does not specifically address the constitutionality of the taxing mechanism.

responsibility for the transportation, disposal or treatment of hazardous wastes; and (3) the intrusion upon and limitation, pursuant to retroactive legislation, of an owner's rights to the use of real, personal or intangible property. Although other comparable situations may also arise to support a constitutional challenge, a general description of these three situations would be most useful to focus the following discussion and provide a foundation in Part III for explaining the potential application of the constitutional doctrines.

1. The imposition of retroactive liability under section 107 for previously lawful activities.

As detailed in chapter 5, section 107 of Superfund creates a new cause of action rendering generators, transporters and dumpsite owners and operators liable for the cost of cleaning up releases or threatened releases of hazardous wastes.[3] In the typical situation, EPA may have expended funds pursuant to section 104, or a state may have expended funds to undertake remedial or removal action at a dumpsite created before the enactment of Superfund. To recover those funds, EPA or the state may file suit under

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[3] An abatement action or order pursuant to Section 106 of the Act, 42 U.S.C. § 9606, may impose comparable retroactive burdens and raise similar constitutional questions. Relevant differences between Sections 106 and 107 will be addressed in the analysis below, but otherwise this chapter will relate the constitutionality arguments generally to Section 107.

section 107, naming as defendants the present site owner and operator, past owners and operators, transporters and waste generators. In many instances, EPA or the state may even assert that these defendants are jointly and severally liable.[4]

The different defendants' role in causing the danger posed at a given site, and indeed the degree of danger actually created, will vary widely from one section 107 action to the next. At one extreme, the site in question may have posed or still pose a serious and immediate threat to health, but in others there may be no genuine threat to public health or the environment. Where a hazard is posed, it may be related causally to the conduct of the site owner or operator, transporters, generators, or any combination of those parties. Moreover, at a multigenerator site the hazard may have been caused by the wastes of only one generator, the combination of wastes from several generators, or the independent release of wastes by several generators. A number of generators, therefore, may be able to argue that their waste was never actually released at the site or that it was released only because other wastes leaked first.

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[4] As discussed in chapter 1, the legislative history of Superfund demonstrates that Congress did not intend to create joint and several liability. Nevertheless, since EPA has continued to argue otherwise, this chapter explores arguendo the constitutional questions presented by the retroactive imposition of joint and several liability.

The degree of fault and the equities of asserting retroactive liability for cleanup costs can also be expected to vary enormously among the different types of defendants and among the defendants within each type. For example, a previous site owner may have engaged in negligent or reckless disposal practices, or learned that continuing practices were resulting in the discharge of hazardous wastes, whereas the current operator may be running a highly professional operation unaware of the past negligent practices. Similarly, some transporters may have continued depositing waste at a site they knew was operated negligently, while other transporters were unaware of the negligence. The variations on the degree of knowledge and fault by generators may be even broader: some generators may have arranged the disposal of wastes fully cognizant of the leakage and health risks, others may have contracted reasonably with transporters to arrange for safe disposal, and others may have employed the best available techniques and precautions, at considerable expense, to dispose safely of their wastes.

The potential for liability under the law applicable prior to Superfund, and thus the degree to which Superfund truly constitutes a retroactive change of law, will differ among the section 107 defendants and will differ from jurisdiction to jurisdiction. In some states, defendants who were neither negligent nor reckless would not have been liable at all prior to the enactment of Superfund. Defendants in other jurisdictions may have been subject to strict

liability for their conduct. Depending upon the status of the prior law and other factors, some section 107 defendants will be able to develop a persuasive argument that significant business judgments were predicated on the fact that their conduct satisfied all legal requirements and would not result in any liability. Other section 107 defendants may be unable to develop such a strong reliance argument, if they held a mere expectation that their conduct was lawful or, in some cases, disregarded potentially applicable state law.

All of the variations on the basic fact pattern outlined above, and especially variations in the pre-existing law and in reliance interests, will be crucial in evaluating whether Superfund's imposition of retroactive liability on a particular defendant or group of defendants is unconstitutional.

2. The retroactive invalidation of contractual provisions.

Over and above the general inequities of retroactivity summarized above, the imposition of liability under section 107 may also have the effect of overriding or invalidating contractual provisions among generators, transporters, and dumpsite operators. In the typical situation where contract impairment presents constitutional questions, a generator may have entered a disposal contract that was intended to transfer completely all responsibility for his wastes to a

transporter or operator for the transportation, disposal and treatment of hazardous wastes. The subsequent imposition of section 107 liability on the generator, for the actions of the transporter, obviously would impair and frustrate this contractual intent.[5]

The contract impairment situation is subject to several unique variations, in addition to those discussed above. Thus, in each case, contractual provisions and intent are likely to differ. For example, some contracts may clearly reflect an intention to transfer responsibility, while in others such an intention can only be inferred from the inclusion of warranty and indemnification provisions.[6]

Among generators that did arrange to transfer responsibility, some may have undertaken special expenses or precautions in reliance on or in accordance with the contract. For example, those generators may have paid more to retain a more reputable transporter or disposer or may have

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[5] Section 107(b) of the Act establishes certain third-party defenses which may excuse liability of a generator for the conduct of a transporter. See Chapter 5 at V-64 to V-66. The following discussion assumes arguendo that these third-party defenses are unavailable.

Another provision of the Act implicated by this situation is section 107(e) which may be construed to prohibit a generator from contractually transferring liability to a transporter, yet to preserve the generator's right to seek indemnification from the transporter.

[6] If such an inference cannot be made from a transporter's warranty and promise of indemnification, the contract impairment argument is weakened considerably, as discussed in Part IIIB infra.

incurred considerable expenses for pre-treatment of waste. By contrast, other generators may be unable to identify any reliance on their contracts apart from reliance on the state of the law prior to Superfund.

These factual variations, in conjunction with the other variations in a section 107 action, will heavily influence whether modification or impairment of contractual rights by the operation of Superfund will violate constitutional limitations.[7]

3. The deprivation of rights in private property

Inevitably government action under Superfund will deprive private parties of property rights, but most of those deprivations will present the same constitutional questions as the patterns discussed above. A distinct pattern of deprivations, however, may give rise to constitutional challenges by the owners of disposal sites in connection with the implementation of certain remedial or removal measures.

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[7] The constitutional objections presented by this pattern of cases may be even stronger when EPA orders abatement or seeks relief under section 106 of Superfund, instead of seeking reimbursement under section 107. See note 3 supra. A section 106 action or order may directly obligate a generator to breach its contract with a transporter or to forego contractual rights, thereby presenting the contract impairment more starkly. In addition, section 106 might be used to interfere with other contracts by a generator, which would not be affected directly by the assertion of financial liability under section 107.

Most commonly this pattern may involve government cleanup action pursuant to section 104 on the site owner's property. At a minimum, government cleanup will require temporary physical intrusions on the property by the government or a government contractor, such as when short-term removal action is undertaken at a disposal site. Permanent or long-term intrusions may occur in connection with remedial action, particularly if permanent structures are built on the property.[8] The extent of impairment of residual property value by the government cleanup measures will be another significant variable in the property deprivation pattern, as will the existence of cleanup alternatives that would cost less and create less impairment.

Private cleanup measures that a site owner is ordered to undertake himself pursuant to section 106 also are included within this pattern. Although the intrusion element may be absent here, there will still be variations in the degree of impairment and in the availability of less burdensome or expensive cleanup measures. Indeed, a number of these cases are likely to involve disagreements between the site owner and the government regarding the extent of cleanup necessary and the ability to pursue less costly alternatives.

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[8] Similar intrusions by other private parties might also occur if a generator or transporter were ordered pursuant to section 106 to undertake cleanup action at the site owner's property.

B. Distinguishing Among Cases and Parties Within the Typical Situations

The importance of presenting any possible constitutional challenges only in the most appropriate case, and only on behalf of the most appropriate parties, should be stressed. Any realistic attempt to challenge Superfund's retroactive impact must recognize the necessity of avoiding facial challenges to the constitutionality of Superfund. As demonstrated by recent Supreme Court decisions discussed in Part II, arguments that retroactive statutes are unconstitutional on their face fail almost universally.[9]

Even where Superfund might be challenged as applied, distinctions will be necessary among different groups of defendants and within groups. As indicated by the variations possible in the typical fact patterns discussed above, Superfund's retroactive consequences may be held unconstitutional as applied to some parties but not as to others. For example, generators would be in a better position to raise many of the constitutional objections than will transporters and dumpsite operators. Moreover, generators who took better precautions regarding disposal of their waste and who

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[9] See, e.g., Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 293-97 (1981) (Surface Mining Control and Reclamation Act of 1977); Hodel v. Indiana, 452 U.S. 314, 333-35 (1981) (Surface Mining Control and Reclamation Act of 1977); Agins v. City of Tiburon, 447 U.S. 255 (1980) (city zoning ordinance).

included protective provisions in their contracts with transporters and operators could make stronger arguments than those who did not. Even factors such as the potential for pre-Superfund liability under different state laws can be critical.

Based on these preliminary considerations, and the factors suggested by the following discussion of the constitutional doctrines, Part III of this chapter uses the three typical fact situations presented above to identify and distinguish the possible constitutional challenges to Superfund that are most likely to succeed.

II. THE BASES FOR A CONSTITUTIONAL CHALLENGE TO SUPERFUND PROVISIONS IN APPROPRIATE CASES.

Three related doctrines, founded on the Due Process Clause of the Fifth Amendment, the Contract Clause of Article I, § 10 as incorporated by the Due Process Clause, and the Taking Clause of the Fifth Amendment, function as the principal constitutional limitations on Congress' power to enact retroactive legislation.[10] Until recently, these

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[10] One additional doctrine that could apply to a limited number of Superfund provisions is the constitutional prohibition in Article I, § 9 against ex post facto laws. This doctrine forbids retroactive criminal penalties, and the Supreme Court has been willing to consider a number of factors in determining whether a statute is penal in nature. See De Veau v. Braisted, 363 U.S. 144 (1960); Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798). See generally United

(Footnote [10] continued on next page.)

three doctrines were perceived as applicable to distinct factual situations, paralleling generally the three typical fact patterns outlined above. The Taking Clause, which limited the taking of private property for public use without just compensation, and the Contract Clause, which limited the governmental impairment of contractual rights, had somewhat narrow ranges of application. Outside those ranges, retroactive legislation was constrained only by the Due

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(Footnote [10] continued from previous page.)

States v. Ward, 448 U.S. 242 (1980). Depending upon the interpretation of the legislative history of Sections 106(b) and 107(c)(3) and those other factors, it may be argued that the fines and treble punitive damages these sections authorize if an abatement order is not implemented are criminal in nature and would violate the Ex Post Facto Clause when applied retroactively. The penalty authorized by section 103(b)(3) for failure to provide notice of unpermitted releases is almost certainly criminal under the Supreme Court's tests, and would also violate this doctrine if applied retroactively.

Several further constitutional doctrines can also operate as constraints on retroactive legislation but are less likely to apply in the context of a challenge to Superfund. The Bill of Attainder Clause in Article I, § 9, for example, prohibits enacting legislation, whether retroactive or not, to punish or disable specifically designated persons or groups without the protections of a judicial trial. See generally Nixon v. Administrator of General Services, 433 U.S. 425, 468-84 (1977). Moreover, statutory presumptions adopted to facilitate retroactive regulatory schemes, particularly "irrebutable presumptions," can be found to violate the Due Process Clause. See generally Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976). The Supreme Court has also held that a few retroactive statutes violated the constitutional principle of separation of powers. See, e.g., United States v. Klein, 80 U.S. (13 Wall.) 128 (1872). Cf. National Cable Television Ass'n v. United States, 415 U.S. 336 (1974). Superfund is unlikely to implicate any of these doctrines, and hence they will not be addressed further here.

Process Clause. In addition to the differences in applicability, the doctrines varied in their stringency as constitutional limitations on retroactivity. Where they applied, the Taking Clause and the Contract Clause were far more likely than the Due Process Clause to prohibit or confine retroactive enactments.

During the past five years, these doctrines have undergone significant development and revitalization and have become more effective limitations on retroactive legislation such as Superfund. In two recent decisions, the Supreme Court invalidated retroactive state statutes under the Contract Clause for the first time in nearly forty years.[11] Another series of Supreme Court decisions appears to strengthen the Taking Clause, even though the constitutional challenges did not always prevail.[12] Although the Court has not yet strengthened significantly the Due Process Clause as a limitation on retroactive legislation, its most

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[11] Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978); United States Trust Co. v. New Jersey, 431 U.S. 1 (1977). See id. at 60 (Brennan, J., dissenting).

[12] Kaiser Aetna v. United States, 444 U.S. 164 (1979), and Loretto v. Teleprompter Manhattan CATV Corp., 102 S. Ct. 3164 (1982), were the most successful of these challenges. See pages VI-29 to VI-34 infra. Other cases among this series of refinements include Hodel v. Virginia Surface Mining & Reclamation Ass'n, supra n.9; Hodel v. Indiana, supra n.9; San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621 (1981); Agins v. City of Tiburon, supra n.9; PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980); Andrus v. Allard, 444 U.S. 51 (1979); Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978).

recent decision in Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976), leaves open the possibility of further development.

Reflecting these doctrinal changes, the number of constitutional challenges to statutes with retroactive implications has escalated sharply in the last several years. Among the challenged legislation have been provisions of the Multiemployer Pension Plan Amendments Act of 1980,[13] the Employee Retirement Income Security Act (ERISA),[14] the 1976 Amendments to the Internal Revenue Code,[15] and the Bankruptcy Reform Act of 1978.[16] In addition, the constitutional objections to retroactivity have

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[13] See, e.g., Shelter Framing Corp. v. Carpenters Pension Trust, 543 F. Supp. 1234 (C.D. Cal. 1982), appeal pending, No. 82-5460 (9th Cir.); Peick v. Pension Benefit Guaranty Corp., 539 F. Supp. 1025 (N.D. Ill. 1982), appeal pending, No. 82-2081 (7th Cir.); Grano Steel Corp. v. Shopmen's Ironworkers Pension Trust Plan, No. CV-81-5862 (C.D. Cal., ruling announced June 7, 1982); American Trucking Ass'ns, Inc. v. Pension Benefit Guaranty Corp., No. J82-0061(R) (S.D. Miss., filed Feb. 4, 1982).

[14] See, e.g., A-T-O, Inc. v. Pension Benefit Guaranty Corp., 634 F.2d 1013 (6th Cir. 1980); Nachman Corp. v. Pension Benefit Guaranty Corp., 592 F.2d 947 (7th Cir. 1979), cert. granted limited to statutory issues and aff'd, 446 U.S. 359 (1980).

[15] See United States v. Darusmont, 449 U.S. 292 (1981) (upholding minimum tax provisions).

[16] See, e.g., Rodrock v. Security Industrial Bank, 642 F.2d 1193 (10th Cir. 1981), prob. juris. noted sub nom. United States v. Security Industrial Bank, 102 S. Ct. 969 (1982). In re Charles E. Ashe, 669 F.2d 105 (3d Cir. 1982); Gifford v. Thorp Finance Corp., 669 F.2d 468 (7th Cir. 1982).

been raised in connection with actions under the Resource Conservation and Recovery Act (RCRA).[17] Although such constitutional challenges have not always succeeded, the arguments presented in these cases, the judicial decisions, and the numerous commentaries[18] confirm that potentially successful constitutional challenges can be developed in appropriate Superfund cases.

The following discussion of these constitutional doctrines begins with the Contract and Taking Clauses, because they traditionally have been perceived as greater limitations on retroactivity despite their more limited factual applicability. The Due Process analysis that should apply more broadly can then be considered in light of the Contract and Taking Clause analyses. Finally, this Part addresses two possible elaborations of the constitutional limitations

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[17] See, e.g., United States v. Diamond Shamrock Corp., 17 E.R.C. 1329 (N.D. Ohio 1981). See also United States v. Solvents Recovery Service of New England, 496 F. Supp. 1127, 1139-41 (D. Conn. 1980) (avoiding constitutional issue); United States v. Vertac Chemical Corp., 489 F. Supp. 870, 888 (E.D. Ark. 1980) (also avoiding retroactivity issue). Because of the grounds for decision and the issues presented, these RCRA cases do not contribute significantly to the substantive analysis here, despite the context similar to Superfund.

[18] See, e.g., Note, Constitutionality of Retroactive Lien Avoidance Under Bankruptcy Code Section 522(f), 94 Harv. L. Rev. 1616 (1981); Note, A Process-Oriented Approach to the Contract Clause, 89 Yale L.J. 1923 (1980); Note, Revival of the Contract Clause: Allied Structural Steel v. Spannaus and United States Trust v. New Jersey, 65 Va. L. Rev. 377 (1979); Burke, The 1976 Retroactive Amendment of the Minimum Tax: An Exercise of the Taxing Power or a Taking of Property, 32 Baylor L. Rev. 165 (1980).

on retroactive legislation: first, the incorporation into the Due Process analysis of the considerations that traditionally make the Contract and Taking Clauses more protective against retroactivity, and second, the possible applicability of the Contract and Taking Clause doctrines to a broader range of factual situations.

All three of these doctrines essentially serve to balance individual property rights against the governmental justification for assigning to a specific group the cost and burden of regulations that benefit the public as a whole. The pattern emerging from recent decisions attempting to strike this balance indicates that at least five Justices on the Supreme Court have become considerably more sympathetic to the protection of the individual property rights implicated by retroactive legislation: Justices Powell, Rehnquist, Blackmun, and Stevens, and Chief Justice Burger.[19] Justice Powell appears to be particularly sensitive to the potential unfairness of retroactive legislation,[20] while Justice

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[19] Justice Stewart was also among this group prior to his retirement. Justices Brennan, White, and Marshall appear more willing to uphold legislation that creates retroactive burdens.

[20] Justice Powell concurred separately in Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976), to emphasize his view that even the constitutionality of the retroactive liability imposed there was a close question. Id. at 38-45. In addition, his concurrences there and in Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. at 305-07, strongly suggest that he would resolve differently challenges to the application of retroactive legislation, despite his upholding the legislation against facial attack.

Rehnquist has taken the lead in protecting property rights.[21] Justice O'Connor may well join this group, but she has not yet participated in enough decisions that reveal her views on these matters.[22] A properly framed challenge might draw upon the Court's changing views to strengthen the constitutional doctrines and extend the protection against retroactive Superfund provisions.[23]

A. Protection Afforded by the Contract Clause.

The Contract Clause of Article I, § 10 provides that "no State shall . . . pass any . . . law impairing the Obligation of Contracts."[24] The initial inquiry in applying

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[21] For example, Justice Rehnquist authored the opinion of the Court in Kaiser Aetna, and the dissent in Penn Central objecting to the application of New York City's Landmarks Preservation Law.

[22] Although Justice O'Connor did join this group in Loretto v. Teleprompter Manhattan CATV Corp., that decision also saw Justices Blackmun and Marshall depart from their usual predispositions.

[23] The Supreme Court already has noted probable jurisdiction in two cases involving these retroactivity doctrines: Energy Reserves Group, Inc. v. Kansas Power & Light Co., No. 81-1370 (Contract Clause) and United States v. Security Industrial Bank, No. 81-184 (Taking and Contract Clauses).

[24] The Clause operates literally as a direct limitation only on state action, but its principles have been incorporated in the Fifth Amendment's Due Process Clause as a limitation on Congressional action. See Allied Structural Steel Co. v. Spannaus, 438 U.S. at 241 n.12; Veix v. Sixth Ward Building & Loan Ass'n, 310 U.S. 32, 41 (1940); Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398, 448 (1934).

(Footnote [24] continued on next page.)

this Clause is to determine whether retroactive legislation causes a "substantial impairment of a contractual relationship." Allied Structural Steel Co. v. Spannaus, 438 U.S. at 244. In many cases, this preliminary inquiry will depend heavily upon definition of the contractual rights and obligations.[25] If legislation does cause such an impairment, the second step in the analysis requires a determination whether the impairment "is reasonable and necessary to serve an important public purpose." United States Trust Co. v. New Jersey, 431 U.S. at 25, 29; accord, Allied Structural Steel Co. v. Spannaus, 438 U.S. at 242-45. This two-stage test does not invalidate all "legislation with retroactive

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(Footnote [24] continued from previous page.)

See generally Hochman, The Supreme Court and the Constitutionality of Retroactive Legislation, 73 Harv. L. Rev. 692, 695 (1960); Hale, The Supreme Court and the Contract Clause: III, 57 Harv. L. Rev. 852, 890-91 (1944). For clarity in distinguishing the relevant constitutional doctrines, this chapter refers to the Contract Clause limitations on Congressional action without repeating that it applies through the Due Process Clause.

[25] Superfund is most likely to impair contractual rights and obligations stemming from provisions in disposal contracts that were intended to transfer responsibility for the transportation, treatment and disposal of hazardous wastes. See pages VI-7 to VI-9 supra and Part IIIB infra. The definition of the contract can become extremely complicated in the Contract Clause cases, particularly where the government is one of the contracting parties or where contractual terms may have been drafted in contemplation of the law then in effect. See, e.g., Dodge v. Board of Education, 302 U.S. 74, 78-79 (1937); Home Building & Loan Ass'n v. Blaisdell, 290 U.S. at 429-30. See generally Hale, The Supreme Court and the Contract Clause: II, 57 Harv. L. Rev. 621, 663-70 (1944).

effects" on contracts, United States Trust, 431 U.S. at 17, but it does establish a basis for determining when Congressional disregard for contractual rights has exceeded acceptable bounds.

The Court has not found a comprehensive standard for deciding when a contract has been "impaired." At a minimum, an impairment occurs when a statute nullifies or dilutes one party's rights under a contract. Many of the older decisions involved laws relieving debtors of obligations to their creditors, which simultaneously diminished the creditors' rights.[26] More recent decisions have found impairments with different types of contracts and where the interference with contractual rights was less direct or the particular rights affected were less central to the contract. The impairment successfully challenged in United States Trust Co., for example, arose from the state's repeal of a statutory convenant that prevented the depletion of revenues and reserves which secured certain state bonds. Although this dilution of the security protection potentially reduced the investment value to the bondholders, the bonds were not in default and evidently had retained most of their value. The Court's decision therefore emphasized that "total destruction" of contractual obligations is not

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[26] See, e.g., Home Building & Loan Ass'n v. Blaisdell, supra n.24. See generally Hale, The Supreme Court and the Contract Clause, 57 Harv. L. Rev. 512, 514-18 (1944).

required to establish legal impairment. See 431 U.S. at 17-21, 26-28. Spannaus developed this holding even further, by explaining that once an impairment is shown, the degree of impairment governs the justification needed in the second stage of analysis to uphold the legislation:

> The severity of the impairment measures the height of the hurdle the state legislation must clear. Minimal alteration of contractual obligations may end the inquiry at its first stage. Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation.

Spannaus, 438 U.S. at 245.

The Spannaus decision also demonstrates that in addition to the diminution of a contracting party's rights, impairment can take the form of "superimposing ... obligations upon the company conspicuously beyond those that it had voluntarily agreed to undertake." Id. at 240. The legislation challenged in Spannaus imposed certain conditions on the termination of pre-existing pension plans for employees of private companies. Not only did the legislation eliminate an employer's contractual right to amend or terminate a plan at any time, but it also required an employer to provide funding upon termination for pension rights that had not even vested under the terms of the pension plan. In finding this to be an impairment, the Court rejected the dissent's contention that the Contract Clause forbids only laws diminishing "the duties of a contractual

obligor," since in "any bilateral contract the diminution of duties on one side effectively increases the duties on the other." Id. at 244-45 n.16.

The second stage of the Contract Clause analysis contemplates a balancing of the public purpose to be served and the reasonableness and necessity of the impairment. United States Trust, 431 U.S. at 25, 29; Spannaus, 438 U.S. at 242-45.[27] A wide range of factors have been considered in this balancing during the long history of the Contract Clause, and not always consistently. One of the most crucial factors limiting retroactive legislation in recent Contract Clause decisions has been the reliance interests of the affected parties. The Court emphasized in Spannaus that the employer had "relied heavily, and reasonably," on its legitimate expectations of obligations owed under the pension contracts. Id. at 245-46. Because the Court perceived the element of reliance as "vital" in selecting adequate

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[27] Different views have been expressed regarding the burden of persuasion once an impairment has been demonstrated. United States Trust suggests at points that a state must justify the reasonableness and necessity of the impairment. Spannaus indicates, however, that the Court applied a more stringent level of scrutiny in United States Trust only because the law challenged there affected contracts to which the state itself was a party. 438 U.S. at 244 & n.15; accord, Nachman Corp. v. Pension Benefit Guaranty Corp., 592 F.2d at 959 n.23. When evaluating the effect of legislation on a purely private contract in Spannaus, the Court referred to a "presumption favoring 'legislative judgment as to the necessity and reasonabless of a particular measure,'" 438 U.S. at 247, but ultimately found that the presumption "simply cannot stand in this case." Id.

funding levels for a pension plan, it was less willing to permit overriding the employer's expectations.[28] Reliance was also an important factor in United States Trust, since the state originally had enacted the covenant to enhance the marketability of its bonds, thereby deliberately inviting reliance on prior law. See 431 U.S. at 9-10, 18. Conversely, the absence of a significant reliance interest may undercut the objections to a contract impairment.[29]

Another crucial factor limiting retroactive legislation in the recent decisions has been the existence of alternative measures that would still serve the governmental interest and yet minimize or avoid altogether the impairment of

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[28] Although not stated so explicitly in its opinion, the Court also appears to have assumed that the employer had relied on the requirements of prior law, or the absence thereof, in establishing a pension plan in the first place and in structuring its contractual obligations. See 438 U.S. at 245-47, 250.

[29] See El Paso v. Simmons, 379 U.S. 497 (1965). Moreover, as suggested by Spannaus, "[i]n some situations the element of reliance may cut both ways." 438 U.S. at 246 n.18. Challenges to the Employee Retirement Income Security Act and the Multiemployer Pension Plan Amendments Act of 1980 have been undercut substantially by findings that the reliance interests of the statutory beneficiaries were at least comparable to those of the parties whose contracts were impaired. See, e.g., A-T-O, Inc. v. Pension Benefit Guaranty Corp., supra n.14 Nachman Corp. v. Pension Benefit Guaranty Corp., supra n.14; Pension Benefit Guaranty Corp. v. Ouimet Corp., 470 F. Supp. 945, 954-58 (D. Mass. 1979), aff'd, 630 F.2d 4, 12 (1st Cir. 1980), cert. denied, 450 U.S. 914 (1981); Peick v. Pension Benefit Guaranty Corp. supra n.13. This difficulty should usually be avoided in a challenge to Superfund, since the statute does not operate ordinarily to protect reliance interests competing against those of indemnified generators.

contracts. Based predominantly on this factor, the Court found in United States Trust that repealing the covenant was neither reasonable nor necessary to achieving the legislative goals. According to the state, the contract impairment was necessary to sell additional bonds for subsidizing new mass transit facilities, which served the broader objective of encouraging a shift from the use of private automobiles to public transportation. 431 U.S. at 29. The Supreme Court rejected this justification on two levels. First, "a less drastic modification would have permitted the [sale of additional bonds] without entirely removing" the covenanted security protection to current bondholders. Id. at 29-30.[30] Second, "the States could have adopted alternative means [than selling additional bonds] of achieving their twin goals of discouraging automobile use and improving mass transit." Id. at 30.[31] The Court's holding therefore depended significantly on the principle that "a State is not free to impose a drastic impairment when an evident and more moderate course would serve its purposes equally well." Id. at 31.[32]

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[30] The Court explained in a footnote a number of these measures. 431 U.S. at 30 n.28.

[31] The Court suggested in a footnote a variety of alternative transportation control strategies that would avoid affecting the contractual safeguards at all. 431 U.S. at 30 n.29.

[32] See generally Note, A Process-Oriented Approach to the Contract Clause, 89 Yale L.J. at 1642-43.

As indicated above, the severity of the contract impairment is also important in the balancing analysis. The retroactive alteration of pension obligations in Spannaus was characterized as causing a "severe disruption of contractual expectations" and imposing "a completely unexpected liability in potentially disabling amounts." 438 U.S. at 247. Moreover, the employer was forced to make all the retroactive changes at one time, without any provision for gradual application or grace periods. Id. Thus, the Court's summary distinguishing its more deferential decisions relied substantially on the Court's conclusion that the challenged legislation "did not effect simply a temporary alteration ... but worked a severe, permanent, and immediate change in [contractual] relationships - irrevocably and retroactively." Id. at 250.[33]

A less important factor in the balance against the legislative justification, yet one still emphasized in Spannaus, is the extent of prior regulation in the subject area affected. The state legislation in Spannaus "invaded an area never before subject to regulation by the State," 438 U.S. at 250, which evidently confirmed the reasonableness of the employer's reliance on pre-existing law and

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[33] Spannaus also pointed out, however, that a less substantial impairment would lessen the justification needed to uphold retroactive legislation. 438 U.S. at 245. Arguably the impairment in United States Trust was insubstantial, but the state's impairment there of its own contracts outweighed this weakness in the challenge.

magnified the severity of the first legislative intrusion. On the other hand, the existence of prior state or federal regulation may serve to legitimize imposing additional obligations and may undercut reliance interests.[34] Consequently, this factor may cut either way just as readily in the Contract Clause analysis.

Balanced against these factors is the legislative justification for the contract impairment. Even absent special circumstances, the governmental determination to support particular objectives can justify some degree of contract impairment, for otherwise contractual relationships could readily thwart regulation for the public interest. That power to override contracts can be increased dramatically, however, by particularly compelling justifications, such as the emergency conditions during the economic depression of the 1930's or a "broad, generalized economic or social problem."[35] In contrast, a narrow legislative focus can weaken the justification for impairment, especially if it appears that a special group has been singled out to bear

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[34] See 438 U.S. at 242-43 n.13, 250, citing Veix v. Sixth Ward Building & Loan Ass'n, 310 U.S. at 38.

[35] See Spannaus, 438 U.S. at 240-44, 249 n.24, 250. See, e.g., Home Building & Loan Ass'n v. Blaisdell, 290 U.S. at 444-47.

the burden of a public program or that the legislation is not appropriately tailored to the justification.[36]

Finally, in applying these factors, it must be recognized that the Contract Clause has its greatest force when the government enacts legislation impairing its own contracts. See, e.g., United States Trust Co., supra. Absent the higher level of scrutiny triggered by this self-interest, the factors discussed above must be carefully marshalled to demonstrate that the contract impairment is either unreasonable or unnecessary to serve the legislative purpose.

Following the Supreme Court's recent decisions, the Contract Clause has become considerably more potent as a limitation on retroactive legislation impairing contracts. Nevertheless, the doctrine still applies factually only to a circumscribed pattern of cases arising under Superfund, i.e., those involving substantial contract impairments, and any challenge based on the doctrine must be carefully chosen and developed in order to succeed, as explained further in Part III.

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[36] See Spannaus, 438 U.S. at 242, 248-50. The retroactive legislation there may have been aimed, somewhat imprecisely, at a single employer, id. at 248 and n.20, and "clearly ha[d] an extremely narrow focus." Moreover, the legislation inequitably penalized only those employers who had in the past been "sufficiently enlightened" to establish voluntary pension plans. Id. at 250.

B. Protection Afforded by the Taking Clause.

The Taking Clause of the Fifth Amendment forbids retroactive legislation that causes a taking of private property for public use, unless Congress provides just compensation for the taking.[37] Notwithstanding the long history of challenges under the Taking Clause, there is no fixed definition of the "property" subject to its protection. Most often the Clause has been applied to protect a variety of interests in real and personal property.[38] Although broader forms of property, such as contract rights, may also be covered in light of the Clause's purpose, the Supreme Court has invoked the Taking Clause only once to invalidate retroactive legislation taking money alone.[39]

The Supreme Court also has declined to develop a uniform test or standard for determining whether protected

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[37] Unlike the Contract Clause and the branch of the Due Process doctrine discussed below, the Taking Clause does not operate specifically as a limitation on retroactive legislation and can apply equally to the prospective taking of property. The limitations on retroactivity imposed by the Taking Clause are rather one consequence of a more general limitation on governmental authority.

[38] The third typical fact pattern under Superfund that is discussed on pages VI-9 to VI-11 supra and in Part IIIC infra illustrates the application of the Taking Clause to protect such interests in real property.

[39] This decision, Railroad Retirement Board v. Alton Railroad Co., 295 U.S. 330 (1935), relied on both the Taking Clause and the Due Process Clause to support this result. See pages VI-36 to VI-39, infra. The potential applicability of the Taking Clause to broader forms of property is discussed infra at VI-54 to VI-55.

property has been taken unconstitutionally. Instead, recent decisions have firmly embraced an "ad hoc" approach of balancing competing governmental and private interests:

> [T]his Court has generally "been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." Rather, it has examined the "taking" question by engaging in essentially ad hoc, factual inquiries that have identified several factors - such as the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action - that have particular significance.

Kaiser Aetna v. United States, 444 U.S. at 175 (citations omitted).[40] A demonstration, therefore, that retroactive legislation affects adversely a property right does not necessarily mean that the property has been "taken." For example, the Supreme Court has long upheld zoning laws[41] and other regulations that limit some, but not all, of the "beneficial uses" of property.[42] These decisions suggest that the Taking Clause would permit an order barring continued use of property as a dumpsite, at least if some other

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[40] Accord, Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. at 295; Penn Central Transportation Co. v. New York City, 438 U.S. at 124.

[41] See, e.g., Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962); Gorieb v. Fox, 274 U.S. 603 (1927); Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

[42] See, e.g., Andrus v. Allard, supra n.12; Penn Central Transportation Co. v. New York City, supra n.12.

use for the property remained. On the other hand, an order denying an owner any economically viable use of the land probably would constitute a taking.[43] In essence, government regulation violates the Taking Clause where the balance of ad hoc factors demonstrates "that the public at large, rather than a single owner, must bear the burden of an exercise of State power in the public interest."[44]

The Supreme Court's most recent Taking Clause decision, Loretto v. Teleprompter Manhattan CATV Corp., extended this doctrine to hold that a "permanent physical occupation of real property" always constitutes a taking. At issue in that case was a New York law requiring landlords to permit the installation on their buildings of equipment that would enable tenants to receive cable television service. Although the equipment occupied only a small area on the outside of the building, the Court considered it a per se taking because "a permanent physical occupation ... is perhaps the most serious form of invasion of an owner's property interests." 102 S. Ct. at 3176. The public benefit from the occupation and the actual economic impact on

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[43] See Agins v. City of Tiburon, 447 U.S. at 260; Penn Central Transportation Co. v. New York City, 438 U.S. at 138, n.36. Although such a denial ordinarily virtually defines a taking, in this situation the prior use as a dumpsite may preclude all other uses and thereby complicate the analysis.

[44] Agins v. City of Tiburon, 447 U.S. at 260; Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. at 306 n.3 (Powell, J., concurring).

the owner were deemed irrelevant to the taking issue, given the special kind of injury to the owner's property rights.[45]

Absent a permanent physical occupation, the broader range of factors suggested by the Court's decisions must be balanced to determine whether a curtailment of property rights rises to the level of a "taking." The most basic factor in balancing the private and public interests is the degree to which the property rights have been impaired.[46] A second factor, which may be equivalent in some cases to the severity of impairment, is the "economic impact of the regulation on the claimant."[47] The Court does not always require an extreme economic impact, however, and in some instances the economic impact may not be subject to ready quantification.[48]

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[45] The case was remanded to determine the amount of compensation due the property owner, which presumably would reflect the relatively slight economic impact of the taking.

[46] See, e.g., Penn Central Transportation Co. v. New York City, supra n.12, See generally, Note, Constitutionality of Retroactive Lien Avoidance Under Bankruptcy Code Section 522(f), 94 Harv. L. Rev. at 1634.

[47] Penn Central Transportation Co. v. New York City, 438 U.S. at 124; accord, Kaiser Aetna v. United States, 444 U.S. at 175.

[48] The government action challenged in Kaiser Aetna v. United States, arguably would not have caused extensive economic consequences. The Court thus applied this factor only to the extent of stating that "[t]his is not a case in which the Government ... will cause an insubstantial devaluation." 444 U.S. at 180 (emphasis added).

Interference with reasonable and distinct investment-backed expectations is another factor that can strongly influence the balance. In Kaiser Aetna v. United States, for example, the owners of a private pond had obtained government approval and undertaken a number of improvements to convert the pond into a marina. These improvements in the marina were intended to enhance the value of surrounding lots and to permit charging fees for the use of the marina by non-resident boat owners. Subsequently, the government claimed that the marina should be opened to the public at large because the improvements had connected the pond to navigable waters. The Court's conclusion that the government's plans would result in taking private property expressly reflected considerable unwillingness to override the "expectancies" created by the previously applicable law and the government's approval of the improvements. 444 U.S. at 179. Thus, where pre-existing regulation, or the absence of regulation, has created comparable "expectancies," this decision and its predecessors suggest that these reliance or expentancy interests can weigh heavily in the balance.[49] On the other hand, acquisition of a property interest that is already subject to extensive legal restrictions may effectively preclude a Taking Clause challenge.

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[49] See also Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 414 (1922); Goldblatt v. Town of Hempstead, 369 U.S. at 594.

The final factor suggested in the Court's recent decisions is the "character of the government action."[50] A "physical invasion" by the government, for example, even short of a permanent physical occupation, is more offensive than a regulation merely restricting private use of the property.[51] Both Loretto and Kaiser Aetna have emphasized that the "right to exclude" is a "fundamental element" of an owner's rights in real property, and any physical invasion by the government or third parties conflicts with that basic right. Thus, while the government might in a given case be able to prohibit a specific use of property by the owner, the addition of temporary intrusions by the government on the property or the creation of an easement for others may result in violating the Taking Clause.

Apart from cases involving permanent physical occupations, the Supreme Court has yet to decide "whether in some circumstances one of these factors by itself may be dispositive." Kaiser Aetna v. United States, 444 U.S. at 178 n.9. Moreover, the Court's recent willingness to protect rights in private property suggests that the above list should not be considered exclusive, if additional factors tend to demonstrate that the public at large should bear the burden

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[50] Kaiser Aetna v. United States, 444 U.S. at 175.

[51] Loretto v. Teleprompter Manhattan CATV Corp., 102 S. Ct. at 3173; Penn Central Transportation Co. v. New York City, 438 U.S. at 124; see, e.g., United States v. Causby, 328 U.S. 256 (1946).

of the exercise of state power. Balanced against these factors, however, despite the omission from the Court's explicit listing, is the nature of the government's interest in restricting or perhaps usurping the private property rights. Where the government interest is compelling and directly related to protection of the public health, the Court may be less willing to prohibit government action under the Taking Clause.

The resolution of a Taking Clause challenge also depends heavily on the procedural context in which it is raised. Taking claims that arise in the context of a facial challenge are resolved by a less protective standard: whether the "mere enactment" of the legislation constitutes a taking by denying "an owner economically viable use of his land."[52] The possibility that beneficial uses of the property will remain available precludes such a finding, evidently without regard to the ordinary elements of the Taking Clause analysis.[53] Accordingly, the Taking Clause is largely ineffective as a limitation on retroactivity absent a specific, applied challenge.

In addition, the procedural and factual context, as well as the structure of the challenged statute, can affect

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[52] Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. at 295-96; Agins v. City of Tiburon, 447 U.S. at 260.

[53] See Virginia Surface Mining, 452 U.S. at 296-97 & 296 n.38; Agins, 447 U.S. at 262-63.

the type of relief provided by a successful challenge. An unconstitutional taking can be remedied either by prohibiting the action that results in the taking or by providing "just compensation." Where the challenged statutory scheme or the procedural context would readily permit the affected parties to seek "just compensation," the retroactive legislation itself that causes the taking may still be upheld. See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.[54] In other instances, where compensation would be unavailable, the violation of the Taking Clause must be remedied by invalidating the legislative provision or forbidding the taking.[55]

C. Protection Afforded by the Due Process Clause.

The Due Process Clause of the Fifth Amendment prohibits Congress from depriving any person of property without due

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[54] The Court declined in the Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974), to declare unconstitutional a statute that might result in "taking" private property, because persons suffering a taking could sue for "just compensation" under the Tucker Act in another court. See also Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. at 297 n.40. "Inverse condemnation" actions might provide a comparable basis to seek "just compensation" for takings caused by Superfund provisions. See generally Note, Constitutionality of Retroactive Lien Avoidance under Bankruptcy Code Section 522(f), 94 Harv. L. Rev. at 1631 n.98; Countryman, Real Estate Liens in Business Rehabilitation Cases, 50 Am. Bankr. L.J. 303, 339 (1976).

[55] See, e.g., Kaiser Aetna v. United States, supra n.12.

process of law.[56] One aspect of that prohibition is a limitation on retroactive legislation, because of the likelihood that retroactive measures will disrupt settled rights and expectations. Despite the long history of Due Process challenges to such legislation, however, none have addressed directly the constitutionality of creating an entirely new cause of action based on past events, which is the retroactive element of Superfund most likely to be challenged. See pages VI-4 to VI-7 supra and Part IIIA infra. The most analogous precedent for a Due Process challenge to Superfund, therefore, may be two decisions involving the establishment of retroactive pension or compensation schemes.

The first of those decisions, Railroad Retirement Board v. Alton Railroad Co., came during the era of "Substantive Due Process," when the Supreme Court invoked the Due Process Clause freely to invalidate economic legislation.[57] The The Railroad Retirement Act of 1934 at issue there established a retirement fund financed by assessments against employers based on the number and wages of a railroad's

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[56] A broader range of "property" is subject to the Due Process requirement than has traditionally been at stake in the Taking Clause cases. As demonstrated by the cases discussed below, deprivations occasioned by retroactive financial liability alone are clearly sufficient to require satisfaction of due process requirements.

[57] See, e.g., Lochner v. New York, 198 U.S. 45 (1905); Adkins v. Childrens' Hospital, 261 U.S. 525 (1923); Coppage v. Kansas, 236 U.S. 1 (1915). See generally L. Tribe, American Constitutional Law 434-42 (1978).

employees. Among many related objections to the Act, a group of railroads challenged provisions awarding pensions to persons who had been employed within the year before enactment but were no longer employed by a railroad, regardless of the reason for ending their railroad employment. Another retroactive provision the group contested allowed any former employee to obtain a pension, based upon the full length of employment prior to the enactment date, if the person subsequently was reemployed by any other railroad. The Court found both provisions retroactively benefitting former employees to be unconstitutional, and even the dissenting Justices agreed with respect to the first provision which benefitted those never again reemployed. 295 U.S. at 349-50 (majority), 389 (Hughes, C.J., dissenting).[58]

In evaluating these retroactive provisions, the Court applied an essentially Due Process test of whether the legislation was "unreasonable, arbitrary or capricious" and "the means selected [had] a real and substantial relation to

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[58] The alignment of Justices in Alton Railroad suggests that it would be inappropriate to limit the current vitality of this case by characterizing it as a Substantive Due Process decision. The four dissenting Justices agreed that retroactive authorization of benefits to former employees never again re-employed was unconstitutional, despite their opposition to the use of the Substantive Due Process doctrine. Moreover, the author of the Court's majority opinion, Justice Roberts, also had recently opposed the excesses of that doctrine in Nebbia v. New York, 291 U.S. 502 (1934), and only two years later joined the previous dissenters in closing the Substantive Due Process era. See L. Tribe, American Constitutional Law 448-49 & n.18 (1978).

the object sought to be attained." Id. at 347-48 n.5. Notwithstanding the government's argument that these provisions of the pension system would promote safety and efficiency in the railroad industry, the Court concluded that the relationship between that end and the pension provisions was too weak to justify the retroactive burden. The Court's discussion of that burden reflects the significant weight given to protecting the settled expectations and rights under prior law:

> Plainly this requirement alters contractual rights; plainly it imposes for the future a burden never contemplated by either party when the earlier relation existed or when it was terminated. The statute would take from the railroads' future earnings amounts to be paid for services fully compensated when rendered in accordance with contract, with no thought on the part of either employer or employee that further sums must be provided by the carrier. The provision is not only retroactive in that it resurrects for new burdens transactions long since past and closed; but as to some of the railroad companies it constitutes a naked appropriation of private property upon the basis of transactions with which the owners of the property were never connected. Thus the act denies due process of law by taking the property of one and bestowing it upon another.

295 U.S. at 349-50.[59] The two major elements of the Court's holding -- a special solicitude for reliance interests and

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[59] This blending of references to Due Process and to the taking of property permits the interpretation of Alton Railroad's holding as resting upon either the Taking Clause, see note 58 supra, or the Due Process Clause, or both.

insistence on a very strong justification to override those interests - established a stringent constitutional test for this form of retroactive legislation.

Following the close of the Substantive Due Process era in 1937, see note 58 supra, the Supreme Court became very reluctant to invalidate economic legislation under the Due Process Clause, even when the legislation was given retroactive effect. Eventually this reluctance led to the Court's decision which upheld a retroactive compensation scheme for coal miners and thus serves as the most appropriate Due Process analogy for comparison to Alton Railroad. At issue in Turner Elkhorn were several statutes[60] that enabled former coal miners and their survivors to obtain compensation from mine operators for disability or death due to pneumoconiosis (black lung) arising out of coal mine employment. A group of mine operators framed a facial challenge under the Due Process Clause against the retroactive aspects of this scheme, specifically the obligation to compensate miners who had left coal mine employment before the effective date of the statute.[61] Although the Court's

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[60] Title IV of the Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 792, as amended by the Black Lung Benefits Act of 1972, 30 U.S.C. §§ 901 et seq.

[61] The operators also challenged several of the presumptions and limitations on rebuttal evidence that Congress enacted for adjudicating the liability of individual operators.

rejection of that challenge is often cited by those advocating a free hand in the imposition of retroactive liability, careful analysis of the Court's opinion reveals the continued existence of significant Due Process limitations on retroactivity.

At the outset, Turner Elkhorn emphasized that stricter scrutiny is necessary when retroactive legislation is challenged under the Due Process Clause. Ordinarily, "the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." 428 U.S. at 15. Only minimal justification is needed to uphold legislation under that test, but a greater justification is required for retroactive measures:

> It does not follow . . . that what Congress can legislate prospectively it can legislate retrospectively. The retrospective aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former.

428 U.S. at 16-17. In essence, the Court adjusted the balancing test it has adopted for Due Process challenges, to lessen the burden of overcoming the presumption of constitutionality.

Following perhaps from the higher standard of scrutiny, the Court's substantive analysis suggested that the imposition of retroactive liability must rest on a compelling health justification or a comparable basis. The beneficiaries of the retroactive liability imposed by the black

lung legislation could recover only if their illness became "totally disabling" or had resulted in the death of a former miner. The justification for establishing a compensation mechanism was therefore much stronger than in situations where liability is not imposed to compensate innocent parties, the need for compensation is less compelling, or public health is not seriously and immediately threatened. Indeed, the Court's distinction of Alton Railroad, which had invalidated legislation creating retroactive pension obligations, appeared to rest on the "specific need" in Turner Elkhorn to compensate those injured by working under "dangerous conditions." 428 U.S. at 19.[62]

The most important limitation on retroactivity developed in Turner Elkhorn, however, is the need for an adequate causal connection between the legislative justification and the persons forced to bear the retroactive liability. A strong connection between the compensable injury and the particular operator subject to liability was statutorily required in Turner Elkhorn, and the Court's opinion suggests that this connection was crucial to the holding. In particular, specific adjudications of individual responsibility and liability for past employees were required by the statutory scheme, and the Court clearly assumed that no operator

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[62] Turner Elkhorn's distinction of Alton Railroad also appears to have been based in part on the stronger causal connection, which is discussed below, between the mine operators and the dangerous conditions causing black lung.

would be liable for disabilities or deaths not attributable to his own conduct.[63] The Court even described the purpose of the new liability as a means of "allocat[ing] to the mine operator an actual, measurable cost of his business." 428 U.S. at 19. The Court therefore held only that "the Due Process Clause poses no bar to requiring an operator to provide compensation for a former employee's death or disability due to pneumoconiosis arising out of employment in its mines." 428 U.S. at 19-20 (emphasis added).

Two subsequent passages of the Court's opinion further emphasized the significance of this strong causal connection to its holding. In the first, the Court considered the validity of an irrebutable presumption that death was due to pneumoconiosis whenever a miner was totally disabled by pneumoconiosis at the time of death.[64] This presumption had been included to establish eligibility for the survivors of disabled miners, and it eliminated the need for proof that pneumoconiosis caused the death. The Court seriously questioned the constitutionality of this presumption and the

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[63] Although not specifically cited in the Court's opinion, the legislation then applicable provided that the government would pay black lung benefits where liability could not be placed on a responsible mine operator. 83 Stat. 742, 30 U.S.C. § 934.

[64] This presumption only arose if certain forms of evidence demonstrated that the miner was afflicted by complicated pneumoconiosis. 428 U.S. at 10-11. The statute also presumed irrebutably that complicated pneumoconiosis was totally disabling, but that presumption did not implicate the line of causation to a responsible operator.

retroactive liability if death was the predicate of a survivor's eligibility, since the death may not have been caused by the operator held liable:

> To the extent that the presumption of death due to pneumoconiosis is viewed as requiring compensation for damages resulting from death unrelated to the operator's conduct, its application to employees who terminated their employment before the Act was passed would present difficulties not encountered in our prior discussion of retroactivity. The justification we found for the retrospective application of the Act is that it serves to spread costs in a rational manner - by allocating to the operator an actual cost of his business, the avoidance of which might be thought to have enlarged the operator's profits. The damage resulting from a miner's death that is due to causes other than the operator's conduct can hardly be termed a "cost" of the operator's business.

428 U.S. at 24-25 (emphasis added). In light of these constitutional doubts, the Court upheld the presumption only because the legislative history revealed that this liability was based on the fact that a miner had suffered from totally disabling pneumoconiosis, not on the fact of death, which may not have been attributable to the operator's conduct.[65]

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[65] The Court's elaboration concerning its reservations also emphasized the importance of the causal connection:

> We might face a more difficult problem in applying § 411 (c)(3)'s presumption of death due to pneumoconiosis on a retrospective basis if the presumption

(Footnote [65] continued on next page.)

The second passage in Turner Elkhorn further emphasizing the importance of a causal connection involved limitations on the evidence that could be used to rebut certain presumptions. The District Court had held these limitations unconstitutional because they would "preclude an operator's defense that the disease did not arise out of employment in the particular mines for which it was responsible." 428 U.S. at 35. Rather than confront that constitutional issue, the Supreme Court adopted a dubious construction of the statute to render the limitations inapplicable to mine

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(Footnote [6S] continued from previous page.)

> authorized benefits to the survivors of a miner who did not die from pneumoconiosis, and who during his life was completely unaware of and unaffected by his illness; or, in the case of a miner who died before the Act was passed, if the presumption authorized benefits to the survivors of a miner who did not die from pneumoconiosis, who nevertheless was aware of and affected by his illness, but whose dependents were completely unaware of and unaffected by his illness. But the Operators in their facial attack on the Act have not suggested that a miner whose condition was serious enough to activate the § 411(c)(3) presumptions might not have been affected in any way by his condition, or that the family of such a miner might not have noticed it. Under the circumstances, we decline to engage in speculation as to whether such cases may arise.

428 U.S. at 26-27.

operators, even though the limitations did apply when compensation was paid by the government. Id.[66] By adopting this construction, the Court strongly suggested that an adequate causal connection is a prerequisite to the imposition of retroactive liability.

In sum, despite the substantial deference given to Congress' judgments, Turner Elkhorn actually does little to confine the Due Process analysis of retroactive legislation. Alton Railroad addressed both sides of the applicable balancing test: on one side, the Court's close scrutiny of the legislative rationale in that era undercut the already weak justification for imposing retroactive liability, and on the other side, the Court demanded that great weight be given settled rights and expectations.[67] Turner Elkhorn, in

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[66] Justice Stewart, joined by Justice Rehnquist, demonstrated in a separate opinion the anomalies that would arise from the Court's statutory construction. 428 U.S. at 49-51. Justice Stewart preferred to avoid the constitutional objections by concluding that, notwithstanding the applicable limitations, other provisions enabled a specific operator to defeat liability by showing that disability did not arise out of employment in his mine during the period when he operated it. Id. at 51.

[67] Although some courts have questioned the continuing vitality of Alton Railroad based on its Substantive Due Process context, see, e.g., A-T-O, Inc. v. Pension Benefit Guaranty Corp., 634 F.2d at 1025 n.13; Pension Benefit Guaranty Corp. v. Ouimet Corp., 470 F. Supp. at 955, Turner Elkhorn clearly declined to overrule the decision, see page VI-41 supra, to the point of noting that the dissenting Justices in Alton Railroad also would have invalidated the provision for allowances to former employees. 428 U.S. at 19 n.18. Moreover, as discussed supra at note 58, the result in Alton Railroad is readily separable from the suspect Substantive Due Process context.

contrast, focused principally upon the adequacy of the legislative justification, without necessarily minimizing the significance of the individual objections.[68] Indeed, as discussed above, Turner Elkhorn may have been the first decision to clearly develop a strong causation requirement, thereby confining the types of justification that can be considered to balance against the burdens of retroactive liability.

D. Elaboration of the Constitutional Protection Against Retroactivity

Notwithstanding Turner Elkhorn's avoidance of significantly weakening the Due Process analysis of retroactivity, the Due Process Clause decisions since the Substantive Due Process era still do not provide the same degree of protection against retroactive legislation as the Contract and Taking Clauses, when they apply factually. However, Turner Elkhorn was decided shortly before the series of recent Supreme Court decisions revitalizing the latter two doctrines. In light of those decisions and the Court's emerging sympathy for the protection of individual property rights, see pages VI-17 to VI-18 supra, the Due Process analysis is capable of providing stronger limitations on

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[68] This focus on only one side of the balance may have been attributable to the operator's failure, in the context of a facial challenge, to develop adequately the factors that can be weighed against the legislative justification.

retroactivity and, in addition, the Contract and Taking Clause protections may become applicable to broader ranges of factual situations.

1. Further development of the Due Process analysis

Further development of the Due Process analysis of retroactivity can draw support from a number of sources. The most obvious of these are the recent Contract and Taking Clause decisions. Many of the factors that have been important in those cases for limiting retroactivity should be equally relevant under the Due Process Clause.[69] In addition, Turner Elkhorn itself suggested that several factors, such as reliance, would have influenced the Due Process balance, had they been present in the case. Finally, even though less analogous than Turner Elkhorn and Alton Railroad, many of the Supreme Court decisions involving Due Process challenges to retroactive legislation can still be valuable for supplementing the constitutional analysis.

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[69] Although not usually considered in this connection, a number of decisions and commentators have concluded that "the analysis employed in Contract Clause cases is also relevant to judicial scrutiny of Congressional enactments under the Due Process Clause." Nachman Corp. v. Pension Benefit Guaranty Corp., 592 F.2d at 959. See generally Hochman, The Supreme Court and the Constitutionality of Retroactive Legislation, 73 Harv. L. Rev. at 695; Hale, The Supreme Court and the Contract Clause: III, 57 Harv. L. Rev. at 890-91.

Based on these sources, three additional factors, in particular, should be developed to support a Due Process challenge against retroactive legislation such as Superfund: interference with reliance interests, the availability of less drastic alternatives to meet the legislative justification, and the nature and extent of the burden caused by the retroactive imposition. Each of these considerations should bear directly upon the reasonableness of the retroactive legislation or on the adequacy of the legislative justification for subjecting the affected persons to retroactive consequences.

The relevance of the reliance factor is demonstrated most clearly by one of the recent Contract Clause decisions, Allied Structural Steel Co. v. Spannaus, 438 U.S. at 246-47. In that case, the Court gave great weight to the company's reliance upon its negotiated contracts and the pre-existing law as the basis for structuring and funding a pension plan for its employees.[70] The reliance factor also appears to have been important in a number of the Supreme Court's Due Process decisions, and especially in Alton Railroad, where pre-existing law ordinarily is the immediate foundation for reliance interests, rather than contractual rights. Unfortunately, most of the Due Process decisions have cited or

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[70] See also United States Trust Co. v. New Jersey, 431 U.S. at 9-10, 18. Similarly, "interference with reasonable investment backed expectations" has become a significant element in the Taking Clause analysis. See, e.g., Kaiser Aetna v. United States, 444 U.S. at 175 (1979).

considered the absence of reliance to support upholding retroactive legislation,[71] and others have reflected considerable readiness to override at least certain forms of reliance interests.[72]

In light of these previous Due Process decisions, Turner Elkhorn specifically observed that the degree of reliance is relevant in the retroactivity analysis:

> [I]n this case the justification for the retrospective imposition of liability must take into account the possibilities that the Operators may not have known of the danger of their employees' contracting pneumoconiosis, and that even if they did know of the danger their conduct may have been taken in reliance upon the current state of the law, which imposed no liability on them for disabling pneumoconiosis.

428 U.S. at 17. Despite the Court's willingness to consider reliance on the pre-existing law, the mine operators had "not specifically pressed the contention that they would have taken steps to reduce or eliminate the incidence of pneumoconiosis had the law imposed liability upon them." Id. In short, although the Court indicated that it might be receptive to such an argument, the operators failed to

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[71] This is particularly true of the Court's decisions involving retroactive changes in the tax laws. See page VI-51 and note 74 infra.

[72] See, e.g., Fleming v. Rhodes, 331 U.S. 100 (1947); Carpenter v. Wabash Ry., 309 U.S. 23 (1940); Norman v. Baltimore & O.R.R., 294 U.S. 240 (1935); Home Building & Loan Ass'n v. Blaisdell supra n.24; Louisville & Nashville R.R. v. Mottley, 219 U.S. 467 (1911).

develop a substantial reliance case, other than to complain that the law upset otherwise settled expectations, which the Court was not persuaded to protect. 428 U.S. at 16.

Turner Elkhorn's passages confirming that reliance interests remain relevant to the Due Process analysis also suggest that some forms of reliance interests are more persuasive, or deserve greater protection, than others. Settled expectations alone, even if fully justified by prior law, may not be enough, even given the continued vitality Alton Railroad. See 428 U.S. at 16-17. A stronger reliance argument can be developed, according to Turner Elkhorn, by those who would have altered their conduct to avoid liability if the liability subsequently attached to their chosen course of conduct could have been anticipated. 428 U.S. at 17 n.16.[73] Many of the Supreme Court's decisions involving Due Process challenges to retroactive tax laws, in particular, can be distinguished by the presence or absence of this form of reliance.[74] The reliance factor probably is strongest, however, in the closely related situation

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[73] The foreseeability of legislative changes may preclude development of this argument, whereas the unforeseeability of the dangers motivating a subsequent change of law may strengthen the reliance factor. See Turner Elkhorn, 428 U.S. at 17.

[74] See, e.g., Welch v. Henry, 305 U.S. 134, 146-48 (1938); Milliken v. United States 283 U.S. 15, 21 (1931); Untermyer v. Anderson, 276 U.S. 440 (1928). See generally, Hochman, The Supreme Court and the Constitutionality of Retroactive Legislation, 73 Harv. L. Rev. at 706-11.

where instead of simply declining to take action based on the applicable law, affirmative conduct and expense were predicated on the prior law. Retroactive legislation in this situation not only deprives those affected of the opportunity to minimize their liability, but it also can impose severe losses or magnify tremendously the expense of previously lawful conduct.[75]

The Due Process analysis can also be strengthened by the development of a less drastic means argument. In United States Trust Co., the Court's invalidation of the retroactive legislation was based in large part upon the availability of alternative measures that would have served adequately the government interest, yet minimized or avoided altogether the impairment of contracts. The Court may have been willing to consider a similar argument in Turner Elkhorn, given the close scrutiny of the legislative justification, but the alternative preferred by the mine operators could hardly be considered less drastic. See 428 U.S. at 17-18.[76]

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[75] The Company involved in Spannaus, for example, was subjected to extensive burdens because it had relied on the absence of the retroactive pension fund restrictions when it adopted and structured its pension plan.

[76] The operators in Turner Elkhorn opposed "basing liability upon past employment relationships," 428 U.S. at 18, due to fears of creating competitive cost advantages for new

(Footnote [76] continued on next page.)

The third factor that should be developed to enhance the Due Process protection against retroactivity is the nature and severity of the burden caused by the retroactive legislation. This factor is incorporated explicitly in the Contract and Taking Clause doctrines, and was especially significant as a limitation on retroactivity in Spannaus. Moreover, as Justice Powell recognized in his Turner Elkhorn concurrence, the burden of retroactive legislation bears directly upon the reasonableness of disrupting settled rights. 428 U.S. at 42-45. Accordingly, Justice Powell specifically suggested that the extent and consequences of the financial burden on the mine operators should be considered in the context of a Due Process challenge to retroactive provisions as applied. Id. Although the Court's opinion was less sympathetic to this factor, id. at 18-19, it certainly did not foreclose consideration of the degree of retroactive burdens in a more appropriate case.[77]

(Footnote [76] continued from previous page.)

firms. The only alternative suggested, however, was creating a new tax on all coal mine operators presently in business. This alternative merely redistributed among private parties the burden of retroactive liability. As explained below, Superfund may be more vulnerable to a less drastic alternatives analysis because it creates two duplicative means of redressing the perceived need: a new cause of action and a Trust Fund consisting of large mandatory contributions.

[77] The discussion of the burden in Turner Elkhorn focused principally upon the ability of the mine owners to pass their retrospective liability on to consumers; see 428 U.S. at 18-19, instead of the magnitude of the burden.

In sum, Turner Elkhorn was not intended and should not be construed as an exhaustive list of the factors relevant to the Due Process analysis. The constraints on retroactivity established by Turner Elkhorn therefore could be supplemented substantially by the persuasive development of these three factors in any subsequent Due Process challenges.

2. Possible extended applicability of the Taking and Contract Clauses

The Contract and the Taking Clauses traditionally have been confined to narrow ranges of factual application as limitations on retroactive legislation. Nevertheless, since both doctrines have been perceived as more stringent limitations on retroactivity than is the Due Process doctrine, extension of their factual applicability should strengthen considerably the constitutional basis for challenging retroactive legislation.

The scope of the Contract Clause already has been expanded in recent years by treating as an "impairment" almost any substantial alteration of contractual rights. Because the language of the Clause ties its application to "contracts," however, there is limited potential for expanding further the applicability of the doctrine.[78] Thus,

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[78] Any further expansion probably must come in the definition of the obligations and rights created by contractual agreements, since Spannaus already has confirmed that the "impairment" requirement can encompass almost all substantial alterations of those contractual rights. See pages VI-20 to VI-22 supra.

broader use of the Contract Clause as a limitation on retroactivity essentially will depend upon relating constitutional objections to contract rights.

The Taking Clause, on the other hand, is still capable of broader applicability, because of the expanding definition of property rights. Most often the Taking Clause has been invoked to protect interests in real or personal property.[79] The Clause should no longer be viewed as confined to those forms of property, if it ever actually was, given the conclusion in several recent decisions that contractual rights must also be considered a form of property subject to the protection of the Taking Clause.[80] Based upon these decisions and upon Alton Railroad, see pages 38-41 and note 40 supra, it may be possible now to urge that financial resources should also be considered protected "property." As a practical matter, the financial resources and assets implicated by a retroactive cause of action are no different as property than a tract of land. Moreover, protection of all forms of property would be consistent with the function

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[79] In addition to the more obvious ownership rights, past decisions have indicated that liens, easements and leaseholds, for example, would also be covered by the Taking Clause.

[80] United States Trust Co. v. New Jersey, 431 U.S. at 19 n.16 (1977) ("Contract rights are a form of property and as such may be taken for a public purpose provided that just compensation is paid."); see also Loretto v. Teleprompter Manhattan CATV Corp., 102 S. Ct. at 3186 n.11 (Blackmun, J., dissenting).

of the Taking Clause to distinguish whether "the public at large, rather than a single owner," should bear the burden of government regulation.[81] Thus, the Taking Clause may still be capable of further extension to protect against retroactivity in the form of a new cause of action.

Already the Due Process, Taking and Contract Clauses establish fundamental limitations on Congress' authority to impose retroactive liabilities. As discussed below, several aspects of Superfund may violate those limitations, if demonstrated in an appropriate case. The combination of extending the applicability of the Taking and Contract Clauses, and of supplementing the Due Process analysis, would strengthen the constitutional protection against retroactivity and lend additional support for challenging Superfund.

III. SUMMARY OF THE CONSTITUTIONAL ARGUMENTS: CRITERIA FOR FRAMING A CHALLENGE TO SUPERFUND PROVISIONS IN APPROPRIATE CASES.

Three typical factual patterns in which the application of Superfund is likely to have retroactive consequences were outlined generally in Part I. The discussion above of the major constitutional doctrines limiting retroactive legislation suggests that six factors will be crucial in determining when those retroactive consequences may reasonably be subject to constitutional challenge:

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[81] Agins v. City of Tiburon, 447 U.S. at 260.

(1) the causal connection between the persons subject to retroactive consequences and the legislative justification; and

(2) the nature and degree of the burden on private parties caused by the retroactive application;

(3) the degree to which reasonable reliance interests have been impaired by the retroactive application;

(4) the potential for liability under pre-existing state or federal law for the conduct questioned under Superfund;

(5) the nature and persuasiveness of the legislative justification for retroactivity, i.e., the public purpose underlying the legislative action;

(6) the availability of alternative measures that would accomplish the legislative objectives without causing such severe retroactive consequences.

The significance of these factors and the importance of distinguishing among the many conceivable challenges is best explained by returning to the typical factual situations described in Part I. Application of the constitutional doctrines and factors to those factual variations should illustrate, without cataloging encyclopedically, the circumstances most likely to result in a successful challenge. For example, one of the factors, the absence of an adequate causal connection, may sustain a challenge almost by itself. Conversely, among the six factors, one in particular, the potential for liability under pre-existing state or federal

law, should virtually disqualify a challenge where prior liability could readily have been established.[82] In most instances, however, all of the factors must be considered and balanced to determine whether the objections to Superfund's retroactive application are strong enough, in light of the Supreme Court's recent decisions, to develop a persuasive constitutional argument.

A. Challenging the Imposition of Retroactive Liability under a New Cause of Action for Previously Lawful Activities.

The most common factual pattern in which a constitutional challenge may be considered will arise when EPA files suit under section 107 to recover funds expended for remedial or removal action at a dumpsite created before the

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[82] Although this factor is rarely addressed independently in the Supreme Court's decisions, it clearly underlies the factors that are discussed. If a generator would have been liable under prior law, the objection to section 107 is not that it imposes liability retroactively, but rather that an existing liability might actually be enforced due to the improvement of remedies. The latter objection is less likely to be considered within the scope of the retroactivity doctrines. See, e.g., Department of Transportation v. PSC Resources, Inc., 419 A.2d 1151, 1160-61 (N.J. 1980). Even if it were within those doctrines, the Supreme Court's Due Process decisions often distinguish between the imposition of entirely new burdens and the mere increase in burdens imposed by prior law. See, e.g., United States v. Darusmont, 449 U.S. at 299-300. In addition, a generator that would have been liable under prior law obviously cannot argue persuasively that it relied reasonably on the preexisting law to undertake conduct now made liable by Superfund. See Usery v. Turner Elkhorn Mining Co., 428 U.S. at 17; (1976); Allied Structural Steel Co. v. Spannaus, 438 U.S. at 245-47, 250.

enactment of Superfund. For multigenerator sites, EPA often names as defendants a number of waste generators and transporters, as well as the past and present site owners and operators. Although EPA may distinguish broadly between major contributors to the site and lesser contributors, little other discrimination among defendants may be expected at the outset. Some of the named defendants could have generated less than 1% of the waste at the site, and the evidence connecting some generators to the site may be very tenuous. EPA also typically adopts an extreme litigation and negotiation stance, claiming harsh interpretations of the statute and asserting joint and several liability against all defendants.

The constitutional objections to retroactivity, where they can be developed persuasively, should serve a dual purpose in these cases. Most directly, constitutional objections can serve as a basis for challenging provisions of Superfund as applied to specific facts. Equally as important, the argument that retroactive application would otherwise be unconstitutional can serve as a means of influencing issues of statutory interpretation. As will become evident below, the statutory arguments particularly susceptible to this consideration are those opposing the imposition of joint and several liability, supporting a broader construction of the third party defenses under section 107(b), demonstrating that liability must be predicated upon

findings of both cause-in-fact and proximate cause, and opposing the use of a strict liability standard of intent.[83]

The initial consideration in assessing the strength of any Due Process retroactivity challenge[84] is the nature and strength of the causal connection between particular defendants and the hazards presented by a given site. In some situations, one or more generators may be able to show that their waste never went to the site or that it was removed before any damage could have occurred. In other situations, a specific threat may have been identified as the basis for cleanup action, such as the appearance of a highly toxic chemical in the ground water. Here, a number of generator defendants may be able to demonstrate that their waste neither contained the chemical in question nor could have caused the release of the chemical from the drums sent to

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[83] Less directly the constitutional objections can reinforce arguments that cleanup action should be taken only to remedy or prevent serious hazards, as well as to confine the types of cleanup measures for which EPA can seek reimbursement. For similar reasons to those discussed above, the prospect of constitutional objections may convince EPA to exercise greater discretion in applying the statute, with or without more reasonable interpretations of the statute.

Conversely, reasonable interpretations and applications of the statute would tend to reduce the number of instances in which a constitutional challenge could be developed persuasively.

[84] The constitutional arguments developed in the context of this factual pattern should be based on a combination of the Due Process, Contract and Taking Clause doctrines, as discussed in Part IID supra.

the site by others. Still other generators may demonstrate that regardless of the content of their waste, their disposal method in fact had prevented any release or threat of release.[85]

The absence of any direct causal connection between the past actions of these generators and the rationale for imposing retroactive liability should permit development of a strong argument that the retroactive application of section 107 to these generators would violate the Due Process Clause. For as discussed above, Turner Elkhorn suggests that an adequate causal connection may be a prerequisite for imposing retroactive liability, independently of other factors in the balancing analysis.[86]

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[85] For example, a more compelling argument could be developed where defendant generator's waste was only stored temporarily at the disposal site and had been moved before the cleanup. Similar arguments might exist where the generator defendant already had financed voluntarily the removal of its waste before government cleanup began.

[86] See pages VI-42 to VI-45 supra. The type and extent of causal connection necessary to justify retroactive liability under the Due Process Clause has not been clarified since Turner Elkhorn. The examples described above involve situations where there is no causal connection even between the generator's waste and the environmental threat. In other situations, there may be a connection with the generator's waste but not with the generator's own conduct following generation of the waste, such as where a transporter's reckless conduct was solely responsible for any hazard. The distinction between these situations is fundamentally one of fault or blameworthiness, and it is not clear that the absence of blameworthiness in the latter situations alone would preclude establishing the minimum connection required

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Following the initial differentiation based on the causal connection factor, a broad range of distinctions among defendants remain to be considered in assessing the strength of any constitutional argument. First, is the nature, degree, and fairness of the burden on private parties caused by the assertion of retroactive liability under section 107.[87] The generators in the best position to emphasize the inequitable burdens of retroactivity are those who acted blamelessly and in good faith, contributed a very small fraction or else questionably toxic waste to the site, and can demonstrate that the causal connection between their own conduct and the endangerment is very attenuated. The risk of substantial financial liability, in relation to the size, financial health, and past conduct of the generator,

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(Footnote [86] continued from previous page.)

by the Due Process Clause. Turner Elkhorn also left unresolved the question whether a weak causal connection, as opposed to the absence of a connection, would be insufficient constitutionally.

Even if this distinct causation argument cannot be developed persuasively, however, the weakness of a causal connection should be significant as a factor in the balancing analysis.

[87] The burden and unfairness of imposing retroactive liability through a new cause of action, of course, is intensified in most cases by the additional assessment of taxes for the statutory Trust Fund. Most generators therefore would be subjected to two forms of retroactive liability.

obviously is also essential to demonstrating an unreasonable burden.[88]

EPA's application and interpretation of the statute in a given case can magnify the inequities considerably. For example, the Agency's present insistence on asserting joint and several liability increases significantly the burden of retroactive liability, especially if a number of defendants have settled and many of the remaining defendants are insolvent.[89] Conversely, the abandonment of that position or its rejection by the courts could reduce the burden in a particular case to the point of weakening a constitutional challenge. Similarly, a prior decision by EPA to undertake expensive and unnecessarily extensive cleanup measures can dramatically increase the response costs sought to be imposed retroactively on private parties. In essence, virtually any consideration that demonstrates the unfairness of imposing section 107 liability on a particular defendant can be related to the burden caused by retroactivity. See pages VI-19 to VI-21, VI-29 to VI-30, VI-40 to VI-41 supra.

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[88] Some of the companies affected by the retroactive provisions of the Multiemployer Pension Plan Amendments Act, for example, have been exposed to liabilities exceeding their profits over a several-year period or even exceeding their net worth. See note 13 supra. Such an extreme burden should not be necessary to develop a challenge here, however.

[89] A narrow construction of the third party defenses set forth in section 107(b)(3) would also exacerbate the unfairness of the burden for many generators, by subjecting them to liability for the conduct of other parties, despite their own precautions.

A related factor, which can strongly support a challenge by some generators at a site, is the degree to which the retroactive reach of section 107 impairs reasonable reliance interests. Although most generators will have relied to some extent on the conclusion that their conduct was lawful and did not create risks of financial liability, some forms of reliance receive far greater constitutional protection than others.[90] Generators who predicated affirmative conduct and expense on the prior law, such as selecting a specific manufacturing process or choosing a site for a facility, are in the best position to develop the reliance argument.[91] Generators may also have relied affirmatively on the prior law in contracting with transporters or operators or in selecting particular waste disposal methods that

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[90] See pages VI-22 to VI-23, VI-32 to VI-33, VI-48 to VI-51 supra. At the same time the reliance interest must be substantial, it must not appear to reflect an attempt to take extreme advantage of gaps in the pre-existing law. Such an attempt not only would weaken the equities of a defendant's position but could also support the justification for retroactive remedial legislation, especially if the attempt included conduct that created obvious risks to health or the environment.

[91] All of these reliance arguments, of course, would require development in the record by affidavits and other means. Having obtained state permits or federal permits for disposal on the generator's own site may be a particularly valuable means of proving reliance.

previously would have precluded the assertion of liability but are now disregarded by EPA.[92]

A larger number of generators can develop the further reliance argument that they would have altered their conduct if the liability retroactively attached to their chosen course of conduct could have been anticipated. Some generators will be able to demonstrate that they would have avoided altogether the conduct for which liability is now asserted, by such measures as abandoning the generating activities, incinerating their waste, or by making alternative arrangements for waste disposal. Other generators would have purchased special insurance or maintained

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[92] Numerous examples of this form of reliance have arisen thus far. Some generators pretreated their waste to permit safe disposal, and others arranged for disposal in concrete tanks or containers. In addition, provisions sometimes incorporated in disposal contracts confirm that a number of generators relied on contractual assurances and obligations that their transporters and dumpsite operators have obtained state and federal permits for their activities. Moreover, some of those generators specifically selected more reputable transporters, and at greater expense, negotiated disposal contracts transferring all responsibility for arranging safe, lawful disposal, all to enable reliance. See pages VI-71 to VI-73 infra.

The paradigm example of this form of reliance may arise in connection with disposal on the generator's own property. Within the several years immediately preceding the enactment of Superfund, EPA required such generators under section 402(a) of the Clean Water Act, 33 U.S.C. § 1342(a), to expend over $1 billion upgrading pits, ponds and lagoons used for the disposal of waste. Forcing those generators to remove that waste under section 106 of Superfund would obviously impair significant investment-backed expectations created by EPA itself.

reserves had there been any risk that their disposal activities might result in financial liability.[93] All of these examples of reliance interests emphasize the unreasonableness of changing the law retroactively, because the retroactivity alone actually prevented the generators from conforming their conduct to the law or otherwise minimizing the risk of liability. In contrast, the disruption of settled expectations that conduct was lawful, without more, does not permit such a persuasive argument that retroactive application violates the Due Process Clause.[94]

The third factor that may differentiate among the defendants at a site and must be considered in developing a persuasive constitutional challenge is the potential for liability under pre-existing state or federal law.[95]

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[93] A generator in this situation might be able to demonstrate that it has purchased insurance in other states or for other plants, or that it carries insurance for other hazardous activities. Proving that a generator would have set aside reserves for self-insurance or increased its prices as a consequence of the liability risk may be somewhat more difficult, except by affidavit.

[94] See page VI-50 supra. Relatively few generators may be in this position, except those unable to document the alternative measures they would have taken. Presumably almost all reputable generators would have altered their conduct had they otherwise been exposed to liability in a government cause of action. Reliance interests therefore may assume unique weight in challenges to retroactive legislation of this nature.

[95] The potential for liability under pre-existing law will vary widely from state to state. The sources of potential liability and many of the variations in state laws are discussed in Appendix A.

Generators who clearly could not have been held liable under pre-existing law are in the best position, especially if they have taken affirmative precautions such as contracting for disposal only on licensed facilities and in accordance with state requirements.[96] The potential for pre-existing liability often cannot be determined with great precision, however, since it usually would depend on the uncertain application of state nuisance law.[97] Consequently, the mere possibility of pre-existing liability under state nuisance law should not by itself preclude a generator from challenging the assertion of retroactive liability under section 107.

All three of the preceding factors - degree of burden, reliance, and pre-existing liability - will depend significantly on how Superfund's liability provisions are interpreted with regard to a defendant's disposal activities. Thus, the defendants in the best position to rely on these factors should include generators who could be held liable only by treating section 107 as a strict liability statute.[98] For example, some generators can demonstrate

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[96] See note 82 supra.

[97] Even where a jurisdiction has sufficient precedent to define the scope of its nuisance law, many of the requirements for establishing that certain actions constitute a nuisance must be considered on a case-by-case basis, such as the location of a dumpsite. See generally Appendix A.

[98] The legislative history of Superfund demonstrates that Congress did not intend to create an absolute standard of strict liability under section 107. See chapter 2.

that they investigated thoroughly and then implemented the best disposal techniques and precautions available at the time.[99] The unforeseeability of any dangers that subsequently arose should support even further a challenge by those generators.[100] On the other hand, defendants chargeable with a greater degree of fault may be unable to develop such persuasive objections.

Balanced against these factors that ordinarily can directly support a constitutional challenge is the justification for imposing retroactive liability under section 107. The nature and persuasiveness of that justification will vary from site to site, depending initially upon the severity of the danger or hazard presented by the site.[101] The

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[99] In addition, generators may have based their decision upon the best information available at the time of disposal (but subsequently proved incorrect) that their waste was not toxic or was not sufficiently soluble to reach the ground water.

[100] In conjunction with its discussion of reliance interests, the Court specifically noted in Turner Elkhorn that "the justification for the retrospective imposition of liability must take into account the possibilit[y] that the operators may not have known of the danger of their employees' contracting pneumoconiosis." 428 U.S. at 17. The context of the Court's opinion suggests that the inability to foresee any such danger may be treated as a separate factor having comparable or greater weight than the protection of reliance interests. Unfortunately, the factor was not developed further in Turner Elkhorn because the mine operators clearly could have foreseen the health risks there.

[101] The circumstances discussed below will also introduce variations among defendants. Many of the Supreme Court's

(Footnote [101] continued on next page.)

justification for creating severe retroactive burdens is weakest, of course, where the need for taking cleanup action under section 104 was highly questionable. For example, EPA may have required removal of thousands of tons of soil contaminated with low levels of TCDD despite the absence of any dangers off the site.[102] Even if the basis for section 104 action is not so tenuous, the justification for constitutional purposes is weaker where the danger consists of a threatened or potential release instead of an actual release, or of a threat to the environment alone and not the public health. Although the justification at those sites may still satisfy the constitutional minimum, absent persuasive development of the countervailing factors discussed above, at least the justification for retroactivity should be less compelling than it might otherwise. In contrast,

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decisions, such as Turner Elkhorn, have focused on the government interest and justification for legislation on the broad public policy level. That abstract perspective should be avoided in developing a challenge to the retroactive application of Superfund, by focusing on the justification and necessity of imposing retroactive liability in the specific case at hand.

[102] Fencing and closing the dumpsite might have sufficed just as well to prevent any danger elsewhere, given the insolubility of TCDD. As this example suggests, the justification for taking any cleanup action generally must be compared to the removal or remedial measures actually demanded or implemented. At some sites EPA may require far more extensive cleanup than necessary to eliminate any threatened hazard, and the health justification for imposing those response costs retroactively on various other defendants may be minimal.

absent special circumstances, development of a persuasive constitutional challenge would be considerably more difficult at sites that presented a serious and immediate threat to public health.[103]

The justification for actually imposing section 107 liability, as opposed to incurring response costs under section 104, can be minimized even further in a number of instances. In particular, the justification becomes increasingly tenuous for generators who can only be weakly connected to causation of the hazard at the site, especially if intervening parties such as transporters or site owners are responsible for the hazard arising. Moreover, the Agency's justification may be questioned and discounted at sites containing waste generated by government agencies, because the government has a considerable self-interest in asserting joint and several liability under section 107 against other parties.[104] Finally, the availability of alternative

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[103] See pages VI-26, VI-29 to VI-30, VI-41 supra. The context of a challenge to retroactive application of section 107, as opposed to section 106, should diminish somewhat the strength of any justification based on health considerations or environmental protection. Specifically, since cleanup measures often will have been completed, the question really is not whether responsive action should be compelled, but rather whether generators should be required to finance that action over and above their contributions to the statutory Trust Fund.

[104] The site at Bluff Road, South Carolina, for example, appears to contain significant amounts of waste generated by

(Footnote [104] continued on next page.)

measures for accomplishing the legislative objectives at a site, i.e., alleviating an environmental danger, without causing such severe retroactive consequences tends to demonstrate that the imposition of section 107 liability is unnecessary and unreasonable. For the present, at least, the availability of funds in the statutory Trust Fund can be cited as such an alternative.[105]

The comparison of all these factors to determine whether any or all of the defendants at a specific site can develop a persuasive constitutional challenge is obviously not a simple process. As discussed above, all of the factors have gradations, and the most persuasive conditions for each factor are not essential for a persuasive challenge. Nevertheless, a challenge to retroactivity will be most appropriate in certain situations on behalf of certain defendants.

(Footnote [104] continued from previous page.)

both federal and state agencies. This type of governmental self-interest in imposing retroactive consequences on others has required strict scrutiny of the legislative justification in the Contract Clause cases, see page VI-27 supra, and should be significant for the same reason in the Due Process balancing analysis.

[105] In effect, Congress created its own less drastic alternative by establishing duplicative means of accomplishing its cleanup objectives, which facilitates substantially the suggestion that this analysis is appropriate under the Due Process Clause as well as the Contract Clause. See pages VI-51 to VI-52 supra.

(Footnote [105] continued on next page.)

B. Challenging the Retroactive Invalidation of Contractual Provisions.

A second typical situation where a constitutional challenge may be developed should arise in connection with the retroactive invalidation of contractual arrangements between generators, transporters and dumpsite operators. A number of the generators named as defendants at a multi-generator site probably will have entered contracts allocating responsibility to transporters and dumpsite operators for the disposal of waste. To the extent the assertion of liability under section 107 interferes substantially with those contracts, the generators may challenge the retroactive application under the Contract Clause.

The existence of a contract impairment, the prerequisite for direct application of the Contract Clause doctrine, will depend fundamentally on the scope of the contractual arrangements. The generators best able to establish an impairment are those whose contracts clearly reflect an agreement to transfer responsibility for safe, lawful disposal of the generator's waste. This type of agreement frequently involves the inclusion of a warranty by the

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(Footnote [105] continued from previous page.)

The less drastic alternatives analysis may also be particularly appropriate in cases involving section 106, where a generator may have proposed fully adequate remedial measures that EPA rejected in favor of far more expensive action.

transporter[106] as well as a promise to indemnify the generator.[107] In addition, the transfer of responsibility may be manifested by provisions demonstrating reliance on the transporter's expertise to select safe disposal measures and sites. Where such a bargain to transfer all responsibility can be established, the subsequent assertion of liability against the generator impairs the essence of the generator's bargain.[108]

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[106] The essence of such an express warranty provision is a promise by the transporter to comply with all applicable federal, state and local laws and regulations. That promise may be supplemented by the transporter's agreement to maintain all permits and documentation that are required for its disposal activities. This supplemental promise facilitates confirming the transporter's compliance with legal requirements and proving the generator's reliance on the warranty (especially if the generator occasionally requested copies of the permits). The warranty provision may also demonstrate the significance to the parties of the intent to transfer all responsibility by clauses requiring renegotiation if the applicable law is changed and permitting termination of the agreement in the event the generator reasonably suspects noncompliance by the transporter.

[107] The indemnification provision would, for example, contain an agreement by the tranporter to indemnify the generator against any penalty for the transporter's failure to comply with the applicable law or to obtain the necessary permits. The intent to transfer all responsibility would be established even more persuasively if the provision includes an agreement, in the language of one such clause, to indemnify, defend and hold the generator harmless from any claims or liabilities arising out of the transporter's "collection, handling, transportation, processing, treatment, use, resale or other disposal" of the generator's waste.

[108] Contracts that contain indemnification and warranty provisions but do not reflect the broader bargain to transfer all disposal responsibility may not provide as strong a

(Footnote [108] continued on next page.)

For those generators whose disposal contracts are impaired within the meaning of the Contract Clause, the strength of a constitutional challenge will vary based upon the factors discussed in connection with the first typical fact pattern.[109] Although most of those factors would apply in essentially the same manner here, a few may assume greater significance. In particular, reliance interests can be predicated on the disposal agreements as well as on the pre-existing law.[110] Moreover, it may be more difficult to justify the reasonableness and necessity of

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foundation for the Contract Clause analysis. In particular, EPA might argue that the imposition of liability does not interfere at all with operation of the indemnification and warranty clauses, and instead only necessitates the application of those provisions. This argument is further supported by section 107(e)(1)-(2) of the Act, which may be construed as preserving a generator's right to seek indemnification from the transporter in a separate cause of action. In contrast, the first sentence of section 107(e)(1) may be construed as expressly overriding an agreement to transfer disposal responsibility entirely, which naming the generator as a defendant also accomplishes.

[109] See pages VI-4 to VI-7 supra. As indicated in Part IID supra, a challenge in the contract impairment situation should be based on both the Contract Clause and the Taking Clause doctrines. In presenting such a challenge, of course, the factors discussed here for the purpose of evaluating the strategy must be related more specifically to the framework of analysis adopted by the Superme Court and explained in Parts IIA and IIB supra.

[110] For example, some generators may have paid higher fees to retain a more reputable transporter who would assume complete responsibility for compliance with the pre-existing law. Accordingly, those generators may have foregone additional precautions in reliance on their contracts.

overriding a private allocation of responsibility, in comparison to imposing liability generally under section 107.[111]

As was the case in the first situation, all of these factors must be carefully weighed in determining whether impairment of specific contracts is prohibited by the Contract Clause. For notwithstanding the potential of greater constitutional protection against retroactivity under the Contract Clause, this argument will be stronger in some situations than others.[112]

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[111] At the same time, defendants must be sensitive to the Court's concern that the Contract Clause not be abused as a means of thwarting legitimate regulation. "One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the state by making a contract about them. The contract will carry with it the infirmity of the subject matter." Hudson County Water Co. v. McCarter, 209 U.S. 349, 357 (1908); accord, Allied Structural Steel Co. v. Spannaus, 438 U.S. at 241-42 (1978).

As indicated in note 7 supra, the contract impairment may be presented more directly, and persuasively, when EPA acts under section 106.

[112] Contract Clause challenges might also be developed in the similar situation where enforcement action is taken against the new owner of property previously used as a disposal site, such as an entire plant that includes a disposal site on the property. Like the generators discussed above, many purchasers may demand express assurances in their contracts that the site complies with all applicable environmental regulations and that the seller will assume responsibility for its former uses of the site. The assertion of liability under section 107 or a demand under section 106 against the new owner, who had never even disposed of waste on the property, would therefore conflict with the essence of that contract. This potential challenge would be

(Footnote [112] continued on next page.)

C. Challenging the Deprivation of Rights in Private Property.

Two principal situations were described in Part I where site owners might develop challenges to the deprivation of their property rights. The first should arise at generator-owned sites where the government undertakes removal or remedial action under section 104. Depending upon the extent of that action and the limitations it imposes on remaining uses of the property, the site owner might demonstrate that the Agency's action constituted a taking of its property without just compensation.[113]

The site owners best able to develop such a constitutional challenge will be those forced to endure a "permanent physical occupation" of their property as a result of the government action. For example, the Agency might build permanent structures on the property for the purpose of

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directed broadly toward Superfund's alteration of contractual responsibility for past actions, rather than focused solely on individual contract assurances. Thus, proper development of this argument by a new owner depends upon whether the sale contract as a whole and surrounding circumstances demonstrate that the parties intended to prevent allocation of liability for past waste disposal to the new owner and demonstrate that this precaution was crucial to the sale.

[113] The challenge in this situation would be based primarily on the Taking Clause doctrine, and, of course, the factors developed to support the challenge should be presented within the framework of analysis used by the Supreme Court. See Part IIB supra.

containing waste, preventing further access, or monitoring ground water. Although the benefit of objecting to these structures may well be minimal in most cases, the Supreme Court's recently adopted "per se" rule suggests that these structures must be considered a taking.[114] A more practical argument may exist where the Agency's remedial or removal action deprives the owner of virtually any remaining economically valuable use of the property.[115] The constitutionality of such action would then be determined by application of an "ad hoc" balancing analysis that incorporates all of the factors discussed above in connection with the other constitutional doctrines. However, the Supreme Court's willingness to uphold land use regulation suggests that merely barring continued use of the property as a dumpsite may not constitute a taking. Thus, a taking challenge could be developed persuasively only where the cleanup measures, as opposed to the former use of the site, precluded all other uses that could have been made had less burdensome cleanup measures been implemented. See pages VI-29 to VI-30 supra.

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[114] See pages VI-30 to VI-31 supra. Absent substantial objections to these structures, of course, little or no compensation may be required for the taking. Moreover, in the event the compensation cannot be paid under Superfund, the Agency may still be entitled to demand implementation of equivalent protective measures. See also notes 45 and 54 supra.

[115] For example, the cleanup action may interfere with operation of other facilities on the generator's property that are distinct from the disposal site.

The second type of situation in which a Taking Clause challenge might be considered will arise in connection with orders under section 106. In particular, site owners who receive such orders may be able to propose cleanup measures that would preserve an economically viable use of the property yet adequately eliminate any hazard off the site. If the Agency rejects those measures and insists on more extensive action that completely restricts any subsequent use of the property, then the Taking Clause might be applied to challenge EPA's position. In sum, the particular forms of cleanup action taken under section 104 or demanded under section 106 are subject to substantial constraints by the Taking Clause doctrine.

APPENDIX A

Potential Liability under State Nuisance Law Prior to the Enactment of Superfund

Potential Liability under State Nuisance Law Prior to the Enactment of Superfund

One of the most crucial criteria for a successful Contract Clause, Taking Clause or Due Process argument is whether the person subjected to liability under Superfund would otherwise have been liable under pre-existing state or federal law. As discussed in Chapter 6, clear liability under preexisting law may preclude applicability of the retroactivity doctrines and prevent establishing that reasonable reliance interests would be threatened. Accordingly, a preliminary step in a given case should be an evaluation of the likelihood of liability under the pre-existing law. In most instances, this evaluation would focus on the state law of nuisance, both because other applicable requirements almost certainly were satisfied[1] and because the boundaries of nuisance law are not well defined and, thus, the imposition of liability under that law often could not have been predicted accurately in advance of undertaking the conduct in question.

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[1] Many of the federal regulatory statutes have preempted the potential applicability of the federal common law of nuisance, see Middlesex County Sewerage Authority v. National Sea Clammers Ass'n, 453 U.S. 1 (1981); City of Milwaukee v. Illinois, 451 U.S. 304 (1981), thereby minimizing the possibility that liability could arise under federal law if all regulatory requirements were met. Compliance with specific regulatory requirements under state laws must be determined on a state-by-state and case-by-case basis, but most companies can be expected to have satisfied express state law provisions regulating land use and disposal activities.

The existence of liability under pre-existing nuisance law will depend heavily on several requirements that vary markedly among the different states. Thus, specific conduct may be actionable as a nuisance in one state but not in other states that preferred less regulation under nuisance doctrines. Similarly, distinctions based on which parties may be responsible under state nuisance law will be necessary; for example, transporters and perhaps even generators may be liable along with owners of dump sites in some states and yet avoid liability in states that concentrate on the more immediate causes of a nuisance. Although any detailed analysis of whether past conduct would be actionable as a nuisance obviously must be performed in the context of individual cases, the following overview of six requirements and two defenses generally describes the factors that must be considered more extensively.[2]

(1) The most fundamental requirement for the imposition of nuisance liability is "some substantial interference with the interest" of others.[3] The actual discharge of hazardous waste in amounts that may be toxic onto adjacent property will almost always qualify as a "significant

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[2] Many of these requirements are also independently significant in a challenge to statutory retroactivity, apart from their relevance to state nuisance law, and are discussed in the context of their independent significance in Part IIIA of Chapter 6.

[3] Prosser, Law of Torts 577-78 (4th ed. 1971).

harm."[4] Depending on the nature of the waste materials and the dangers they may present, relief may also be granted in some states where there is no present interference but only a serious threat or potential for significant property damage or physical injury.[5]

(2) Nuisance law also requires that the act or omission of the party in question must cause the substantial interference.[6] Proof of causation may be extremely difficult in hazardous waste cases, and depending on the ability to infer causation under state law, this requirement may substantially limit nuisance liability.[7]

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[4] See, e.g., New Jersey v. Chemical & Pollution Sciences, Inc., 2 Chem. & Rad. Waste Lit. Rep. 673 (N.J. Super. 1981); Ewell v. Petro Processors of Louisiana, Inc., 364 So.2d 604 (Ct. App. La. 1978).

[5] Compare O'Leary v. Moyer's Landfill, Inc., 523 F. Supp. 642, 658 (E.D. Pa. 1981); Robie v. Lillis, 299 A.2d 155, 159 (N.H. 1972) with Village of Wilsonville v. SCA Services, Inc., 426 N.E.2d 824, 836-37 (Ill. 1981). See generally Comment, A Private Nuisance Approach to Hazardous Waste Disposal Sites, 7 Ohio N.U.L. Rev. 86, 101 (1980).

[6] The causation requirement for common law actions in general is also discussed in Chapter 3.

[7] See, e.g., Shell Oil v. Ainsworth, 2 E.R.C. (BNA) 1606, 1608 (Miss. 1971); Magnolia Petroleum Co. v. Williams, 76 So.2d 365 (Miss. 1954). See generally Note, An Analysis of Common Law and Statutory Remedies for Hazardous Waste Injuries, 12 Rutgers L.J. 117, 138-40 (1980); Senate Comm. on Environment and Public Works, Report on Six Case Studies of Compensation for Toxic Substances Pollution: Alabama, California, Michigan, Missouri, New Jersey and Texas, 96th Cong., 2d Sess. at 105, 255, 309, 380, 488 (Comm. Print 1980). But see Pan American Petroleum Co. v. Byars, 153 So. 616, 618 (Ala. 1934).

(3) A related requirement under nuisance law is that the act or omission in question must constitute a "proximate cause" of the interference.[8] Although the standards of proximate cause are no less ambiguous in hazardous waste cases than in other areas of tort law, most courts have appeared to focus in this context on the foreseeability that the act or omission would result in damage or injury.[9] This foreseeability standard arguably even applies where a strict liability test is substituted for intent requirements.[10] Thus, the proximate cause requirement of a close connection between a generator's actions and the interference to others may further confine the possible establishment of liability under pre-existing nuisance law.[11]

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[8] The proximate cause requirement at common law is discussed generally in Chapter 3 at III-31 to III-35.

[9] See, e.g., Bianchini v. Humble Pipe Line Co., 480 F.2d 251 (5th Cir. 1973). See generally Note, An Analysis of Common Law and Statutory Remedies for Hazardous Waste Injuries, supra n.7 at 144. See also Holland v. Keaveney, 306 So.2d 838 (Ct. App. La.), aff'd, 310 So.2d 843 (1975).

[10] Holland v. Keaveney, supra. Ginsberg & Weiss, Common Law Liability for Toxic Torts: A Phantom Remedy, 9 Hofstra L. Rev. 859, 876 n.66, 878, 912, 918 (Spring 1981). But see Beshada v. Johns-Manville Products Corp., No. A-162 (D.N.J., July 7, 1982).

[11] Some states may shift the burden of proof under certain circumstances to require that a nuisance defendant demonstrate that it was not the proximate cause of an interference. E.g., City of Bridgeton v. B.P. Oil, Inc., 369 A.2d 49, 51 (N.J. 1976). Allocation of the burden of proof may, as a practical matter, be virtually dispositive in a nuisance action, but it is not clear how the allocation question would bear upon the analysis for a constitutional challenge to Superfund.

(4) The intent standard for imposing nuisance liability can vary widely among the states. Intentional or negligent acts or omissions will satisfy the intent requirement for all states. However, that level of intent often will not exist in the hazardous waste context because culpability must be judged by the knowledge available when the act or omission occurred, not by the wisdom born of hindsight.[12] A number of states have virtually eliminated these intent requirements in many cases by adopting a strict liability standard for "ultrahazardous activities," and the various factors used to define an "ultrahazardous activity"[13] consequently may lead to the imposition of strict liability in hazardous waste cases.[14] Nevertheless, even in states where this doctrine has been adopted, hazardous waste disposal may not be judged "ultrahazardous" if the disposal site is in a remote or otherwise peculiarly appropriate

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[12] Prosser at 146; Ginsberg & Weiss, supra n.10 at 885, 890. See, e.g., New Jersey v. Ventron, 2 Chem. & Rad. Waste Lit. Rep. 348, 373 (N.J. Super. 1979); (discussing common law nuisance theory).

[13] See generally Restatement (Second) of Torts § 520 (1977).

[14] See, e.g., City of Bridgeton v. B.P. Oil, Inc., 369 A.2d at 53-54; Village of Wilsonville v. SCA Services, Inc., 426 N.E.2d at 838; New Jersey v. Ventron, 2 Chem. & Rad. Waste Lit. Rep. at 376.

location,[15] or if evidence demonstrates that disposal could have been performed safely.[16]

Accordingly, the applicability of a meaningful intent requirement to limit the potential existence of nuisance liability under prior law depends upon: (a) whether a state has rejected or not yet adopted the principle of strict liability for ultrahazardous activities,[17] or if it has adopted that principle, (b) whether the disposal site is located in areas considered particularly appropriate.

(5) Notwithstanding the absence of a limiting intent requirement in many states, hazardous waste activities still will not constitute a nuisance unless they are "unreasonable." Based on this requirement, courts balance the gravity of the interference caused against the utility of the conduct claimed to be a nuisance.[18] If all practicable precautions were taken to reduce the interference to others,

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[15] See, e.g., State Department of Environmental Quality v. Chemical Waste Storage & Disposition, Inc., 528 P.2d 1076 (Ct. App. Ore. 1974). See generally Ginsberg & Weiss, supra n.10 at 916.

[16] See Ewell v. Petro Processors of Louisiana, Inc., 364 So.2d at 606; Doundoulakis v. Town of Hempstead, 368 N.E.2d 24, 27 (N.Y. 1977).

[17] Several states have considered and rejected this principle, see Prosser at 509, and others have avoided deciding expressly whether to adopt the principle. Cf. Freeman v. Olin Corp., 2 Chem. & Rad. Waste Lit. Rep. 790, 802 (N.D. Ala., August 14, 1981).

[18] Restatement (Second) of Torts §§ 826, 827, 828 (1979); Prosser at 581, 596-99.

disposal activity is less likely to be found unreasonable.[19] Another "decisive consideration in many cases is the nature of the locality, and the suitability of the use made of the land" by both the nuisance plaintiff and defendant.[20] Consequently, this reasonableness requirement has prompted courts in several instances to find that waste disposal activities were not a nuisance.[21]

(6) The final requirement that may limit the existence or degree of nuisance liability relates to the apportionment of damages.[22] The presumption in nuisance law is that damages should be apportioned where there is a practical basis for doing so.[23] Accordingly, courts have found some basis for apportioning liability in most of the hazardous waste cases decided thus far under the nuisance doctrine.[24]

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[19] Prosser at 599. See also Restatement (Second) of Torts § 830 (1979).

[20] Prosser at 599. See also Restatement (Second) of Torts § 831 (1979).

[21] See, e.g., Robie v. Lillis, 299 A.2d at 159; State Department of Environmental Quality v. Chemical Waste Storage & Disposition, Inc., 528 P.2d at 1079-82.

[22] The common law rules concerning apportionment of damages are discussed in greater detail in Chapter 1.

[23] Prosser at 608; Note, Superfund: Conscripting Industry Support for Environmental Clean-up, 9 Ecol. L.Q. 524, 535 (1981). See generally Prosser at 314-19; Restatement (Second) of Torts §§ 881, 433A, 433B (1979 and 1965).

[24] New Jersey v. Chemical & Pollution Sciences, Inc., supra n.4 at 679. See also United States v. Waste Industries, Inc., 1 Chem. & Rad. Waste Lit. Rep. 1017, 1059 (E.D.N.C., April 7, 1981); United States v. Vertac Chemical Corp., 489 F. Supp. 870, 888 (E.D. Ark. 1980).

Nevertheless, where the "damage done is incapable of any practical division,"[25] or courts infer that nuisance defendants have acted "in concert," joint and several liability may be imposed.[26] The significance of these apportionment rules in nuisance law for developing a constitutional challenge against Superfund must be determined in individual cases. The strongest challenge could be made where joint and several liability is asserted under Superfund and nuisance liability would not have been imposed at all. A credible challenge might also be developed in such a case if nuisance liability would have been imposed but reduced significantly by apportionment. Where joint and several liability is not sought under Superfund, however, the ability to apportion under pre-existing nuisance law does not provide any distinction between the previous law and the retroactive legislation.

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[25] See, e.g., Michie v. Great Lakes Steel Division, National Steel Corp., 495 F.2d 213 (6th Cir.), cert. denied, 419 U.S. 997 (1974); Phillips Petroleum Co. v. Hardee, 189 F.2d 205, 212 (5th Cir. 1951); Velsicol Chemical Corp. v. Rowe, 543 S.W.2d 337 (Tenn. 1976).

[26] See, e.g., Ewell v. Petro Processors of Louisiana, Inc., 364 So.2d at 608 (imposing liability on chemical company for cleanup of waste left by numerous other companies because it continued to dump waste after learning that site was not properly managed). But see Ginsberg & Weiss, supra n.10 at 897 n.156 ("it is questionable whether plaintiffs in hazardous waste disposal site litigation could establish cooperation between the diverse enterprises involved at a disposal site to ignore the then existing safety standards in favor of more risk laden, though less costly, practices").

(7) Even if all the elements of a nuisance were otherwise satisfied, liability still would not have been imposed under pre-existing nuisance law if either of two affirmative defenses were applicable. The first such defense is that the disposal activities were authorized by government permit or regulation. In some states, this authorization may constitute a complete defense,[27] but courts in other states may either disregard the authorization[28] or severely limit its significance.[29] The second major defense to nuisance liability, primarily available to generators, is that an independent contractor was responsible for the act of omission that caused the "substantial interference." This defense may preclude liability under pre-existing law in some states for generators that entered contracts giving transporters or operators broad discretion to select safe disposal methods.[30] A number of states, however, have created exceptions, particularly a theory of "enterprise

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[27] See, e.g., Warren County v. North Carolina, 528 F. Supp. 276, 285 (E.D.N.C. 1981); Twitty v. North Carolina, 527 F. Supp. 778, 781 (E.D.N.C. 1981).

[28] See, e.g., Borland v. Sanders Lead Co., 369 So.2d 523 (Ala. 1979); Commonwealth v. Barnes & Tucker Co., 319 A.2d 871 (Pa. 1974).

[29] See, e.g., Village of Wilsonville v. SCA Services, Inc., 426 N.E.2d at 837. See generally Note, Hazardous Wastes: Preserving the Nuisance Remedy, 33 Stan. L. Rev. 675, 679 (1981).

[30] Ewell v. Petro Processors of Louisiana, Inc., 364 So.2d at 606.

liability," that may preclude reliance on the defense in certain cases.[31]

Based on the interpretation of these elements and defenses under the applicable state nuisance law, and any special requirements adopted in that particular jurisdiction, the likelihood of liability under pre-existing law can be assessed for a specific case and defendant.[32] This assessment should then be given significant weight in determining whether to develop a constitutional challenge to the application of Superfund.

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[31] See, e.g., United States v. Waste Industries, Inc., supra n.24 at 1050. See generally Prosser at 468; Ginsberg & Weiss, supra n.10 at 95; Ramirez v. Amsted Industries, Inc., 408 A.2d 818, 825-26 (N.J. 1979), aff'd, 431 A.2d 811 (1981).

[32] In the event a state's nuisance law has evolved in recent years, leading to an increased likelihood of liability, the assessment should primarily reflect the law applicable at the time disposal activities were undertaken but also recognize the difficulty of demonstrating that more recent judicial decisions actually changed the prior law instead of merely interpreting it.

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